



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

FIRST SECTION

CASE OF KURIER ZEITUNGSVERLAG UND DRUCKEREI GMBH v. AUSTRIA (No. 2)

(Application no. 1593/06)

JUDGMENT

STRASBOURG

19 June 2012

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

In the case of Kurier Zeitungsverlag und Druckerei GmbH v. Austria (no. 2),
The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Nina Vajić, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,
and Søren Nielsen, *Section Registrar*,
Having deliberated in private on 22 May 2012,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1593/06) 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 Kurier Zeitungsverlag und Druckerei GmbH (“the applicant company”), a limited liability company with its registered office in Vienna, on 30 December 2005.

2. The applicant company was represented by Giger, Ruggenthaler & Partner, a partnership of lawyers practising 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 it to pay damages had infringed its right to freedom of expression under Article 10 of the Convention.

4. On 20 May 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 is the owner and publisher of the daily newspaper *Kurier*.

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sole custody was granted to E.R., while his brother stayed with U.W. On 13 February 2001 U.W. asked for custody to be withdrawn from E.R. and transferred to him.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 widely reported on in the media.

B. The articles which appeared in *Kurier*

18. On 29 January 2004 an article was published in the applicant company's newspaper under the title "Mother flees hospital with Christian" ("*Mutter flüchtete mit Christian aus Spital*"), which read as follows.

"On Wednesday evening the child-care proceedings concerning 8-year-old Christian from Salzburg took a very surprising turn: Whilst father, mother and son were still talking together over the sick bed in the afternoon, the mother suddenly snatched the boy ..., left the hospital via an underground passage, took a car that had been left at her disposal and disappeared. "She is being taken care of on neutral ground and the boy is getting psychological support" said Hadmar Hufnagel from the Salzburg District Court. The father suspects the whole affair of being rigged.

At lunch-time 33-year-old mother E.R. had arrived at the hospital, hidden from the public. "The boy was not afraid of his mother" says children's advocate Andrea Holz-Dahrenstaedt. Whereas the father claims that Christian clung to him and tried to defend himself against his mother.

PLANNED After talks lasting an hour, the bombshell: E.R. snatched her son when he was left unattended for a moment, and fled the hospital. "The operation was authorised by the family judge" explained Hufnagel. Beforehand the older son, Christoffer, had been taken to a psychologist and afterwards to the partner of the children's father.

U.W. suspects the operation of being a conspiracy: "It was planned. They were only waiting for a good opportunity." He claims to have heard his son crying and then there had been a sudden silence. The father had sat

for minutes next to Christian's empty sickbed.

Friends and relatives of the father have announced a demonstration for today in front of the justice buildings in Salzburg.

The whole country is now shocked about this family dispute. It was triggered by an attempt to take Christian away from his father on Monday. Two bailiffs tried to pull the boy into a car. However, he defended himself, screamed, bit and clung to the car. Since this incident Christian has remained in the children's hospital.

Opinions in this dispute are very divergent. The Salzburg District Court tries to justify the conduct of the officers. "In this case the Court has acted in the interest of the child", explained the President of the Regional Court, Walter Grafinger. The bailiffs had been ordered to seize the child without bodily harming him. This order was carried out accordingly.

However, the Linz Court of Appeal has a different view on the matter. 'The conduct of the officers was unacceptable and excessive', declares press officer Günther Wiensauer. 'This was practically ill-treatment of a child', said the Vienna child and juvenile advocate Monika Pinterits.

SPECIAL TRAINING The president of the Judges' Association, Barbara Helige, suggests special training for bailiffs. She is a family judge and has never in her 20-year career seen such a case. Helige does not consider it helpful for a judge to be present when children are taken away from their parents: "This would even reinforce the impression of State intervention."

A report from the Ministry of Justice will be handed over to the disciplinary commission. The Minister of Justice, Dieter Böhmdorfer (FP), announced that an expert commission would be established in order to avoid escalations. And in the future he wants a judge to be present when compulsory measures are carried out.

According to the Minister, the Court in Salzburg acted in an appropriate manner; however, the father had breached his obligation of discretion. Disputes in childcare proceedings should not be fought on the backs of the children."

19. A second article was published in the applicant company's newspaper under the title "A dispute might now arise about Christian's brother" (*Nun droht Streit um Christians Bruder*) on 30 January 2004. It read as follows.

"After the tumultuous events on Friday the dispute over 8-year-old Christian from Salzburg has for the time being calmed down. According to information from the Court, the mother and the boy are at present accommodated and looked after in municipal housing in Salzburg.

However, the future of little Christian, and whether and when he will leave with his mother for Sweden, is still unclear. A tug of war might also take place over the older brother Christoffer: The Youth Welfare Office has custody over him for the time being in view of the current child-care proceedings initiated by the father. An investigation procedure is planned for the summer.

U.W. had applied for custody of all three children. In December 2003 his custody applications for Alexander, 11, and Christian were refused. The decision concerning Christoffer had been postponed. Christoffer is for the time being staying with his father.

U.W. is, however, still at loss about the fact that his ex-wife fled the hospital with Christian. 'I cannot talk about it', he stuttered on Thursday, his voice trembling with tears.

Eva Weissenbacher, a friend of the family who was present when the father and mother met at the hospital, said: 'I saw the mother slap the boy in the face'.

IGNORED The fact that bothered the lady from Salzburg most was that the mother was only focussing on Christian: 'She has cold-shouldered Christoffer. I don't know why she is behaving like that and what her goal is.'

Neither the mother nor her lawyer want to answer *Kurier's* queries about this incident. Hadmar Hufnagel, Chairman of the Salzburg District Court, considers the 'Christian case' closed as far as the courts are concerned: 'The judicial authorities are no longer involved. It does not concern the judge anymore. It is the parents' responsibility to take the next steps. The court has issued a decision and fulfilled its obligations.'

In the evening friends of the father started demonstrating in front of the Salzburg Regional Court. 'Without wanting to get involved in the case in question, we would like to point out that children have a right to be heard and have their wishes and opinions respected', says Anita Gerhardtter."

20. Finally, the applicant company published a third article in its newspaper under the title "The Christian case: 'Judicial authorities have to become more sensitive' (*Fall Christian: Die Justiz muss sensibler werden*) on 13 February 2004. It read as follows.

"A Salzburg judge has given the order to use 'force'. 'Appropriate force' in order to take a child away from his father and to take him to his mother in Sweden. 8-year old Christian from G. The boy had fought against two bailiffs on 26 January. Alarming pictures show the end of the child-care proceedings.

As reported, the results of the investigations of the Linz Court of Appeal are now available. Court of Appeal President Helmut Hubner says: 'This case is also a wake-up call for the judicial authorities. We have to become more sensitive.'

FORCE In his interview with *KURIER* Hubner defends the judge who ordered the officers, who are bound by his instructions, 'to summon the minor with due tact, but without considering his wishes, and if necessary with due force'. He says: 'That is the wording of the law'.

This is not quite true. The word 'force' is not to be found in the non-contentious act. 'Means of coercion' are allowed by the law; however, they have to be directed against the parent not respecting the judgment.

But Hubner also says: 'This matter should never have been dealt with in such a way'. He wants the officers to be trained how to deal with children and how to talk to them. A disciplinary procedure against the District Court judge is going to be initiated: the bailiffs contacted him four times during that mission, should he have ended it earlier?

Judges are discussing the matter. Judge Barbara Helige: 'This case brings us to the limits of judicial activities, it is a tightrope walk'.

Means of coercion have to be allowed for at least in cases where severely mistreated children have to be saved from an abusing parent 'even when they still love their parents and don't want to be taken away'. However, Christian was definitely not in such a situation.

Linz University professor Astrid Deixler-Hübner (Institute for Civil Law) says that this law will be changed, taking effect from 1 January 2005, and she further states: 'The well-being of the child is the top priority. The new ruling stipulates that the judge has to discontinue the execution of his orders when the well-being of the child is in danger'.

President Huber thinks, on the other hand, that this is already the case today. 'Even if this is not clearly written in the text of the law, there is such a thing as common sense!'

He does not only hope that the judicial authorities will act with common sense but the parents as well. They can fight their wars of the roses anywhere, but not on the back of their children.

He considers that Christian's development is positive: 'He was examined by a psychologist before leaving with his mother for Sweden. The child has calmed down. He was curious about Sweden and he was not unhappy'."

21. All articles were accompanied by photos of Christian. The first article was accompanied by a picture of Christian showing him with a distressed expression, clinging to his brother, and a similar picture accompanied the third article.

C. The proceedings under the Media Act

22. With regard to the articles published by the applicant company on 29 and 30 January and 13 February 2004, and the above events, Christian W., represented by his mother, brought proceedings under Section 7 and 8a of the Media Act against the applicant company, seeking damages and publication of the ensuing judgment. He argued that the reporting on him had interfered with the intimate sphere of his life in a manner which was 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 crime in a manner which made him or her recognisable in public, which was only allowed if the importance of the offence or the persons implicated meant that there was a preponderant interest of the public in the information. Both applications were filed with the Vienna Regional Court for Criminal Affairs (*Landesgericht für Strafsachen Wien*).

23. On 19 October 2004 the Regional Court allowed the action and ordered the applicant company to pay damages in the amount of 20,000 euros (EUR), to publish the judgment in its

periodical, and to bear the costs of the proceedings. The court found that the publishing of the above articles containing details of the custody dispute over eight-year old Christian W. had caused the intimate sphere of his personal life to be exposed in a manner likely to compromise him in public, in breach of section 7 of the Media Act. Moreover, the article published on 29 January 2004 had made the full name of Christian W. public and had been accompanied by a photograph of him. Thereby the identity of a person who had been the victim of a criminal offence had been disclosed to a large and not directly informed circle of people without any justification. This was in breach of Section 7a of the Media Act. The Regional Court observed further that all the articles had been accompanied by pictures of Christian W. in which he, with a highly perturbed facial expression, was seen clinging to his brother.

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

25. On 25 February 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 that on the issue of enforcement of custody orders there was an ongoing discussion in which presidents of various courts and the President of the Association of Judges were participating. Moreover, the Federal Minister of Justice had set up a working group of experts to draw up a report on the events of 26 January 2004. The press had been addressed not only by Christian's father but also by representatives of the Federal Ministry of Justice, the courts and the Linz Court of Appeal, which had even held a press conference. In such circumstances it had been necessary to inform the public of the identity of the persons involved, and against the background of the public discussion the custody dispute and the preliminary events leading to the incident on 26 January 2004 had also been of legitimate interest to the public.

26. On 5 April 2005 the plaintiff commented on the appeal. He argued that the applicant company could not rely in its defence on the fact that organs of the judiciary had also commented in public on the events, because they had neither made public the full name of the victim and details from his intimate life nor published photos of him. Had the applicant company acted in the same way, its reporting would have been fully acceptable.

27. On 22 June 2005 the Vienna Court of Appeal partly allowed the appeal. It found that there was no breach of Section 7a of the Media Act, because under that provision a compensation claim only existed 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. It reduced the compensation to EUR 3,000 per article, altogether EUR 9,000.

28. The Court of Appeal dismissed the applicant company's criticism that the Regional Court had not taken sufficiently into account that representatives of the judiciary themselves had made public statements. The Regional Court had accepted that there was a direct link between the events reported on and the public interest. However, giving details from the plaintiff's intimate family life, giving his full name, and adding pictures of the plaintiff had transgressed into his intimate sphere as these details had been given merely in order to satisfy the lust for sensation and the curiosity of its readers.

29. Even if there was a link to public life, the media could only report on a person's intimate sphere to the extent necessary for adequately satisfying the need for information relating to those elements which were of relevance to the public interest. Reporting on events within the intimate sphere of a person must therefore be adequate to the occasion and proportional. In the present case it had not been necessary for the purpose of informing the public on alleged shortcomings within the judiciary, and it had not been necessary to expose in such an intense and striking way the severe strain being suffered by the juvenile plaintiff through the insertion of photographs showing his distress and despair, through mentioning his full name, and through setting out the details of his seizure.

II. RELEVANT DOMESTIC LAW

30. 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.”

31. 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.”

32. 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.”

33. 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 so ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

34. 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.”

35. The Government contested that argument.

A. Admissibility

36. 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

37. 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.

38. 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.

39. The Court considers, and this was acknowledged by the parties, that the interference was prescribed by law, namely by sections 7 and 7a 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.

40. 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*

41. 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.

42. 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. Otherwise the press would lose its audience and would no longer be able to fulfil its protection and warning role. In fulfilling this role the press was entitled to resort to exaggeration and provocation in their reporting and this right was not restricted to textual reporting but also extended to images illustrating the articles. It was true that the applicant company had published one picture of Christian which could be considered as showing his suffering and despair while clinging to his brother, but that picture had been published only for the purpose of rousing the public from apathy. The essential question was therefore whether the importance of the events on which the applicant company was reporting justified the publication of pictures which also showed the pain and suffering of the persons concerned by the events. For the above reasons the answer must be in the affirmative.

43. The applicant company also argued that the amount of compensation granted to Christian had been excessive, because the impugned articles had not been published on the front page of the newspaper but merely towards the back, and the main reason for the granting of compensation was the publication of one single picture showing the suffering and despair of Christian, while the other pictures were merely neutral images of him.

44. 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.

45. 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 reveal the identity of Christian and publish pictures showing him in a state of despair. The disclosure of the identity of Christian was irrelevant for understanding the details of the events of which he had been the victim and this specific detail was also unnecessary in raising 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.

46. Lastly the Government argued that the amount of compensation awarded to Christian, namely EUR 9,000 was not disproportionate, given that this figure was well below the maximum amount of compensation possible, and taking into account the wide dissemination of the information by the applicant company and the influence it had had on public opinion.

2. *The Court's assessment*

(a) **General principles**

47. 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).

48. 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).

49. 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).

50. 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).

51. 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

52. In the present case the applicant company published in its newspaper Kurier, between 29 January 2004 and 13 February 2004, three articles about a dispute between parents over custody of their child, Christian. In the custody proceedings the competent courts did not accept 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 again 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 on this case and the articles published disclosed Christian's identity and details of his family life and of the custody dispute. They were accompanied by photographs of Christian that had not been rendered anonymous and, in particular, one which showed him in a state of pain and despair on the occasion of the intervention of the court officers on 26 January 2004.

53. 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 awarded compensation at EUR 3,000 per Article, altogether EUR 9,000. 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.

54. 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".

55. 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).

56. 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.

57. 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.

58. The applicant company also argued that it had been necessary to publish the picture of Christian showing his suffering and despair while clinging to his brother for the purpose of rousing the public from apathy and attracting their attention, as otherwise the press would not have been able to fulfil its protection and warning role. However, the Court has found in the past 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.

59. 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.

60. Lastly the Court considers that the interference with the applicant company's right to impart information was proportionate. The applicant company was not subject to a fine imposed in criminal proceedings but was ordered to pay compensation for the injury caused to the person with whose right to respect for his strictly private life it had interfered. The amount of compensation, EUR 9,000, relates to three published articles. The amounts appear reasonable taking into account the length of the articles, their contents, which, on account of the details given and the photographs published, constituted a serious interference given the vulnerable situation of Christian as the victim of the custody dispute and the particularly wide circulation of the applicant company's media.

61. In sum, the Court finds that in awarding compensation for the interference with Christian's strictly 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.

62. 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.

Søren Nielsen
Registrar

Nina Vajić
President