



Fundstelle: MR 2012, 171

- 1. Ein Kind wird dadurch, dass es Opfer eines Obsorgerechtsstreits zwischen seinen Eltern ist, der erhebliche öffentliche Aufmerksamkeit auf sich zog und über den mehrfach in den Medien berichtet wurde, nicht zur Person der Öffentlichkeit.**
- 2. Die Angemessenheit einer von Mediengerichten zugesprochenen Entschädigung in Höhe von EUR 130.000,00 wegen einer Artikelserie mit persönlichkeitsverletzenden, reißerischen Bildinformationen hält Art 10 Abs 2 MRK stand.**

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

In the case of *Krone Verlag GmbH v. Austria*, The European Court of Human Rights (First Section), sitting as a Chamber composed of: *Nina Vaji*, *President*, *Anatoly Kovler*, *Elisabeth Steiner*, *Khanlar Hajiyev*, *Mirjana Lazarova Trajkovska*, *Linos-Alexandre Sicilianos*, *Erik Møse*, *judges*, and *Søren Nielsen*, *Section Registrar*, Having deliberated in private on 29 May 2012, Delivers the following

Judgment,

which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 27306/07) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by *Krone Verlag GmbH & Co. KG* (“the applicant company”), a limited liability company with its registered office in Vienna, on 26 June 2007.
2. The applicant company was represented by *Ebert Huber Liebmann Rechtsanwälte GmbH*, a law firm based in Vienna. The Austrian Government (“the Government”) were represented by their Agent, *Ambassador H. Tichy*, Head of the International Law Department at the Federal Ministry for European and International Affairs.
3. The applicant company alleged that judgments under the Media Act ordering them to pay damages had infringed their right to freedom of expression under Article 10 of the Convention.
4. On 27 August 2009 the President of the First Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company, *Krone Verlag GmbH & Co KG*, is the owner and publisher of the daily newspaper *Kronen Zeitung*.

A. The background of the case

6. In 1999 E.R. and U.W., the parents of Christian W., dissolved their common household and concluded a provisional agreement on the custody of Christian under which sole custody was granted to E.R., while his brother stayed with U.W. On 13 February 2001 U.W. asked for custody to be withdrawn from E.R. and transferred to him.

7. On 22 February 2001 E.R. and U.W. agreed that pending the outcome of an expert report custody be provisionally transferred to U.W. (*vorläufige Obsorge*) and that for the time being Christian should live with U.W., his father.

8. It appears that subsequently U.W. hindered contact between Christian and E.R. and, in June 2002, moved to Sweden. Thereupon, by an interlocutory decision (*einstweilige Verfügung*) of 26 July 2002, custody of Christian was transferred back to E.R.

9. U.W. was ordered to hand Christian over to E.R. immediately or to take him back to Austria before 5 August 2002. That order was confirmed on appeal on 12 September 2002 and became final.

10. Thereupon E.R. travelled to Sweden to have that decision enforced. U.W. proposed to E.R. that they enter into an agreement on custody of Christian, and E.R. also agreed to staying in Sweden. However, no such agreement was finally reached. After E.R. had settled in Sweden and found employment there, U.W., together with Christian, left Sweden for Austria.

11. On 4 November 2002, pending the outcome of the custody proceedings, custody was temporarily transferred to the Salzburg Youth Welfare Office. On 23 December 2003 the court dismissed U.W.'s request for custody to be withdrawn from E.R. and transferred to him. The decision was declared immediately enforceable.

12. Subsequently, various attempts to enforce that decision were undertaken. The Austrian newspapers reported on these events because U.W. kept them regularly informed and sought publicity.

13. The first attempt at enforcement, on 23 December 2003, failed because U.W. and Christian went into hiding. U.W. had informed the media of this step in advance. Some time later they returned. In order to enforce the custody decision the competent court scheduled a hearing for 15 January 2004 in the course of which Christian was to be handed over to E.R. U.W. failed to appear at the hearing.

14. Thereupon the judge ordered that Christian be brought before the court by force (*zwangsweise Vorführung*).

15. When that decision had to be enforced by court officers Christian barricaded himself in his elementary school and, since the police officers who intervened decided not to use physical force on the premises of the school, this attempt also failed. These events were also widely covered by the media because U.W. had informed them in advance.

16. After further unsuccessful attempts the rural police (*Gendarmerie*) were informed on 26 January 2004 that Christian was at his father's house. Court officers sent to the house noted, however, that Christian was not in the house but, together with a babysitter, in a car in front of it. The officers tried to take hold of Christian but he cried and resisted. These scenes were again the subject of widespread media coverage because they were observed and photographed by several journalists, who had been informed and had hurried to the spot.

17. In order to establish whether Christian had suffered injuries during the attempt to enforce the court order, U.W. took him to the Salzburg hospital. On 28 January 2004, by means of a diversion manoeuvre, U.W. and Christian were separated and on the same day Christian was handed over to his mother, E.R., on the premises of the hospital. E.R. and Christian have been living in Sweden since that time. This final phase of the events was also widely reported on in the media.

B. The proceedings under the Media Act

18. On 7 July 2004 Christian W., represented by his mother, brought proceedings under Sections 7 and 8a of the Media Act against the applicant company, seeking damages and publication of the ensuing judgment, claiming that a series of articles on the above-mentioned events published by the applicant company between 7 January and 16 February 2004 and which contained a detailed description of the events, giving his full name and illustrated by pictures of him, had breached his rights under those provisions.

19. He argued that the reporting on him had interfered with his strictly private life in a manner likely to expose and compromise him in public. Moreover, the articles constituted a breach of section 7a of the Media Act, which prohibited reporting on the victim of a crime in a manner which made him or her recognisable in public; that was only allowed if the importance of the offence or the persons implicated meant that there was a preponderant public interest in the information. Both applications were lodged with the Vienna Regional Criminal Court.

20. On 19 October 2004 the Regional Court gave a detailed judgment in the case, which referred to the following articles published in the applicant company's newspaper and summed up by the Regional Court as follows:

“(1) 7 January 2004

The heading ‘Missing father returns home with his two boys’, with a picture of Christian. According to the report, the child's father returned from holiday with Christian and his brother and had to go to the police because the boy was being forced against his wishes to move in with his mother following an inhuman court decision in the context of a divorce battle.

(2) 8 January 2004

The heading ‘Family drama: Christian needs peace at last’, accompanied by a picture of the child. The report describes a failed attempt to take the boy to Sweden and quotes the head teacher of his primary school as saying that Christian suffers from anxiety. A large number of people, some of whom have signed a petition, are reported to be campaigning for Christian to remain with his father.

(3) 16 January 2004

(a) On the front page, the heading ‘My best friend is my dog’. Underneath is a picture of Christian with his dog and text stating that the child does not wish to go to his mother.

(b) The heading ‘What's going on here is inhuman’, with two photographs of Christian. According to this article, five police officers entered the primary school in order to fetch the boy, who refused to go with them. The head teacher, some parents and classmates are reported as saying that what happened was inhuman.

(4) 17 January 2004

The heading ‘Mad scramble for 8-year-old’, with a picture of Christian. The report states that several different people want the child, but no one has asked his opinion, resulting in an inhuman tug-of-war which is already affecting the child psychologically. The article further reports that a bailiff went to the child's father's flat but found no one at home.

(5) 27 January 2004

(a) On the front page, the heading ‘Christian's battle for his home’, with a picture of the plaintiff showing him grimacing as he resists being taken (into the police car) by the bailiff, while his brother tries to obstruct the bailiff.

(b) The heading ‘You have no idea what you're doing to the child’, with two more pictures. The article describes the child being taken from the babysitter's car to the police car. It likens the scene to something from a distant dictatorship, with two bailiffs trying to tear the young plaintiff away from his familiar surroundings by brute force, against his will and despite his cries for help. Neighbours and friends of the family are reported as crying with rage and directing abuse at the court officials. The plaintiff reportedly sustained a serious injury to his spine at the hands of the bailiffs and had to be taken to hospital.

(6) 28 January 2004

(a) On the front page, the heading 'The whole of Salzburg up in arms', accompanied by a photograph of the child lying in a hospital bed wearing a surgical collar. According to the article, the child was injured by the bailiffs' rough treatment, and everyone was appalled and angered.

(b) The heading 'Bailiff pursues 8-year-old right into hospital', with three pictures of the plaintiff, one showing him on a stretcher, one of him grimacing in pain in the arms of the bailiff while his brother tries to obstruct the latter, and a close-up of the child, again grimacing in pain, next to the bailiff and the car. The article also details rough treatment by the bailiffs, reportedly causing injury to the child, who is said to have complained of neck pains and to have told reporters how he had been punched in the back of the neck by one of the bailiffs. The doctor treating him is reported to have fitted a surgical collar.

(c) The heading 'Cries for help rang out in the night', again with pictures of the child and reports on the public's reaction to the bailiffs' methods;

(d) The heading 'All for the good of the child', together with the court's findings and a picture of the child and

(e) letters from readers angered by the treatment of the child by his mother and the court, again with a picture of the plaintiff.

(7) 29 January 2004

(a) Heading on front page 'Christian abducted from hospital', together with a photograph.

(b) The heading 'Whole country moved by abduction', with two photographs. The article criticises the allegedly rough methods of the bailiffs.

(c) The heading 'Did the bailiff want to put a sticker on the child?', also with critical comments.

(d) The heading 'Abduction from hospital at dead of night', also with a photograph. The article describes the child's removal from the hospital by his mother and quotes the father as saying that unless tough action is taken against the bailiffs, he will lodge a complaint.

(e) The heading 'Minister Böhmendorfer says violence against children is unacceptable' again with a photograph and comments on the case, including by the then Justice Minister Dr Dieter Böhmendorfer, who condemns violence against children.

(8) 30 January 2004

(a) The heading 'Everyone wants Christian finally left in peace': another report on the mother's flight with her child, accompanied by a photograph of the child.

(b) The heading 'Scenes like those with Christian are completely avoidable', also with a photograph. Comments on the case by a crisis-management expert.

(9) 31 January 2004

(a) The heading 'Christian's case reopened', with photograph. The report states that a new expert psychological opinion on the child is to be ordered.

(b) The heading 'Custody battle – the story so far', describing events up to that point.

(c) The heading 'Blind hatred in salmon pink', with comments by Günther Traxler, again with a picture of Christian grimacing in pain as the bailiff tries to put him in the police car.

(10) 2 February 2004

Under the heading 'Christian already in Sweden', a report stating that the child has already been taken to Sweden by his mother and has had to leave his beloved dog behind. The report is accompanied by a picture.

(11) 12 February 2004

The heading 'I don't want to stay here any longer', again with three pictures of Christian. The reporter writes that the judge and bailiffs will have to answer to a disciplinary board and that Christian no longer wishes to stay with his mother in Sweden but wants to return to his father in Austria.

(12) 13 February 2004

The heading 'Interpol soon to search for missing Christian', again with a picture of the child. The report states that the boy has tried to run away from his mother and has disappeared.

(13) 16 February 2004

A reader's letter under the heading 'Violence is not the answer', in which a 12-year-old criticises the judge, again with a picture showing Christian grimacing in pain."

21. The Regional Court allowed the action and ordered the applicant company to pay damages in the amount of EUR 136,000, to publish the judgment in its newspaper, and to bear the costs of the proceedings. The Regional Court found that by publishing the above articles containing details of the custody dispute over nine-year-old Christian W., and, moreover, disclosing his full name and accompanied by a photograph of him partly showing a highly distressed facial expression, the applicant company had exposed his strictly private life in a manner likely to compromise him in public, in breach of section 7 of the Media Act. Moreover, the articles published on 27, 28 and 29 January 2004 had, without justification, disclosed the identity of a person who had been the victim of a criminal offence to a large and not directly informed circle of people, in breach of section 7a of the Media Act.

22. The Regional Court accepted that there existed a direct link between the events reported on and the public interest because of the sharp criticism voiced of the conduct of the court officials who had attempted to enforce the custody order. However, the person with custody of Christian had not agreed to publication and the public interest in the events could have been satisfied without giving the child's full name and publishing pictures of him.

23. On 29 March 2005 the applicant company appealed. Relying on Article 10 of the Convention, it argued, *inter alia*, that the Regional Court had failed to take into account the fact that there had already been an ongoing debate and that Christian's father, acting as his son's spokesman and in his interests, had informed the media of the events. Furthermore, it claimed that it had only acted as a public watchdog, informing the public about the proceedings and criticising the domestic authorities in the public interest.

24. On 21 September 2005 the Vienna Court of Appeal partly allowed the appeal. It found that there had been no breach of section 7a of the Media Act, because under that provision a compensation claim existed only if a media outlet had described acts by which someone had become the victim of a crime and if the description violated the victim's protected interests. In the present case, however, it was not the description of a criminal act that had breached Christian's protected interests, since the proceedings against the court officials had ended without a conviction. The Court of Appeal therefore remitted the case to the Regional Court on this point.

25. It further emphasised that by giving details of the plaintiff's intimate family life and his full name, and by adding pictures of him, the newspaper had intruded into his strictly private life, as these details had merely been given in order to create a sensation and satisfy the curiosity of its readers. Even if there was a link to public life, a media outlet could report on a person's strictly private life only to the extent necessary to satisfy the need for information related to those elements which were of relevance to the public interest. Reporting on events relating to a person's strictly private life therefore had to be appropriate to the circumstances and proportionate. In the present case it had not been necessary for the purpose of informing the public of alleged shortcomings within the judiciary, nor had it been necessary to expose in such an intense and striking manner the severe strain being suffered by the juvenile plaintiff by inserting photographs showing his distress and despair, mentioning his full name and setting out the details of his seizure.

26. On 19 May 2006 the Regional Court ruled again on the case and found no breach of section 7a of the Media Act. It accordingly reduced the amount of compensation to EUR 130,000.

27. On 14 March 2007 the Vienna Court of Appeal upheld that decision.

II. RELEVANT DOMESTIC LAW

28. Section 7 of the Media Act, which has the title “Interference with a person’s most intimate personal sphere” (*Verletzung des höchstpersönlichen Lebensbereiches*), reads as follows:

“(1) If a person’s strictly private life is discussed or presented in the media in a manner which is apt to compromise this person in public, the person concerned may claim compensation from the owner of the media for the injury suffered. The amount of compensation shall not exceed EUR 20,000 ...

(2) No compensation claim under paragraph 1 exists if

1. the publication at issue is based on a truthful report on a public session of the National Council or the Federal Council, the Federal Assembly, a regional diet or a committee of one of these general representative bodies;
2. the publication is true and has a direct connection to public life;
3. in the circumstances it could have been assumed that the person concerned had agreed to the publication;
4. it is a direct broadcast on radio or television (live programme) and the employees or contractors of the radio or television station have not neglected the principles of journalistic diligence;
5. the information has been published on a retrievable website and the owner of the media or its employees or contractors have not neglected the principles of journalistic diligence.”

29. Section 7a of the Media Act, which has the title “Protection against divulging a person’s identity in special cases” (*Schutz vor Bekanntgabe der Identität in besonderen Fällen*), reads as follows:

“(1) Where publication is made, through any medium, of a name, image or other particulars which are likely to lead to the disclosure to a larger not directly informed circle of people of the identity of a person who

1. has been the victim of an offence punishable by the courts, or
2. is suspected of having committed, or has been convicted of, a punishable offence,

and where legitimate interests of that person are thereby injured and there is no predominant public interest in the publication of such details on account of the person’s position in society, of some other connection with public life, or of other reasons, the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered. The award of damages shall not exceed 20,000 euros; additionally, section 6(1), second sentence, shall apply.

(2) Legitimate interests of the victim shall in any event be injured if the publication

1. in the case of subsection (1)1, is such as to give rise to an interference with the victim’s strictly private life or to his or her exposure,
2. in the case of subsection (1)2, relates to a juvenile or merely to a lesser indictable offence (*Vergehen*) or may disproportionately prejudice the advancement of the person concerned.

(3) No compensation claim under paragraph 1 exists if

1. the publication at issue is based on a truthful report on a public session of the National Council or the Federal Council, the Federal Assembly, a regional diet or a committee of one of these general representative bodies;
2. the publication of the information on the person has been decided officially, in particular for the purposes of criminal justice or public security;
3. the person concerned has agreed to the publication or if the publication is based on information given by that person to the media;

4. it is a direct broadcast on radio or television (live programme) and the employees or contractors of the radio or television station have not neglected the principles of journalistic diligence;

5. the information has been published on a retrievable website and the owner of the media or its employees or contractors have not neglected the principles of journalistic diligence.”

30. Section 6(1) second sentence of the Media Act, to which reference has been made above, reads as follows:

“The amount of compensation shall be fixed according to the extent of the publication, its impact and, in particular, the type of media and how broadly it is disseminated; the compensation must not endanger the economic existence of the media owner.”

31. Section 8a of the Media Act, which has the title “Separate compensation proceedings” (*Selbständiges Entschädigungsverfahren*), insofar as relevant, reads as follows:

“In a judgment by which compensation under Section 6, 7, 7b or 7c has been awarded on the basis of a separate compensation request, the court must also order the publication of the judgment if the person concerned so requests, ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicant company complained under Article 10 of the Convention that the judgments of the Austrian courts violated its right to freedom of expression. Article 10 reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

33. The Government contested that argument.

A. Admissibility

34. 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

35. The Court notes that it is common ground between the parties that the Vienna Regional Court’s judgment of 19 October 2004, upheld by the Court of Appeal, which awarded damages to Christian, constituted an interference with the applicant company’s right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

36. An interference contravenes Article 10 of the Convention unless it is “prescribed by law”, pursues one or more of the legitimate aims referred to in paragraph 2, and is “necessary in a democratic society” for achieving such an aim or aims.

37. The Court considers, and this was acknowledged by the parties, that the interference was prescribed by law, namely by section 7 of the Media Act. The Court further finds, and this was likewise not disputed between the parties, that the interference served a legitimate aim, namely “the protection of the reputation or rights of others” within the meaning of Article 10 § 2 of the Convention.

38. The parties’ argument concentrated on the question whether the interference had been “necessary in a democratic society” within the meaning of Article 10 § 2 of the Convention.

1. The parties’ submissions

39. The applicant company maintained that the interference with its right to impart information had not been necessary in a democratic society. There was no doubt that the event on which the applicant company had reported had involved questions which were a subject of public importance, namely the conduct of the courts and authorities when enforcing the Family Court’s decision to hand Christian over to his mother, and contributed to the public discussion which had been triggered by the questionable conduct of the enforcement officers.

40. In reporting on the matter the press could not, as suggested by the Austrian courts, have done so in a merely neutral and sober way. It was also a corporate necessity to attract the attention of the public by incorporating entertaining components, as otherwise it would be practically impossible to reach the public. Christian’s father had turned to the applicant company for assistance, as his son had repeatedly expressed the wish to remain with his father, whereas the Austrian courts had decided to transfer custody to his mother. The applicant company had therefore reported on this issue and the way in which the authorities had enforced their respective decisions. In order to show the public the anguish and shock which this approach had produced in Christian, it had been necessary to publish a picture showing the pain in his face and make clear to the public just what measures the Republic of Austria was implementing, allegedly in the interest of the child. This effect could not have been achieved if Christian’s face had been blurred. For the same reason it had been necessary to report extensively on how happy and intact Christian’s world had been while he was still living with his brothers and father.

41. The applicant company also argued that the amount of compensation awarded to Christian had been excessive. Firstly, no punitive damages were possible under Austrian law and the sum awarded was not proportionate to the actual injury suffered by Christian on account of the publication of the impugned material, and secondly, no distinction had been made between the thirteen different articles published. It was apparent that in a series of related articles, as in the present case, a later article with similar content to a previous one could not injure again to the same extent since the injurious circumstances would already be known.

42. The Government, while acknowledging the essential role played by the press as a “public watchdog”, asserted that in the present case the interference with the applicant company’s freedom of expression had been necessary within the meaning of Article 10 § 2 of the Convention. They argued in particular that the domestic courts had had to weigh the applicant company’s interest in imparting information on an issue of public interest against the right to protection of the most intimate sphere of life of the person on whom it reported, which was equally protected by the Convention, namely, the right to respect for his or her identity, protected by Article 8 as part of a person’s private life. The necessity to carry out such a weighing of interests was laid down in section 7 of the Media Act.

43. The Austrian courts had found that that the articles published by the applicant company constituted an intrusion into the strictly private life of Christian, a minor. In its judgment of 19 October 2004 the Regional Court had explained in detail that even though it was clearly permissible to publish an article on the events surrounding the handing over of Christian to his mother, and the conduct of the courts and authorities in this respect, this did not mean that in doing so the applicant company had the right to publish photographs of Christian that had not been rendered anonymous, showing him in a state of pain and despair, and to disclose his identity and other details of his family life, his health and his emotional state. The disclosure of such information on Christian was

not relevant for the understanding of the details of the events of which he had been the victim, nor was it necessary in order to raise public awareness concerning the conduct of the authorities. In such cases the State had a positive obligation to ensure effective protection against breaches of the personal integrity of children, as a particularly vulnerable group.

44. Lastly, the Government argued that the amount of compensation awarded to Christian, namely EUR 130,000, was not disproportionate, as that figure had to be seen against the background of the wide dissemination of the information by the applicant company and its influence on public opinion. Christian had already been affected psychologically by the custody dispute between his parents, of which he was the victim, and, in this situation had been exposed by the applicant company to the curiosity of the millions of readers of its newspaper exclusively for the purpose of raising sales figures as a result of an one-sided emotive reporting. This had caused him additional and significant suffering. Another important factor was the extensive dissemination of the information and the inherently strong influence the applicant company's newspaper had on public opinion. It had to be noted that the *Kronen Zeitung* reached (in 2006) 43.6% of the entire Austrian population – up to 60% of the population in some *Länder* – as readers, which, in relative terms, made it one of the newspapers with the highest circulation in the world. For this reason a significant amount of compensation had to be awarded by the Austrian courts.

2. *The Court's assessment*

(a) **General principles**

45. According to the Court's well-established case-law, the test of necessity in a democratic society requires the Court to determine whether the interference complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient (see *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30). In assessing whether such a need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III).

46. An important factor for the Court's determination is the essential function of the press in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others or the proper administration of justice, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *Bladet Tromsø and Stensaas*, cited above, § 59, and as a recent authority, *Flinkkilä and Others v. Finland*, no. 25576/04, § 73, 6 April 2010). By reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and providing reliable and precise information in accordance with the ethics of journalism (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I, and, as a recent authority, *Eerikäinen and Others v. Finland*, no. 3514/02, § 60, 10 February 2009).

47. Whilst it is true that the methods of objective and balanced reporting may vary considerably and that it is therefore not for this Court, nor for the national courts, to substitute its own views for those of the press as to what technique of reporting should be adopted (*Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298), editorial discretion is not unbounded. Not only does the press 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" (*Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Bladet Tromsø and Stensaas*

v. *Norway* [GC], no. 21980/93, § 62, ECHR 1999-III; and, more recently, *Gutiérrez Suárez v. Spain*, no. 16023/07, § 25, 1 June 2010).

48. The Court has always stressed the contribution made by photographs or articles in the press to a debate of general interest (see *Standard Verlags GmbH v. Austria* (no. 2), no. 21277/05 § 46, 4 June 2009, with further references). However, the publication of photographs and articles the sole purpose of which is to satisfy the curiosity of a particular readership regarding the details of a public figure's private life cannot be deemed to contribute to any debate of general interest to society despite the person being known to the public. In such conditions freedom of expression calls for a narrower interpretation (see *MGN Limited v. the United Kingdom*, no. 39401/04, § 143, 18 January 2011, and *Von Hannover v. Germany*, no. 59320/00, § 65-66, ECHR 2004-VI). Moreover, although freedom of expression also extends to the publication of photographs, this is an area in which the protection of the rights and reputation of others takes on particular importance. Photographs appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution (see *Von Hannover v. Germany*, cited above, at § 59, and *Hachette Filipacchi Associés v. France*, no. 71111/01, § 42, 14 June 2007).

49. The subject matter at issue in this case relates, on the one hand, to the right of the press under Article 10 of the Convention to inform the public on matters of public concern regarding ongoing court proceedings and on the manner in which decisions by the courts are enforced and, on the other, to the State's positive obligations under Article 8 of the Convention to protect the privacy of persons, in particular minors, to whom such proceedings relate. When verifying whether the authorities struck a fair balance between two protected values guaranteed by the Convention which may come into conflict with each other in this type of case – freedom of expression protected by Article 10 and the right to respect for private life enshrined in Article 8 – the Court must balance the public interest in the publication of the information and the need to protect private life (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, ECHR 2007-VII). The balancing of individual interests which may well be contradictory is a difficult matter and Contracting States must have a broad margin of appreciation in this respect since the national authorities are in principle better placed than this Court to assess whether or not there is a “pressing social need” capable of justifying an interference with one of the rights guaranteed by the Convention (see *MGN Limited*, cited above, § 142, and *Egeland and Hanseid v. Norway*, cited above, § 55).

(b) Application of these principles to the present case

50. In the present case the applicant company published in its newspaper *Kronen Zeitung*, between 7 January 2004 and 16 February 2004, a series of thirteen articles about a dispute between parents over custody of their child, Christian. In the custody proceedings the competent courts had refused to transfer custody of Christian to the father, who had refused to comply with that decision. Various attempts at enforcement were unsuccessful because Christian and his father had gone into hiding, and in January 2004 the competent court ordered that Christian be brought before the court by force. On 26 January 2004 court officers went to the house of Christian's father and tried to seize the child, who cried and resisted. These scenes were the subject of wide media coverage, notably by the applicant company's newspaper, because they were observed and photographed by several journalists, who had been informed and had hurried to the spot. The applicant company's newspaper reported extensively on this case and the articles published disclosed Christian's identity and details of his family life, his health and his emotional state, and they were accompanied by photographs of Christian that had not been rendered anonymous and which showed him in a state of pain and despair.

51. Thereupon, Christian brought proceedings under the Media Act against the applicant company, claiming compensation in respect of reporting constituting an intrusion into his strictly private life (section 7 of the Media Act) and reporting on the victim of a crime in a manner rendering that person recognisable by the public (section 7a of the Media Act). On 19 October 2004 the Vienna Regional Criminal Court found against the applicant company, ordering it to pay

compensation and to publish the judgment in its newspaper. On appeal the Court of Appeal found on 21 September 2005 that the reporting at issue had been in breach of the obligation not to interfere with a person's strictly private life, but rejected the other ground for compensation, namely, reporting on the victim of a crime in an identifiable manner, and remitted the case to the Regional Court on that point. On 19 May 2006 the Vienna Regional Criminal Court decided again on the case following the findings of the Court of Appeal, and reduced the compensation accordingly. The Court of Appeal upheld that decision except for costs on 14 March 2007. The Regional Court and the Court of Appeal considered that the reporting at issue had breached Christian's right to respect for his strictly private life, and found that there had existed no predominant public interest in the revealing of his identity and giving details of his family life, his health and his emotional state, or the publishing of photographs taken at the time of the unsuccessful attempt to enforce the court's order to hand him over to his mother showing him in a state of pain and despair.

52. In the Court's view the reasons given by the Regional Court and upheld by the Court of Appeal were undoubtedly "relevant" reasons for the purposes of the necessity test to be applied under Article 10 § 2. It will next examine whether they were also "sufficient".

53. The Court agrees with the domestic courts that the case concerned a balancing of the applicant company's right to freedom of expression under Article 10 against Christian's right to protection of his strictly private life. In such cases one factor the Court has taken into account is the position of the person concerned by the publication: whether or not he or she was a "public figure" or had otherwise "entered the public scene" (see, for instance, *Flinkkilä and Others*, cited above, § 83, and *Eerikäinen and Others*, cited above, § 66). Another important factor is whether the articles or photographs in the press contributed to a debate of general interest (see *Flinkkilä and Others*, cited above, § 76, and *Eerikäinen*, cited above, § 66).

54. In the present case, Christian is not a public figure, nor does the Court consider that he has entered the public scene by becoming the victim of a custody dispute between his parents which attracted considerable public attention.

55. The Court further considers that the articles at issue dealt with a matter of public concern, namely the appropriate enforcement of custody decisions and whether and to what extent force may or should be used in this context. Such a matter could, and in the present case did, give rise to a public debate. However, given that neither Christian himself nor his parents were public figures or had previously entered the public sphere, it cannot be considered that the disclosure of his identity was essential for understanding the particulars of the case (see "*Wirtschafts-Trend*" *Zeitschriften-Verlagsgesellschaft mbH (no. 2) v. Austria* (dec.), no. 62746/00, 14 November 2002). In this connection, the Court notes that it was acceptable for the applicant company to report on all relevant details concerning the case of Christian, in particular as regards the problematic attempt to enforce the decision taken in the custody proceedings by the court officers on 26 January 2004, but not to reveal the identity of Christian while publishing the most intimate details about him, or publish a picture of him from which he could be recognised.

56. Moreover, the Court is not persuaded by the applicant company's argument that the publication of the photograph which showed the pain in Christian's face was necessary in order to ensure the credibility of the story. In this regard the Court reiterates that the publication of photographs and articles the sole purpose of which is to satisfy the curiosity of a particular readership regarding the details of a public figure's private life cannot be deemed to contribute to any debate of general interest to society despite the person being known to the public. In such conditions freedom of expression calls for a narrower interpretation (see *MGN Limited*, cited above, § 143, with further references). The Court considers that such considerations also apply to persons, like Christian, who are not public figures.

57. On the other hand, there is no doubt that the preservation of the most intimate sphere of life of a juvenile who had become the victim of a custody dispute and had not himself stepped into the public sphere deserved particular protection on account of his or her vulnerable position.

58. The Court has further to examine whether the interference with the applicant company's right to impart information was proportionate. It notes in the first place that the applicant company was not subject to a fine imposed in criminal proceedings but was ordered to pay compensation for the injury caused to a person who had suffered from an intrusion into his strictly private life. However, the amount of compensation, EUR 130,000, is exceptional, and the Court observes in this connection that in specific circumstances an exceptional and particularly high amount of damages for libel (see *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 51, Series A no. 316-B, and *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, § 115, ECHR 2005-V (extracts)), or unusually high cost awards in defamation proceedings (see *MGN limited*, cited above, § 217), may raise an issue under Article 10 of the Convention.

59. In the present case the applicant company reported on the case of Christian in a series of thirteen articles, each time repeating information on his strictly private sphere revealing intimate details of his life, his emotional state and his health, and repeatedly publishing photographs of him. Even though these news items had already become known to the public, at a certain point their frequent repetition was capable of creating a climate of continual harassment inducing in the person concerned a very strong sense of intrusion into their private life or even of persecution (see *Von Hannover*, cited above, § 59).

60. Another element which has to be taken into account is the particularly wide circulation of the applicant company's newspaper, which rendered the interference more intense. In this connection, the Government submitted, and this was not disputed by the applicant company, that (in 2006) the *Kronen Zeitung* reached 43.6% of the entire Austrian population, amounting to approximately eight million inhabitants – and up to 60% of the population in some of the *Länder* – as readers, which, in relative terms, makes it one of the newspapers with the highest circulation in the world.

61. Lastly, the Court has to examine whether in domestic law there existed adequate and effective domestic safeguards against disproportionate awards (see *Independent News and Media and Independent Newspapers Ireland Limited*, cited above, § 115). In this regard, the Court observes that a maximum amount for compensation in a single case is provided for in section 7(1) of the Media Act, which provides that damages must not exceed EUR 20,000. Moreover, section 6(1) of the Media Act contains clear guidelines for the fixing of the amount of damages, and provides, *inter alia*, that the compensation must not endanger the economic existence of the media owner. The Court considers that these safeguards are adequate and effective preventing disproportionate awards. The Court therefore concludes that the amount awarded in damages was not disproportionate in the particular circumstances of the case.

62. In sum, the Court finds that in awarding compensation for the interference with Christian's private life by the applicant company, the respondent State acted within its margin of appreciation in assessing the need to protect his privacy. It is satisfied that the restriction on the applicant company's right to freedom of expression resulting from the judgments of the Regional Court and the Court of Appeal was supported by reasons that were relevant and sufficient, and was proportionate to the legitimate aims pursued.

63. There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 19 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Anmerkung*

I. Das Problem

Der Ausgangssachverhalt der beiden Urteile ist gleich und unterschied sich nur durch die jeweils klagende Zeitung, einmal die Medieninhaberin der Neuen Kronenzeitung, zum zweiten die Medieninhaberin des Kurier. In beiden Fällen ging es um den sog. „Fall Christian“, der im Jänner/Februar 2004 für mediale Aufregung in ganz Österreich sorgte: die Eltern des minderjährigen Christian hatten sich getrennt, über die Obsorge wurde gestritten, aber schließlich erhielt die Mutter, die dem Vater nach Schweden nachgezogen war, das Sorgerecht zugesprochen. Der Vater entzog sich der Durchsetzung der Entscheidung und zog mit Christian wieder nach Österreich. Die Obsorge wurde für die Dauer eines wieder anhängig gemachten Sorgerechtsverfahrens dem Salzburger Jugendwohlfahrtsamt übertragen.

Am 23. Dezember 2003 wurde der Antrag des Vaters, der Mutter die Obsorge zu entziehen, abgewiesen. Die Durchsetzung der Gerichtsentscheidung wurde vom Vater wieder torpediert, er tauchte mit dem – damals achtjährigen – Christian unter. Nachdem die zwangsweise Vorführung des Kindes angeordnet wurde, kam es am 26. Jänner 2004 zu einem Gendarmerieeinsatz in der Nähe der Stadt Salzburg, bei dem sich das Kind weinend gegen die Abnahme wehrte. Vom Vater verständigte Journalisten beobachteten und fotografierten diesen Einsatz. Zwei Tage später konnte das Kind, das vom Vater in ein Krankenhaus gebracht worden war, um allfällige Verletzungen wegen des Gendarmerieeinsatzes feststellen zu können, der obsorgeberechtigten Mutter übergeben werden.

Die österreichischen Medien berichteten ausführlich, auch der ORF brachte die Aufnahmen vom Gendarmerieeinsatz unverpixelt und zeigte das schmerzverzerrte Gesicht des Kindes. Gerade um die "formale Kälte des Gerichts" zu betonen. Besonders reißerisch und bebildert mit Fotos des Minderjährigen tat sich die spätere Klägerin hervor, von der die Kronenzeitung herausgegeben wurde. Und eines Tages titelte die Krone dann: *"Alle wollen: Christian soll endlich zur Ruhe kommen"*, ganze zwei Tage nach der Titelschlagzeile *"Ein Aufschrei geht durch ganz Salzburg"*.

Die (obsorgeberechtigte) Mutter des minderjährigen Christian machte Ansprüche nach §§ 7 und 8a MedienG wegen Verletzung des höchstpersönlichen Lebensbereichs und Urteilsveröffentlichung gegen die Medieninhaberinnen von Krone und Kurier geltend. Die Krone Verlag GmbH wurde zu einer Entschädigung in Höhe von EUR 130.000,- verurteilt, die später ebenfalls beim Menschenrechtsgerichtshof klagende Kurier Zeitungsverlag und Druckerei GmbH zu einem Betrag in Höhe von EUR 9.000,-.

Im Straßburger Verfahren sahen die beide Medieninhaberinnen ihr Recht auf freie Meinungsäußerungsfreiheit, insbesondere die Pressefreiheit als verletzt an. Es hätte sich nämlich um eine öffentliche Debatte über das fragwürdige Verhalten von Vollzugsorganen gehandelt. Darüber hätte man nicht in einer neutralen und nüchternen Weise berichten können.

Der EGMR hatte sich daher letztlich damit zu beschäftigen, ob die vom österreichischen Gericht herangezogenen Gründe für die zugesprochenen Entschädigungen iS des Art 10 MRK zulässig bzw. notwendig waren?

II. Die Entscheidung des Gerichts

Der Menschenrechtsgerichtshof sah vorliegend keine Verletzung der Pressefreiheit. Die Medienurteile, mit denen dem mj. Christian Entschädigungen zugesprochen worden waren, stellten zwar Eingriffe in das Recht der Beschwerdeführerinnen auf freie Meinungsäußerung dar. Diese

* RA Hon.-Prof. Dr. *Clemens Thiele*, LL.M. Tax (GGU), Anwalt.Thiele@eurolawyer.at; Gerichtlich beeideter Sachverständiger für Urheberrechtsfragen aller Art, insbesondere Neue Medien und Webdesign; Näheres unter <http://www.eurolawyer.at>.

waren aber in § 7 MedienG gesetzlich vorgesehen und dienen dem legitimen Ziel des Schutzes des guten Rufs und der Rechte anderer. Nach Ansicht der Straßburger Richter waren die Gründe, die das LG für Strafsachen Wien für die Verurteilungen heranzog und die vom OLG Wien bestätigt wurden, ohne Zweifel relevant in Hinblick auf die Verhältnismäßigkeitsprüfung nach Art 10 Abs 2 MRK. In Fällen wie dem vorliegenden hat der GH die Position der von der Veröffentlichung betroffenen Person herangezogen und berücksichtigt, ob sie eine Person des öffentlichen Lebens ist oder sonstwie die Bühne der Öffentlichkeit betreten hat. Ein weiterer wichtiger Faktor ist, ob die Artikel oder Fotos zu einer Debatte von allgemeinem Interesse beitragen.

Christian war weder eine Person des öffentlichen Lebens noch hatte er die Bühne der Öffentlichkeit betreten, indem er Opfer eines Sorgerechtsstreits zwischen seinen Eltern wurde, der erhebliche öffentliche Aufmerksamkeit erregte. Unter solchen Umständen musste die Meinungsäußerungsfreiheit enger ausgelegt werden. Darüber hinaus betonten die Richter die Bewahrung der intimsten Sphäre des Lebens eines Jugendlichen, der Opfer eines Sorgerechtsstreits wurde und nicht selbst in die Öffentlichkeit getreten ist, als besonders schutzwürdig. Schließlich beurteilte der EGMR auch die Höhe der Entschädigungen als verhältnismäßig.

III. Kritische Würdigung und Ausblick

Dem vorliegenden Urteil ist in seiner Deutlichkeit und Begründung vollinhaltlich beizupflichten. Es ist demnach nicht notwendig, die Bilder des Minderjährigen abzudrucken, um sein Leiden und seine Verzweiflung zu zeigen und damit die Öffentlichkeit aus ihrer Apathie zu rütteln und ihre Aufmerksamkeit zu erreichen (Rz 58 des Kurier-Urteils), oder das schmerzverzerrte Gesicht des Minderjährigen zu bringen, um die Glaubwürdigkeit der Berichterstattung zu sichern (Rz 55 des Krone-Urteils). Wörtlich schreibt der EGMR den österreichischen (Boulevard-)Journalisten ins Stammbuch: *„Es besteht kein Zweifel, dass die Bewahrung des intimsten Lebensbereiches eines Minderjährigen, der Opfer eines Sorgerechtsstreits wurde und nicht selbst die öffentliche Sphäre betreten hat, wegen seiner verwundbaren Stellung besonderen Schutz verdient.“*

Die einzig ernsthaft zu thematisierende Frage, nämlich ob der Eingriff „in einer demokratischen Gesellschaft notwendig“ iS des Art 10 Abs 2 MRK gewesen war, trifft den Kern der vorliegenden Entscheidungen. Nach st Rsp¹ ist das nur dann der Fall, wenn die Beschränkung einem „dringenden gesellschaftlichen Bedürfnis“ entspricht. Im konkreten Fall müssen das Recht auf freie Meinungsäußerung und das Recht auf Schutz des Privatlebens gegeneinander abgewogen werden.

Hierbei ist zu berücksichtigen, ob die Person, über die berichtet wird, bereits – vor dem Vorfall – in der Öffentlichkeit gestanden hat. Menschen, die bereits im Licht der Öffentlichkeit stehen, müssen sich weitergehende Eingriffe in ihr Recht auf Privatleben gefallen lassen als unbekannt Personen. In diesem Zusammenhang stellt der EGMR zutreffend fest, dass Christian vor der Berichterstattung keine Person von öffentlichem Interesse gewesen war. Außerdem spielt es eine Rolle, inwieweit die Beiträge in der Presse einen Beitrag zu einem Thema von gesellschaftlichem Interesse geleistet hätten. Der Gerichtshof anerkennt, dass die Kritik am Verhalten der Justiz ein Gegenstand ist, an dem ein Interesse der Allgemeinheit besteht. Nach Auffassung des EGMR ist allerdings die Enthüllung der Identität des Kindes nicht notwendig gewesen, um diesen Beitrag zur öffentlichen Debatte zu leisten. Die Veröffentlichung des Bildes bedeutet auch einen schwerwiegenden Eingriff in das Recht des Abgebildeten auf Privatleben, das durch Art 8 MRK geschützt ist. Für diesen Eingriff stellt die „reißerisch bebilderte Berichterstattung“ keine Rechtfertigung dar, weil sie vor allem die Neugier und Sensationslust des Publikums befriedigen sollte, maW die Zeitungsauflage steigerte.

Schließlich ließen die Straßburger Menschenrechtsrichter auch die vom OLG Wien letztlich (leicht) reduzierten Entschädigungssummen unbeanstandet. Zur Verhältnismäßigkeit des Eingriffs führt der EGMR aus, dass es sich nicht um eine strafrechtliche Sanktion handelt, dass der Betrag von €

1 Vgl. EGMR Von Hannover/D v. 24.6.2004 = NL 2004, 144 = EuGRZ 2004, 404 = ÖJZ 2005, 588; Hachette Filipacchi Associés/F v. 14.6.2007 = NL 2007, 140; Egeland und Hanseid/N v. 16.4.2009 = NL 2009, 104; Enea/I v. 17.9.2009 (GK) = NL 2009, 264

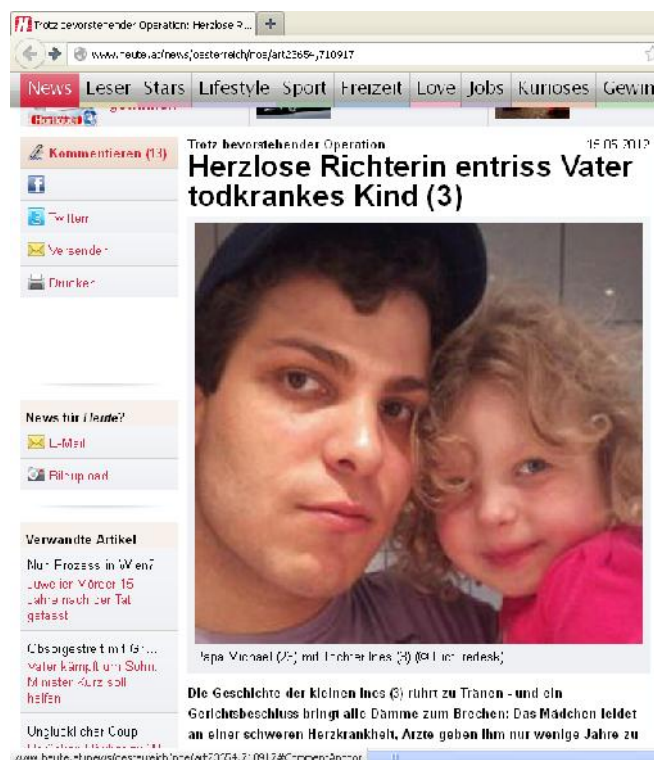
130.000 aber außergewöhnlich hoch sei. Im Hinblick auf die konkreten Umstände (Anzahl der Artikel, hoher Marktanteil der Krone, Schutzmechanismen gegen überhöhte Entschädigungen) ist dies aber noch verhältnismäßig

Ausblick: Der „Fall Christian“ hat hierzulande auch Positives bewirkt. Die Österreichische Justiz hat Interventionsteams bestehend aus Psychologen, Vertreter des Jugendamtes und (geschulten) Richtern zusammengestellt, die in Fällen sog. „Kindesabnahmen“ behutsamer vorgehen als im eingangs geschilderten Anlassfall. Die Einführung der Familiengerichtshilfe² – nahezu flächendeckend ab 01.01.2014 – soll bewirken, dass es gar nicht zu Eskalationen in Obsorgestreitigkeiten kommt.

Nach dem vorliegenden Urteilsspruch aus Straßburg ist die Boulevardpresse hierzulande gefordert, „herzerreißend mit Kindern bebilderte“ Familienrechtstragödien zu unterlassen. Die Justiz ist sensibler geworden, wenngleich es fraglos keine Servicedienstleistung darstellt, einem Elternteil die Obsorge zu entziehen. Das muss allen Beteiligten klar sein. Der Boulevardjournalismus muss allerdings noch erheblich sensibler werden, wie ein Negativbeispiel von „HEUTE“ aus jüngerer Zeit zeigt:³

IV. Zusammenfassung

Die mediale Bebilderung aufsehenerregender Obsorgestreitigkeiten wie den „Fall Christian“ (dort: Foto vom schmerzverzerrten Gesicht des Opfers) ist nicht durch die Pressefreiheit gedeckt, da sie



für die Ausübung der Meinungsfreiheit in einer demokratischen Gesellschaft nicht notwendig ist. Es besteht für den EGMR kein Zweifel, dass die Bewahrung des intimsten Lebensbereiches eines Minderjährigen, der Opfer eines Familienzwists wurde und nicht selbst die öffentliche Sphäre betreten hat, wegen seiner verwundbaren Stellung besonderen Schutz verdient.

² Instruktiv dazu *Fucik*, Verfahren in Ehe- und Kindschaftsangelegenheiten nach dem KindNamRÄG 2013, ÖJZ 2013, 297; vgl. auch *Deixler-Hübner*, Neue verfahrensrechtliche Instrumentarien im KindNamRÄG 2013, Zak 2013, 9.

³ Abrufbar unter <http://www.heute.at/news/oesterreich/noe/art23654,710917> (04.01.2014).