Nr. 17 Axel Springer AG/Duitsland

Europees Hof voor de Rechten van de Mens 7 februari 2012
(Application no. 39954/08)

Uitgever Axel Springer AG publiceert o.a. het dagblad *Bild*. Op 14 juni 2003 schrijft *Bild* dat een bekende Duitse krimiacteur (hierna X), die van 1998 tot 2003 in 54 afleveringen van een politieserie de rol van politiechef heeft gespeeld, voor illegaal drugsbezit is veroordeeld (in 2000). Onder dreiging van een dwangsom houdt het blad echter buiten de openbaarheid dat bij X thuis vier gram cocaïne is gevonden die hij per post uit Brazilië heeft ontvangen, en dat hij daarvoor een voorwaardelijke gevangenisstraf van vijf maanden en een boete van € 5.000,– heeft gekregen.

Op 23 september 2004 om ongeveer 23.00 uur arresteert de politie X op het Oktoberfest in München wegens het bezit van cocaïne. De politie bevestigt dit tegenover een journalist van *Bild*. Deze neemt vervolgens contact met de persofficier van justitie op. Ook die bevestigt de informatie en voegt daaraan toe dat X is aangehouden, omdat politieagenten in burger hem een verdacht gebaar met zijn hand hebben zien maken, terwijl hij uit de toiletruimte kwam. Bij een fouillering hebben zij 0.23 gram cocaïne bij hem aangetroffen.

Bild plaatst hierover op 29 september 2004 een artikel op de voorpagina, onder de groot opgemaakte kop *Cocaïne! Inspecteur X gepakt op het bierfestival van München*. Het artikel verhaalt daarvan met naam en toenaam, citeert de persofficier van justitie en refereert nu ook aan de voorwaardelijke gevangenisstraf die hij eerder heeft gekregen. Het stuk gaat vergezeld van drie foto's, één op de voorpagina en twee op pagina 12. Andere media volgen het voorbeeld van *Bild*. Op televisie beschrijft de persofficier van justitie hoe en waarom X is aangehouden. Op 7 juli 2005 bericht *Bild* dat de rechtbank X heeft veroordeeld voor het bezit van cocaïne en hem een boete van € 18.000,– heeft opgelegd.

X komt onmiddellijk in actie bij de civiele rechter. Het *Landesgericht* Hamburg verbiedt de – verdere – publicatie van het eerste artikel (van 29 september 2004) bij wijze van voorlopige voorziening en herhaalt dit in een bodemprocedure. Wegens schending van het *Allgemeines Persönlichkeitsrecht* van X wordt Springer tot betaling van € 5.000,– met kosten veroordeeld. Het gerecht benadrukt dat het maar om een kleine hoeveelheid drugs gaat en dat X niet van dealen is beschuldigd. Verder neemt X, afgezien van het feit dat hij tv-acteur is, niet een zodanig prominente plaats in de publiciteit in dat hij mag worden geacht zijn persoonlijkheidsrecht te hebben prijsgegeven. Dat de gepubliceerde informatie op zichzelf juist is, doet hieraan niet af.

Het *Oberlandesgericht* bekrachtigt het vonnis, maar beperkt de boete tot € 1.000,–. Zijn overwegingen zijn voor een groot deel gelijk aan die van het *Landesgericht*. Het wijst erop dat X een bekend acteur is die gedurende langere tijd de rol politie-inspecteur heeft gespeeld. Hij is daardoor echter niet een idool of rolmodel voor brandschoon gedrag geworden. Ook al is X zeer populair, hij heeft zich in eerdere interviews niet over zijn privé-leven uitgelaten om de aandacht van het publiek te trekken. Hoewel hij in het openbaar is gearresteerd, heeft hij de drugs op het mannentoilet, in een beschermde privé-omgeving, gebruikt. Zijn aanhouding is misschien een zaak van substantieel openbaar belang, de details zijn dat niet.

Het tweede artikel (over het vonnis tegen X) treft in grote lijnen hetzelfde lot. De zaken blijven bij de tweede instantie steken, omdat er geen rechtsvragen zijn waarover het *Bundesverfassungsgericht* een oordeel kan vellen. Daarom wendt Axel Springer AG zich vervolgens tot het Europese Hof voor de Rechten van de Mens.

Het EHRM begint met het citeren van de relevante Duitse wettelijke bepalingen, de belangrijkste uitspraken van het *Bundesverfassungsgericht* en de meest toepasselijke passages uit de Aanbeveling van het Comité van Ministers van 10 juli 2003 over het publiceren van informatie over strafzaken in de media (Rec (2003) 13) en Resolutie 1165 (1998) van 26 juni 1998 van de Parlementaire Assemblee van de Raad van Europa over het recht op privacy. Vervolgens stelt het hof vast dat de zaak-Springer, die rechtstreeks naar de Grote Kamer is gegaan, gezien de aard van de feiten en het belang van de rechtsvragen van die van Caroline von Hannover tegen Duitsland (zie elders in dit nummer) is afgesplitst. Het hof citeert dan artikel 10 EVRM en constateert dat de zaak ontvankelijk is. Wij komen bij onderdeel II sub B (r.o. 55) het arrest binnen.

55. The Government acknowledged that the impugned court decisions amounted to an interference with the applicant company's right to freedom of expression. However, the interference was prescribed by law and pursued an aim recognised as legitimate by the Court, namely, the protection of the private sphere (*News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 44, ECHR 2000-I). The question at issue between the parties in the present case was whether the interference had been proportionate, and in particular whether the balancing exercise undertaken by the national courts of the applicant company's right to freedom of expression against X's right to respect for his private life was in conformity with the criteria established by the Court's case-law. In that connection regard had to be had to the role of the person concerned, the purpose of the publication and the severity of the sanction imposed on the press.

56. The Government referred to the national courts' finding that, unlike Superintendent Y, X was not well known to the public and accordingly could not be regarded as a public figure. In its judgment concerning the second article, the Regional Court had, moreover, differentiated X from Prince Ernst August von Hannover (see paragraph 39 above). The press interviews given by X had not been sufficient in themselves to increase the public's interest in his person. In the Government's submission, the task of assessing how well a person was known to the public should fall to the domestic courts. That was particularly true in borderline cases, which required an assessment of the facts and of social situations that the Court could not undertake in respect of each and every potential public figure in 47 States.

57. With regard to the subject matter of media reports, the Government acknowledged that where the press reported on the commission of an offence it was generally playing its role as "public watchdog", in particular where criminal proceedings were concerned. There was a greater public interest in this case than when the press merely reported details of the private life of an individual. In the present case, however, the public had no interest in being informed about the offence committed by X, whom they could not have dissociated from the person of the defendant. The present case had not called into question the workings of the justice system, like the case of *Obukhova v. Russia* (no. 34736/03, 8 January 2009), but had concerned only a minor drugs-related offence committed by a relatively well-known actor.

58. The task of assessing the seriousness of the offence should fall within the margin of appreciation of the national authorities. In the instant case the courts considered that the offence was of medium, or even minor, seriousness. The Government pointed out that the amount of the fine was relatively high on account of X's income. The criminal courts had fixed the amount at 90 day-fines, so the offence did not appear in X's certificate of good conduct (destined for employers) or in his criminal record.

59. The Government disputed the applicant company's allegation that the Munich prosecutor had held a press conference and published a press release about X's arrest prior to publication of the first article (see paragraph 69 below).

60. As regards the nature of the penalty imposed on the applicant company, the Government observed that the latter had merely been prevented from publishing the content of the articles in question and had been ordered to reimburse modest legal costs. The applicant company had neither been convicted under criminal law nor ordered to pay damages, unlike publishers in other cases who had been given a custodial sentence; nor had it been prevented from carrying on the profession of journalist or faced an order for the seizure of all copies of the particular edition of a newspaper or an order to pay hefty damages (*Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 112, ECHR 2004-XI; *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, no. 58547/00, § 41, 27 October 2005; and *Flinkkilä and Others v. Finland*, no. 25576/04, § 89, 6 April 2010). The Government added that the German courts had not, moreover, imposed a blanket ban on all reporting of X's arrest and trial; the problem had been that the applicant company had failed to maintain the anonymity of the actor at the time of his arrest and prior to the trial.

61. The Government highlighted the margin of appreciation enjoyed by the State in the present case. That margin depended on the nature of the activities in question and the aim pursued by the restrictions. In its recent case-law, the Court had moreover left the State a broad margin of appreciation in cases concerning Article 8 of the Convention. (*Armonienė v. Lithuania*, no. 36919/02, § 38, 25 November 2008, and *A. v. Norway*, no. 28070/06, § 66, 9 April 2009). Generally speaking, the margin enjoyed by the States was broader where there was no European

consensus. In the Government's submission, whilst there was admittedly a trend towards harmonisation of the legal systems in Europe, differences nevertheless remained, as evidenced by the failure of the negotiations for the adoption of a regulation of the European Union on conflict-of-law rules regarding non-contractual obligations (Regulation EC No. 864/2007 of 11 July 2007 – Rome II Regulation). The margin of appreciation was also broad where the national authorities had to strike a balance between competing private and public interests or Convention rights (*Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I, and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78 ECHR 2007-XIII). Moreover, the case-law of the Court of Justice of the European Union apparently took the same approach (cases of *Omega* of 14 October 2004, C-36/02, and *Schmidberger* of 12 June 2003, C-112/00).

62. The Government argued that the special nature of certain cases, such as the present one, in which the domestic courts were required to balance the rights and interests of two or more private individuals lay in the fact that the proceedings before the Court were in fact a continuation of the original legal action, with each party to the domestic proceedings potentially able to apply to the Court. It was precisely for that reason that one result alone of the balancing exercise of the competing interests was insufficient, and that there should be a "corridor" of solutions within the confines of which the national courts should be allowed to give decisions in conformity with the Convention. Failing that, the Court would have to take the decision on every case itself, which could hardly be its role.

63. The Government stated that there had been slightly less of a tendency to do this at domestic level because the Federal Constitutional Court granted the ordinary courts a margin of appreciation in that respect and refrained from carrying out its own balancing exercise in their stead. That could, moreover, explain the absence of reasons given for the decision of the Federal Constitutional Court in the present case. The tendency, at national level, to reduce the scope of review by a constitutional court should apply *a fortiori* to the European Court of Human Rights, which had the task of examining the outcome of balancing exercises carried out by the courts in 47 Contracting States, whose legal systems were still very heterogeneous.

64. In the Government's submission, the Court should intervene only where the domestic courts had not taken account of certain specific circumstances when undertaking the balancing exercise or where the result of that exercise was patently disproportionate (*Cumpănă and Mazăre*, cited above, §§ 111-120). That conclusion was confirmed, moreover, by Article 53 of the Convention: where the relationship between State and citizen was concerned, a gain of freedom for the individual concerned involved only a loss of competence for the State, whereas in the relationship between two citizens the fact of attaching more weight to the right of one of the persons concerned restricted the right of the others, which was forbidden under Article 53 of the Convention.

(b) The applicant company

65. The applicant company maintained that at the material time X was a well-known actor who played the main role in a television crime series that was extremely popular, especially among young male adults; X had, moreover, been voted second most popular actor in 2002. He was not therefore just an ordinary individual who did not attract media attention, as had been so in other cases decided by the Court (see, *inter alia*, *Sciacca v. Italy*, no. 50774/99, ECHR 2005-I; *Toma v. Romania*, no. 42716/02, 24 February 2009; and *Egeland and Hanseid v. Norway*, no. 34438/04, 16 April 2009).

66. In the applicant company's submission, the commission of a criminal offence was, by its very nature, never a purely private matter. Furthermore, in the present case X was a repeat offender as he had already been given a five-month suspended prison sentence in July 2000 and fined EUR 5,000 for possession of drugs.

67. The public's interest in being informed prevailed over X's right to respect for his private life. X had – of his own initiative – courted public attention, had a market value corresponding to his high profile, had willingly allowed photos to be taken of himself on public occasions and had given press interviews revealing aspects of his private life, including his drug consumption. As a role model and having himself entered the public arena, X should have accepted that he would attract the public's attention, in particular if he committed a criminal offence. The applicant company argued that anyone who used the media for self-promotion should expect their conduct to be truthfully reported on by the media. This was particularly true in X's case because, following his first conviction for possession of drugs, he had asserted that he had given up taking drugs. He had accordingly waived his right to privacy.

68. The applicant company stated, further, that the truth of the facts reported in the articles in question was not disputed (citing, conversely, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, ECHR 2004-XI). The information given had, moreover, not affected the conduct of the preliminary investigation or the trial (citing, conversely, *Tourancheau and July v. France*, no. 53886/00, 24 November 2005); it had included details not only about X's private life, but also serious factual information about criminal law and the consequences of drug taking. The present case was thus distinguishable from the case of *Von Hannover* (cited above), especially as, unlike X, the applicant in that case had always sought to protect her private life.

69. The applicant company reiterated that it had reported on X's arrest after the prosecution authorities had disclosed the facts and the identity of the person arrested. In its submissions at the hearing, particularly in reply to the judges' questions, it had stated that prior to publication of the articles the Munich public prosecutor's office had held a press conference – in the presence of television cameras – during which it had provided detailed information. The public prosecutor's office had also published a long press release on the subject. Accordingly, the applicant company had published only information that had already been made public. It would be demotivating for journalists not to be able to publish such information. Attending a press conference would be a complete waste of time.

70. In conclusion, the applicant company submitted that the press should not be reduced to reporting only on political figures. Since prominent persons were able to establish a certain image of themselves by seeking the attention of the media, the latter should be permitted to correct that image when it no longer corresponded to the reality. It was not a question of asserting the primacy of the freedom of expression over the right to respect for private life. Freedom of expression should, however, prevail where the person concerned enjoyed a more than regional degree of prominence and had freely engaged in his or her self-promotion.

2. Third parties' observations

(a) Media Lawyers Association

71. The third-party association submitted that the right to reputation was not protected by the Convention. Publication of a defamatory article about a person did not, of itself, amount to an interference with the exercise of the rights guaranteed under Article 8. When balancing the rights under Articles 8 and 10 of the Convention wide and strong protection should be given to the right of the media to report on all matters of public interest and in particular to inform the public about judicial proceedings. The third-party association observed that the inclusion of a person's name or other identifying detail played an important part in fulfilling the task of informing the public.

72. According to a United Kingdom Supreme Court ruling, if the names of the parties were not revealed when reporting on court proceedings the report would be disembodied, readers would be less interested and editors would give the report lower priority. The Media Lawyers Association also stressed the importance of preserving a wide editorial discretion and the principle of open justice to which the media contributed an essential element, adding that there should be no incursion into that principle except where strictly necessary such as protecting a defendant or witness by anonymity. Other than in those circumstances, there should be no restriction on the right of the media to publish reports on court proceedings including photographs.

(b) Joint submissions by the Media Legal Defence Initiative, International Press Institute and World Association of Newspapers and News Publishers

73. The three third-party associations submitted that a broad trend could be observed across the Contracting States towards the assimilation by the national courts of the principles and standards articulated by the Court relating to the balancing of the rights under Article 8 against those under Article 10 of the Convention, even if the individual weight given to a particular factor might vary from one State to another. They invited the Court to grant a broad margin of appreciation to the Contracting States, submitting that such was the thrust of

Article 53 of the Convention. They referred to the Court's judgment in the case of *Chassagnou and Others v. France* ([GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III), submitting that the Court had indicated that it would allow Contracting States a wide margin of appreciation in situations of competing interests.

74. The Contracting States were likewise generally granted a wider margin in respect of positive obligations in relationships between private parties or other areas in which opinions within a democratic society might reasonably differ significantly (*Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I). The Court had, moreover, already allowed the Contracting States a broad margin of appreciation in a case concerning a balancing exercise in respect of rights under Articles 8 and 10 of the Convention (*A. v. Norway*, cited above, § 66). Its role was precisely to confirm that the Contracting States had put in place a mechanism for the determination of a fair balance and whether particular factors taken into account by the national courts in striking such a balance were consistent with the Convention and its case-law. It should only intervene where the domestic courts had considered irrelevant factors to be significant or where the conclusions reached by the domestic courts were clearly arbitrary or summarily dismissive of the privacy or reputational interests at stake. Otherwise, it ran the risk of becoming a court of appeal for such cases.

3. The Court's assessment

75. The parties agreed that the judicial decisions given in the present case constituted an interference with the applicant company's right to freedom of expression as guaranteed by Article 10 of the Convention.

76. Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 § 2 and was "necessary in a democratic society" for the aforesaid aim or aims.

77. It is common ground between the parties that the interference was prescribed by Articles 823 § 1 and 1004 § 1 of the Civil Code (see paragraphs 18 and 47 above), read in the light of the right to protection of personality rights. They also agree that it pursued a legitimate aim – namely, the protection of the reputation or rights of others – within the meaning of Article 10 § 2 of the Convention, which, according to the Court's case-law (*Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI, and *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007), can encompass the right to respect for private life within the meaning of Article 8. The parties disagree, however, as to whether the interference was "necessary in a democratic society".

(a) General principles

(i) Freedom of expression

78. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV).

79. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. 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" (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Pedersen and Baadsgaard*, cited above, § 71).

80. This duty extends to the reporting and commenting on court proceedings which, provided that they do not overstep the bounds set out above, contribute to their publicity and are thus consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. It is inconceivable that there can be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 56, ECHR 2000-I; *Dupuis and Others v. France*, no. 1914/02 § 35, ECHR 2007-VII; and *Campos Dâmaso v. Portugal*, no. 17107/05, § 31, 24 April 2008).

81. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Pedersen and Baadsgaard,* cited above, § 71). Furthermore, it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Eerikäinen and Others v. Finland*, no. 3514/02, § 65, 10 February 2009).

(ii) Limits on the freedom of expression

82. However, Article 10 § 2 of the Convention states that freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. These duties and responsibilities are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see *Pedersen and Baadsgaard*, cited above, § 78, and *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 89, ECHR 2007-III).

83. The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others*, cited above, § 70; *Pfeifer,* cited above, § 35; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). The concept of "private life" is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to their image (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008-...). It covers personal information which individuals can legitimately expect should not be published without their consent (see *Flinkkilä and Others*, cited above, § 75, and *Saaristo and Others v. Finland*, no. 184/06, § 61, 12 October 2010).

In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, cited above, § 64). The Court has held, moreover, that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII).

84. When examining the necessity of an interference in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007, and *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011).

(iii) Margin of appreciation

85. The Court reiterates that, under Article 10 of the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of

expression guaranteed under that provision is necessary (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I, and *Pedersen and Baadsgaard,* cited above, § 68).

86. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court (see *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 38, ECHR 2004-X, and *Flinkkilä and Others*, cited above, § 70). In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Petrenco v. Moldova*, no. 20928/05, § 54, 30 March 2010; *Polanco Torres and Movilla Polanco*, cited above, § 41; and *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010).

87. In cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve equal respect (see *Hachette Filipacchi Associés (ICI PARIS) v. France*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; see also point 11 of the Resolution of the Parliamentary Assembly – paragraph 51 above). Accordingly, the margin of appreciation should in principle be the same in both cases.

88. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited*, cited above, §§ 150 and 155, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011).

(iv) Criteria relevant for the balancing exercise

89. Where the right to freedom of expression is being balanced against the right to respect for private life, the criteria laid down in the case-law that are relevant to the present case are set out below.

(α) Contribution to a debate of general interest

90. An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest (see *Von Hannover*, cited above, § 60; *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, § 68, 9 November 2006; and *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05 § 46, 4 June 2009). The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes (see *White v. Sweden*, no. 42435/02, § 29, 19 September 2006; *Egeland and Hanseid*, cited above, § 58; and *Leempoel & S.A. ED. Ciné Revue*, cited above, § 72), but also where it concerned sporting issues or performing artists (see *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, § 25, 22 February 2007; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, nos. 11182/03 and 11319/03, § 28, 26 April 2007; and *Sapan v. Turkey*, no. 44102/04, § 34, 8 June 2010). However, the rumoured marital difficulties of a president of the Republic or the financial difficulties of a famous singer were not deemed to be matters of general interest (see *Standard Verlags GmbH*, cited above, § 52, and *Hachette Filipacchi Associés (ICI PARIS)*, cited above, § 43).

(β) How well known is the person concerned and what is the subject of the report?

91. The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures (see *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005, and *Petrenco,* cited above, § 55). A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions (see *Von Hannover*, cited above, § 63, and *Standard Verlags GmbH*, cited above, § 47).

Whilst in the former case the press exercises its role of "public watchdog" in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – even where the persons concerned are quite well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying the curiosity of a particular readership in that respect (see *Von Hannover*, cited above, § 65 with the references cited therein, and *Standard Verlags GmbH*, cited above, § 53; see also point 8 of the Resolution of the Parliamentary Assembly – paragraph 51 above). In the latter case, freedom of expression calls for a narrower interpretation (see *Von Hannover*, cited above, § 66; *Hachette Filipacchi Associés (ICI PARIS)*, cited above, § 40; and *MGN Limited*, cited above, § 143).

(γ) Prior conduct of the person concerned

92. The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration (see *Hachette Filipacchi Associés (ICI PARIS)*, cited above, §§ 52 and 53, and *Sapan*, cited above, § 34). However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the report or photo at issue (see *Egeland and Hanseid*, cited above, § 62).

(δ) Method of obtaining the information and its veracity

93. The way in which the information was obtained and its veracity are also important factors. Indeed, the Court has held that 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 provide "reliable and precise" information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; *Pedersen and Baadsgaard*, cited above, § 78; and *Stoll v. Switzerland* [GC], no. 69698/01, § 103, ECHR 2007-V).

(ε) Content, form and consequences of the publication

94. The way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be factors to be taken into consideration (see *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no. 3)*, nos. 66298/01 and 15653/02, § 47, 13 December 2005; *Reklos and Davourlis v. Greece*, no. 1234/05, § 42, 15 January 2009; and *Jokitaipale and Others v. Finland*, no. 43349/05, § 68, 6 April 2010). The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation (see *Karhuvaara and Iltalehti*, cited above, § 47, and *Gurgenidze v. Georgia*, no. 71678/01, § 55, 17 October 2006).

(ζ) Severity of the sanction imposed

95. Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of an interference with the exercise of the freedom of expression (see *Pedersen and Baadsgaard*, cited above, § 93, and *Jokitaipale and Others*, cited above, § 77).

(b) Application to the present case

(i) Contribution to a debate of general interest

96. The Court notes that the articles in question concern the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest. The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence (see *News Verlags GmbH & Co. KG,* cited above, § 56; *Dupuis and Others*, cited above, § 37; and *Campos*

Dâmaso, cited above, § 32; see also Recommendation Rec(2003)13 of the Committee of Ministers and in particular principles nos. 1 and 2 appended thereto – paragraph 50 above). That interest will vary in degree, however, as it may evolve during the course of the proceedings – from the time of the arrest – according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings.

(ii) How well known is the person concerned and what is the subject of the report?

97. The Court notes the substantially different conclusions reached by the national courts in assessing how well known X was. In the Regional Court's opinion, X was not a figure at the centre of public attention and had not courted the public to a degree that he could be considered to have waived his right to the protection of his personality rights, despite being a well-known actor and frequently appearing on television (see paragraph 23 above). The Court of Appeal, however, found that X was a well-known and very popular figure and had played the part of a police superintendent over a long period of time without himself having become a model law-enforcement officer, which would have justified the public's interest in the question whether in his private life he actually behaved like his character (see paragraphs 33 and 34 above).

98. The Court considers that it is, in principle, primarily for the domestic courts to assess how well known a person is, especially where that person is mainly known at national level. It notes in the present case that at the material time X was the main actor in a very popular detective series, in which he played the main character, Superintendent Y. The actor's popularity was mainly due to that television series, of which, when the first article appeared, 103 episodes had been broadcast, the last 54 of which had starred X in the role of Superintendent Y. Accordingly, he was not, as the Regional Court appeared to suggest, a minor actor whose renown, despite a large number of appearances in films (more than 200 – see paragraph 22 above), remained limited. It should also be noted in that connection that the Court of Appeal referred not only to the existence of X's fan clubs, but also to the fact that his admirers could have been encouraged to imitate him by taking drugs, if the offence had not been committed out of public view (see paragraph 32 above).

99. Furthermore, whilst it can be said that the public does generally make a distinction between an actor and the character he or she plays, there may nonetheless be a close link between the popularity of the actor in question and his or her character where, as in the instant case, the actor is mainly known for that particular role. In the case of X, that role was, moreover, that of a police superintendent, whose mission was law enforcement and crime prevention. That fact was such as to increase the public's interest in being informed of X's arrest for a criminal offence. Having regard to those factors and to the terms employed by the domestic courts in assessing the degree to which X was known to the public, the Court considers that he was sufficiently well known to qualify as a public figure. That consideration thus reinforces the public's interest in being informed of X's arrest and of the criminal proceedings against him.

100. With regard to the subject of the articles, the domestic courts found that the offence committed by X was not a petty offence as cocaine was a hard drug. The offence was nevertheless of medium, or even minor, seriousness, owing both to the small quantity of drugs in X's possession – which, moreover, were for his own personal consumption – and to the high number of offences of that type and related criminal proceedings. The domestic courts did not attach much importance to the fact that X had already been convicted of a similar offence, pointing out that this had been his only previous offence and, moreover, had been committed some years previously. They concluded that the applicant company's interest in publishing the articles in question was solely due to the fact that X had committed an offence which, if it had been committed by a person unknown to the public, would probably never have been reported on (see paragraph 20 above).

The Court can broadly agree with that assessment. It would observe, however, that X was arrested in public, in a tent at the beer festival in Munich. In the Court of Appeal's opinion, that fact was a matter of important public interest in this case, even if that interest did not extend to the description and characterisation of the offence in question as it had been committed out of public view.

(iii) X's conduct prior to publication of the impugned articles

101. Another factor is X's prior conduct *vis-à-vis* the media. He had himself revealed details about his private life in a number of interviews (see paragraph 25 above). In the Court's view, he had therefore actively sought the limelight, so that, having regard to the degree to which he was known to the public, his "legitimate expectation" that his private life would be effectively protected was henceforth reduced (see, *mutatis mutandis*, *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, § 53, and, by converse implication, *Eerikäinen and Others*, cited above, § 66).

(iv) Method of obtaining the information and its veracity

102. With regard to the method of obtaining the published information, the applicant company submitted that it had reported on X's arrest only after the disclosure, by the prosecuting authorities, of the facts and of the identity of the accused. It also asserted that all the information that it had published had already been made public, particularly during a press conference and in a press release issued by the public prosecutor's office (see paragraph 69 above). The Government denied that any such press conference had been held by the public prosecutor's office and submitted that it was not until after the applicant company had published the first article that the prosecutor W. had confirmed to other media the facts related by the applicant company.

103. The Court observes that it cannot be determined from the documents in its possession whether or not the applicant company's assertions that a press conference had been held and a press release issued prior to publication of the first article are substantiated. On the contrary, following a question put by the Court at the hearing the assertions in question turned out to be unfounded. The Court finds the attitude of the applicant company regrettable in this respect.

104. It can be seen, however, from the court decisions delivered in the present case and the observations of the parties to the domestic proceedings that this point was not dealt with before the domestic courts. For the purposes of examination of the present case, the Court will merely observe that the applicant company attached to all its replies in the various domestic proceedings a statement by one of its journalists as to how the information published on 29 September 2004 had been obtained (see paragraphs 11 and 12 above) and that the Government have not contested the truth of that statement. Consequently, whilst the applicant company is not justified in claiming that it had merely published information made public at a press conference held by the Munich public prosecutor's office, the fact remains that the confirmation of the published information, and in particular X's identity, emanated from the police and the prosecutor W., who was, moreover, press officer for the Munich public prosecutor's office at the time.

105. Consequently, as the first article was based on information provided by the press officer at the Munich public prosecutor's office, it had a sufficient factual basis (see *Bladet Tromsø and Stensaas*, cited above, § 72; *Eerikäinen and Others*, cited above, § 64; and *Pipi v. Turkey* (dec.), no. 4020/03, 15 May 2009). The truth of the information related in both articles was, moreover, not in dispute between the parties to the domestic proceedings, and neither is it in dispute between the parties to the proceedings before the Court (see *Karhuvaara and Iltalehti,* cited above, § 44).

106. However, in the opinion of the domestic courts examining the case, the fact that the information had emanated from the Munich public prosecutor's office merely meant that the applicant company could rely on its veracity; it did not dispense it from the duty to balance its interest in publishing the information against X's right to respect for his private life. They found that that balancing exercise could only be undertaken by the press because a public authority was not in a position to know how or in what form the information would be published (see paragraphs 27-30 above).

107. In the Court's opinion, there is nothing to suggest that such a balancing exercise was not undertaken. The fact is, however, that having regard to the nature of the offence committed by X, the degree to which X is well known to the public, the circumstances of his arrest and the veracity of the information in question, the applicant company – having obtained confirmation of that information from the prosecuting authorities themselves – did not have sufficiently strong grounds for believing that it should preserve X's anonymity. In that context, it should also be pointed out that all the information

revealed by the applicant company on the day on which the first article appeared was confirmed by the prosecutor W. to other magazines and to television channels. Likewise, when the second article appeared, the facts leading to X's conviction were already known to the public (see, *mutatis mutandis*, *Aleksey Ovchinnikov v. Russia*, no. 24061/04, § 49, 16 December 2010). Moreover, the Court of Appeal itself considered that the applicant company's liability did not extend beyond minor negligence given that the information disclosed by the public prosecutor's office had led it to believe that the report was lawful (see paragraph 35 above). In the Court's view, it has not therefore been shown that the applicant company acted in bad faith when publishing the articles in question.

(v) Content, form and consequences of the impugned articles

108. The Court observes that the first article merely related X's arrest, the information obtained from W. and the legal assessment of the seriousness of the offence by a legal expert (see paragraph 13 above). The second article only reported the sentence imposed by the court at the end of a public hearing and after X had confessed (see paragraph 15 above). The articles did not therefore reveal details about X's private life, but mainly concerned the circumstances of and events following his arrest (see *Flinkkilä and Others*, cited above, § 84, and *Jokitaipale and Others*, cited above, § 72). They contained no disparaging expression or unsubstantiated allegation (see the case-law cited in paragraph 82 above). The fact that the first article contained certain expressions which, to all intents and purposes, were designed to attract the public's attention cannot in itself raise an issue under the Court's case-law (see *Flinkkilä and Others*, cited above, § 74, and *Pipi*, above-cited decision).

The Court notes, moreover, that the Regional Court imposed an injunction on publication of the photos accompanying the impugned articles and that the applicant company did not challenge that injunction. It therefore considers that the form of the articles in question did not constitute a ground for banning their publication. Furthermore, the Government did not show that publication of the articles had resulted in serious consequences for X.

(vi) Severity of the sanction imposed on the applicant company

109. Regarding, lastly, the severity of the sanctions imposed on the applicant company, the Court considers that, although these were lenient, they were capable of having a chilling effect on the applicant company. In any event, they were not justified in the light of the factors set out above.

(c) Conclusion

110. In conclusion, the grounds advanced by the respondent State, although relevant, are not sufficient to establish that the interference complained of was necessary in a democratic society. Despite the margin of appreciation enjoyed by the Contracting States, the Court considers that there is no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued.

111. Accordingly, there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

112. Article 41 of the Convention provides:

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

A. Damage

113. The applicant company claimed EUR 27,734.28 in respect of pecuniary damage, corresponding to the three penalties that it had had to pay X (EUR 11,000.–; see paragraphs 31 and 46 above), and X's legal costs (EUR 1,261.84; paragraphs 18 and 40 above) and lawyers' fees (EUR 15,472.44) which it had had to reimburse. It referred, on the latter point, to the case of *Verlagsgruppe News GmbH v. Austria (no. 2)*, (no. 10520/02, § 46, 14 December 2006).

114. The Government did not comment in that connection.

115. The Court finds that there is a sufficient causal link between the violation found and the amounts claimed, except those corresponding to the two penalty payments of EUR 5,000.–. Accordingly, it awards EUR 17,734.28 under this head.

B. Costs and expenses

116. The applicant company sought EUR 32,522.80 in respect of costs and expenses. That sum included court costs (EUR 6,610.–) and lawyers' fees for the proceedings before the civil courts (EUR 13,972.50), the Federal Constitutional Court (EUR 5,000.–) and the Court (EUR 5,000.–), plus translation costs for the proceedings before the Court (EUR 1,941.30). The applicant company specified that although it had agreed on a higher amount of fees with its lawyers, it was claiming only the amounts provided for in the statutory fee scales. With regard to the amounts claimed for lodging the appeal with the Federal Constitutional Court and the application before the Court, the applicant company left the matter to the Court's discretion, whilst specifying that it sought at least EUR 5,000.– in respect of each set of proceedings.

117. The Government noted that the applicant company limited its claims for lawyers' fees to the amounts set out in the scales applicable in Germany, which was not open to criticism. They contested the amounts claimed for the proceedings before the Federal Constitutional Court and before the Court, however, for lack of particulars. They indicated that where the Federal Constitutional Court declined to entertain a constitutional appeal, it generally fixed the value of the subject matter of the case at EUR 4,000.–. The corresponding lawyers' fees would in that case amount to EUR 500.– inclusive of tax.

118. The Court finds the sums claimed to be reasonable and, accordingly, awards those sums.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Disjoins,* unanimously, the applications in the case of *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) from the present application;
2. *Declares*, unanimously, the application admissible;
3. *Holds*, by twelve votes to five, that there has been a violation of Article 10 of the Convention;
4. *Holds*, by twelve votes to five,
   (a) that the respondent State is to pay the applicant company, within three months, the following amounts:
      (i) EUR 17,734.28 (seventeen thousand seven hundred and thirty-four euros and twenty-eight centimes), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 32,522.80 (thirty-two thousand five hundred and twenty-two euros and eighty centimes), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses*, unanimously, the remainder of the applicant company's claim in respect of just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 February 2012.

Michael O'Boyle	NicolasBratza
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge López Guerra joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi is annexed to this judgment.

Noot

Willem Korthals Altes
Mr. W.F. Korthals Altes is Seniorrechter, Rechtbank Amsterdam en Visiting Professor, New York Law School.

Vijf dagen na het uitspreken van de eerste zaak van Caroline von Hannover, op 29 juni 2004, (zie *Mediaforum* 2012-5, nr. 14 m.nt. O.G. Trojan), begint een reeks arresten die in ons land vrij onopgemerkt blijft, maar de vraag doet rijzen of het Hof in Straatsburg de privacy niet belangrijker begint te vinden dan de uitingsvrijheid. De zaak (*Chauvy et al./Frankrijk*, EHRM 29 juni 2004, nr. 64915/01) betreft de publicatie door Gérard Chauvy over de volgens hem dubieuze rol die de in Frankrijk beroemde verzetsstrijder Raymond Aubrac (op 11 april van dit jaar op 97-jarige leeftijd overleden) en diens echtgenote zouden hebben gespeeld bij het verraad van een aantal verzetsstrijders in Lyon in 1943. De Franse rechter veroordeelt Chauvy tot betaling van FF 200.000 wegens het onrechtmatige karakter van zijn uitlatingen. Het EHRM is het hiermee – op zichzelf niet ten onrechte – eens. Het overweegt daarbij echter ook dat het echtpaar Aubrac het recht had zijn reputatie te beschermen, '*a right which is protected by Article 8 as part of the right to respect for private life*'.

Zonder enige nadere uitleg krijgt het recht op reputatie hiermee de status van grondrecht, op gelijke hoogte met de uitingsvrijheid, en is het niet meer uitsluitend een – aan die uitingsvrijheid ondergeschikte – afwegingsfactor. Zeker voor ons als Noordwest-Europeanen is dit een verrassende ontwikkeling. In Oost-Europa is de wettelijke bescherming van (persoonlijke of zakelijke reputatie) een meer gebruikelijk verschijnsel.

De zaak-*Chauvy* blijkt geen eendagsvlieg te zijn. In 2006 brengt het EHRM het recht van Anthony White op zijn reputatie onder het recht op bescherming van zijn persoonlijke levenssfeer, als diverse krantenartikelen hem ervan beschuldigen Olof Palme te hebben vermoord en een typische crimineel te zijn (*White/Zweden*, EHRM 29 sep 2006, nr. 42435/02). Niettemin kiest het Hof uiteindelijk voor dezelfde benadering als de Zweedse rechters, die oordelen dat de publicisten weliswaar geen bewijs voor hun beweringen hebben geleverd, maar wel een redelijke grond daarvoor hebben en pogingen hebben gedaan de juistheid daarvan te verifiëren.

Andere voorbeelden zijn *Pfeifer/Oostenrijk* (EHRM 15 nov 2007, nr. 12556/03) en *Petrina/Roemenië* (EHRM 14 okt 2008, nr. 78060/01). Opvallend in deze laatste uitspraak dat de Roemeense rechters uiterst zorgvuldig de belangen van de door artikel 10 EVRM beschermde uitingsvrijheid afwegen. Het EHRM waardeert dit gebruik van de '*margin of appreciation*' echter niet. Het vindt dat de media die Petrina een agent van de beruchte Securitate hebben genoemd, diens door artikel 8 beschermde recht op privacy hebben geschonden. Commentaren, met name uit het voormalige Oostblok, betreuren dat het hof weinig oog toont voor de moeite die het in een land als Roemenië kost informatie over de Securitate boven tafel te krijgen.

In 2009 lijkt het of een kentering optreedt, als het hof in *Karakó/Hongarije* (EHRM 28 april 2009, nr. 39311/05) uitgevers van een in het kiesdistrict van Karakó verspreide brochure beschermt. In de brochure wordt beweerd dat hij vaak tegen de belangen van zijn district heeft gestemd. De Hongaarse rechters beschouwen dit als een waardeoordeel en het EHRM is het daarmee eens, ook al lijkt de zaak nauwelijks te onderscheiden van die waarin de bescherming van de reputatie de overhand krijgt. Het feit dat een andere kamer dan in de eerdere zaken de zaak-Karakó behandelt, zou voor deze witte raaf een verklaring kunnen zijn.

In de *Springer*zaak is het – voor het eerst – de Grote Kamer die de kans krijgt zijn licht over het recht op reputatie te laten schijnen. Kan de krimiacteur, die erover klaagt dat *Bild* – misschien wat sensationeel, maar overeenkomstig de waarheid – van zijn drugsgerelateerde activiteiten verslag doet, zich op dat recht beroepen of niet?

De meest principiële overweging van het EHRM staat in randnummer 83. Daarin stelt het hof vast dat het recht op iemands reputatie door artikel 8 wordt beschermd, maar het moet dan wel enig gewicht hebben: '*an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life*'. Verder mag het verlies aan reputatie niet het gevolg zijn van eigen handelen, zoals het begaan van een strafbaar feit. Kortom, het moet wel iets voorstellen en als je zelf goed de fout bent ingegaan, kun je het schudden.

In grote lijnen past het hof dan dezelfde criteria toe als in de zaak-*Caroline II*: Wat is de bijdrage van de publicatie aan een debat dat de belangstelling van het publiek heeft? Hoe bekend is de persoon en waarover gaat de publicatie? Wat was zijn gedrag in het verleden? Wat zijn de inhoud, vorm en gevolgen van de publicatie? Het hof voegt daaraan twee criteria toe: Hoe is de wijze van informatievergaring en wat is het waarheidsgehalte? (In *Caroline II* gaat het om de omstandigheden waaronder de foto's zijn genomen.) En wat is de zwaarte van de opgelegde sanctie?

Het hof legt opvallend de nadruk op de margin of appreciation. Dat is misschien een vingerwijzing naar *Petrina*, maar wellicht ook naar de kritiek die het de laatste tijd in sommige landen, zoals Engeland, ondervindt. Als bewijs van zijn houding verwijst de Grote Kamer in de toepassing van de hiervoor genoemde criteria meermalen naar de overwegingen van de Duitse gerechten, die overigens sterk verdeeld zijn.

In deze zaak komt het erop neer dat het publiek altijd belangstelling voor strafzaken heeft. Verder wordt de acteur met zijn rol als '*crime fighter*' vereenzelvigd. De media zouden over zijn strafzaak natuurlijk nooit hebben bericht, als hij niet was wie hij was. Maar het hof acht van belang dat hij op het *Oktoberfest* in het openbaar was gearresteerd. Verder heeft X zich in de media meermalen over zijn privé-leven uitgelaten. Een rol speelt ook dat *Bild* van meet af aan duidelijk is geweest over de wijze waarop zij aan haar informatie komt, die de persofficier van justitie ook tegenover andere media bevestigt.

Ten slotte zal de lezer van het arrest een kleine glimlach niet kunnen onderdrukken, als hij ziet dat het hof aan de sanctie tegen Springer Verlag (aanvankelijk een boete van € 5.000.–, in appel tot € 1.000,– verlaagd) een '*chilling effect*' toekent. Springer zal er in ieder geval niet van hebben wakker gelegen. Het lijkt of het EHRM met de twee uitspraken van 7 februari 2012 weer iets meer waardering voor de uitingsvrijheid toont en het belang van de bescherming van de persoonlijke levenssfeer wat terugdringt.