Bundesverfassungsgericht

ECLI:DE:BVerfG:2008:rs20080226.1bvr160207

HEADNOTE:

Decision regarding the scope of the fundamental right to protection of personality rights pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law (Grundgesetz – GG) in respect of photographs of celebrities within the context of entertaining media reports concerning their private and everyday life.

Order of the First Senate of 26 February 2008 – 1 BvR 1602, 1606, 1626/07 –

in the proceedings regarding the constitutional complaints of

1.	E. GmbH & Co. KG

- authorised representative:

Rechtsanwalt Dr. Thomas von Plehwe,
Arndtstraße 4, 76199 Karlsruhe -

against a)	the judgment of the Federal Court of Justice (Bundesgerichtshof) of 6 March 2007 – VI ZR 51/06 –,
b)	the judgment of the Hamburg Regional Court (Landgericht) of 1 July 2005 – 324 O 873/04

– 1 BvR 1602/07 –,

2.	K. GmbH & Cie., represented by its directors

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Rechtsanwalt Dirk Knop,
in Sozietät Rechtsanwälte Werner & Knop,
Ortenberger Straße 47, 77654 Offenburg -

against a)	the judgment of the Federal Court of Justice of 6 March 2007 – VI ZR 51/06 –,
b)	the judgment of the Hamburg Regional Court of 24 June 2005 – 324 O 869/04

– 1 BvR 1606/07 –,

3.	Ms C.

-

Rechtsanwälte Prinz, Neidhardt, Engelschall,
Tesdorpfstraße 16, 20148 Hamburg -

against a)	the judgment of the Federal Court of Justice of 6 March 2007 – VI ZR 51/06 –,

b)	the judgment of the Hanseatic Higher Regional Court (Hanseatisches Oberlandesgericht) of 31 January 2006 – 7 U 88/05

– 1 BvR 1626/07 –.

RULING:

- The constitutional complaints are hereby consolidated.
- The constitutional complaints of the first and third complainants are rejected as unfounded.
- The judgment of the Federal Court of Justice of 6 March 2007 – VI ZR 51/06 –, and the judgment of the Hamburg Regional Court of 24 June 2005 – 324 O 869/04 – infringe the fundamental right of the second complainant pursuant to Article 5.1 sentence 2 of the Basic Law. The judgment of the Federal Court of Justice is overturned. The matter is referred back to the Federal Court of Justice for reconsideration.
- The Federal Republic of Germany shall reimburse the second complainant its necessary costs.

GROUNDS:

The subject of the constitutional complaints is the admissibility of photojournalistic articles on the private and everyday life of celebrities. 1

The original proceedings giving rise to the constitutional complaints concern civil-law actions by the third complainant seeking an injunction to prevent publication of a photojournalistic article. The actions were initiated after the European Court of Human Rights (hereinafter also referred to as "the Court") in a judgment of the Third Section dated 24 June 2004 (Application no. 59320/00, *von Hannover v. Germany* , Reports and Decisions 2004-VI, pp. 1 et seq.; unofficial German translation published in the *Europäische Grundrechte-Zeitschrift* (EuGRZ) 2004, pp. 404 et seq. and the *Österreichische Juristen-Zeitung* (ÖJZ) 2005, pp. 588 et seq.) ruled that the Federal Republic of Germany was in breach of its obligations under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") due to the fact that the German courts in several earlier decisions regarding the admissibility of photojournalistic articles concerning the present third complainant repeatedly failed to offer protection against the dissemination of such photographs. The subject of the individual application submitted by the applicant to the Court was, in particular, a landmark judgment by the Federal Court of Justice (Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofs in Zivilsachen,* hereinafter "BGHZ") 131, 332), against which the third complainant had sought redress at the time by means of a constitutional complaint. The First Senate of the Federal Constitutional Court in its judgment of 15 December 1999 (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* , hereinafter "BVerfGE") 101, 361) had only granted one part of the constitutional complaint, which was not subsequently of importance as regards the decision of the European Court of Human Rights. 2

The complaint proceedings 1 BvR 1602/07 and 1 BvR 1626/07 3

1. The third complainant is one of the daughters of the now deceased Prince Rainier of Monaco and is married to Prince Ernst August von Hannover. The object of the original proceedings was a piece of photojournalism concerning the private and everyday life of the third complainant and her husband unrelated to the exercise of any official duties. 4

a) The first complainant is publisher of the weekly magazine "*Frau im Spiegel* ". In edition no. 9/02 of 20 February 2002, the magazine reported under the headline: "Fürst Rainier – Nicht allein zu Haus" ("Prince Rainier – not alone at home"), that the father of the third complainant and reigning prince of the state of Monaco had taken ill and had not appeared to official engagements for the past several weeks. The article went on to state: 5

"Im Land herrscht große Sorge. Und bei seinen Kindern. Prinz Albert (zur Zeit als Olympia-Teilnehmer in Salt Lake City), Prinzessin Caroline (im St.-Moritz-Urlaub mit Prinz Ernst August von Hannover) und Prinzessin Stephanie wechseln sich in der Betreuung des Vaters ab. Er soll nicht allein sein, wenn es ihm nicht gut geht. Nicht ohne die Liebe seiner Kinder." ("The whole country is fraught with concern. As are his children. Prince Albert (presently in Salt Lake City as a member of the Olympic team), Princess Caroline (on holiday in St. Moritz with Prince Ernst August von Hannover) and Princess Stephanie take turns caring for their father. He is not to be left alone when he is not well. Not without the love of his children.") 6

The article was accompanied *inter alia* by a photograph showing the third complainant together with her husband on a street in the Swiss winter sport resort St. Moritz. 7

Edition no. 9/03 of the same magazine dated 20 February 2003 contained an article entitled: "*St. Moritz - Königliches Schneevergnügen* " ("St. Moritz – Royal Fun in the Snow"), concerning the visit of the third complainant and other well-known members of the European aristocracy to this winter sports resort. The article was accompanied by a picture of the third complainant on one of its streets with her husband. The caption commented that the third complainant was enjoying the "sun and the snow" with her husband. 8

In edition no. 12/04 of 11 March 2004, the magazine reported under the headline: "*Prinzessin Caroline – Ganz Monaco wartet auf sie* " ("Princess Caroline – the whole of Monaco awaits her"), that the third complainant, who had not appeared in public for a long time, was expected to attend the Rose Ball held annually in Monaco. The third complainant had not objected to a photograph depicting her attendance at this social event in previous years. Her action before the non-constitutional courts was directed solely against a further photograph. This showed her together with her husband in a chair lift; the caption under the picture read: "*Gemütliches Plaudern im Sessellift* " ("Chatting cosily in a chair lift"). The accompanying article states that the third complainant was currently spending time with her husband in Zürs, where the photograph had also been taken; it further states that she had travelled to St. Moritz on the occasion of her husband's birthday celebrations. 9

b) The third complainant sought an injunction against the first complainant preventing publication of this piece of photojournalism. 10

aa) The Regional Court prohibited the first complainant from publishing the challenged photographs again. The Regional Court held that in weighing the public's interest in being informed against the arguments impeding publication the balance had tipped in favour of the third complainant. In accordance with the provisions of Article 8.1 of the Convention (which are equal in rank to non-constitutional federal laws) as interpreted by the European Court of Human Rights in its judgment of 24 June 2004, the third complainant could, in principle, claim protection against the publication of photographs in which she was depicted in her private and everyday life merely to satisfy the public's curiosity and their desire for entertainment. According to the Regional Court, the Second Senate of the Federal Constitutional Court in its order of 14 October 2004 (BVerfGE 111, 307) had charged the non-constitutional courts with the task of integrating relevant case-law of the Court into the respective partial legal area of the German legal system developed by differentiated case-law, insofar as interpretation of the relevant legal provisions allowed the scope to do so and there were no objections on constitutional grounds. 11

The Regional Court further argued that by reference thereto, the case-law of the Court concerning the protection of privacy offered by Article 8.1 of the Convention might be considered within the framework of provisions relating to general rights of personality pursuant to Article 2.1 in conjunction with Article 1.1 GG, as well as pursuant to § 23.2 of the Art Copyright Act (*Kunsturhebergesetz –KUG*) and Article 8.1 of the Convention, which are characterised by abstract legal concepts. It was true that the Federal Constitutional Court, in its judgment of 15 December 1999 (BVerfGE 101, 361), had thus far defined the constitutionally guaranteed right to protection of privacy more narrowly than would correspond to the view of the Court. Nevertheless it remained a matter for the non-constitutional courts to determine the limits of personality rights on a case-by-case basis as a part of the private law of torts that was safeguarded by fundamental rights even in cases where the Federal Constitutional Court had expressed an opinion as to the constitutional requirements to be considered. The third complainant could rely on a legitimate interest in the protection of her private life pursuant to § 23.2 of the Art Copyright Act. Freedom of the press and freedom of information as guaranteed by Article 5.1 of the Basic Law and Article 10.1 of the Convention did not outweigh this interest of the third complainant. 12

This was also true if one took into account the fact that the press, in communicating information and thoughts on all questions which are of interest to the public, fulfilled an important function in democratic society and that the dissemination of photographs for this purpose was admissible. Admittedly, the subject of the article on the illness of the third complainant's father and her upcoming attendance at a ball in Monaco had at any rate been, applying the permitted broad interpretation, an event of contemporary history. In addition, it shed light on the relationship between two people who were not wholly insignificant figures of public life by reporting that the third complainant had been on holiday temporarily during her father's illness. Nevertheless the third complainant's legitimate and overriding interest in protecting her privacy pursuant to § 23.2 of the Art Copyright Act precluded publication. For in accordance with the case-law of the European Court of Human Rights, photographs showing celebrities carrying out everyday activities such as crossing the road in itself represented a significant infringement of their personality rights even when if they were not in a secluded place at the time. The article did not have sufficient informational value to justify such an intrusion. The husband of the third complainant held no political office and the only connection the third complainant had to the Head of State of a country of, moreover only minimal international political significance, was her relationship to him being one of his daughters. If her father's illness could nevertheless be regarded as having a sufficient interest to justify disseminating images of the third complainant, this would no longer be in keeping with the effective protection of celebrities from constant harassment by reporters as required by the judgment of the Court. This did not constitute a disproportionate restriction of the first complainant's reporting options. The first complainant was 13

not able to show what interest the challenged article served other than to satisfy the mere curiosity of the reader.

Similarly, it was not evident what information interest sufficient to outweigh the interests of the third complainant had been served by publishing a picture showing the third complainant during her winter holiday. Even if one did regard the third complainant's stay in St. Moritz as an event of contemporary history due to her status as what is known as an absolute figure of contemporary society "*par excellence*" (*absolute Person der Zeitgeschichte*), the third complainant could nonetheless claim an injunction preventing dissemination of those photographs, which showed her during a private holiday with her husband. 14

The Regional Court held that, publication of the photograph in connection with an article on the third complainant's expected attendance at a society ball in Monaco was also inadmissible. The photograph showed the third complainant in a chair lift with her husband. Her intention to attend a socially significant ball might well be considered an event of contemporary history. The image used, however, did not have the required connection to the object reported on in the text of the article but related, instead, to another event. 15

bb) Following the first complainant's appeal on points of facts and law, the Higher Regional Court overturned the decision of the Regional Court and rejected the application submitted by the third complainant. According to the Higher Regional Court, the protection of the private sphere required by Article 8.1 of the Convention yielded to the protection of the fundamental right under Article 5.1 sentence 2 of the Basic Law to the extent specified in the case-law of the Federal Constitutional Court. Pursuant to § 31.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*), the appeal court was bound by the main considerations of the judgment of the First Senate of the Federal Constitutional Court of 15 December 1999 (BVerfGE 101, 361). 16

cc) In its appellate judgment on points of law (BGHZ 171, 275) the Federal Court of Justice, in rejecting the third complainant's appeal, approved the appellate court's rejection of the third complainant's appeal, insofar as it was directed against publication of the photograph in connection with an article on her father's illness. With regard to the two remaining photographs, the Federal Court of Justice overturned the appeal judgment and, by rejecting the first complainant's appeal, reinstated the prohibition ordered by the Regional Court. 17

According to the Federal Court of Justice, when deciding whether or not to categorise a photographic representation as falling within the sphere of contemporary history named in § 23.1 no. 1 of the Art Copyright Act, the interests of the person portrayed, as guaranteed by Article 8.1 of the Convention and Article 2.1 in conjunction with Article 1.1 of the Basic Law must be weighed against the interest of the general public in being informed as guaranteed by Article 10.1 of the Convention and Article 5 of the Basic Law, even when photographic representations of a person such as the third complainant who is well known to the public, which are acquired outside a situation of spatial seclusion, are disseminated. In order to allow the press sufficient room for manoeuvre, to decide in accordance with journalistic criteria within the legal limits what constitutes a matter of public interest, the concept of contemporary history must, in the interests of the public, be defined in such a way that it includes all matters of general interest to society. Entertaining contributions were no exception hereto. Even in these, a formation of opinion takes place. However, the press must, in this case, bear in mind the need to protect the private and family life of the persons concerned. 18

The Federal Court of Justice held that, in the necessary process of weighing interests, particular importance was attached to the informational value of the article. The greater the informational value for the general public, the more the protective rights of the person concerned must yield to the interest in information. Conversely, the need to protect the personality rights of the person concerned weighed more heavily, the lower the informational value for the general public. The interest of the readership in mere entertainment consistently carried less weight than the protection of private and family life, and was not worthy of protection. These principles ought also to be the starting point where the article concerned well-known individuals. Here, too, the question of whether the report contributes to a general debate with a factual content going beyond the mere satisfaction of pure curiosity, should not be left unconsidered. This did not, however, rule out that the public profile of the person concerned might also come to be of importance in determining the informational value. Furthermore, in the interests of the opinion-forming role of the press, it was prudent to take a broad view of what was of informational value. 19

The weighing of interests on the basis of such principles took into account the protection of fundamental rights under Article 5.1 of the Basic Law, as well as the standards which could be inferred from the case-law of the European Court of Human Rights. Contrary to the view taken by the court of appeal, even the binding effect of the judgment of the First Senate of the Federal Constitutional Court of 15 December 1999 (BVerfGE 101, 361) pursuant to § 31.1 of the Federal Constitutional Court Act was no impediment thereto. The Federal Constitutional Court might have approved the fact that the Federal Court of Justice in its judgment of 19 December 1995 (BGHZ 131, 332) had restricted protection of privacy from unwanted photography to failure to respect a recognisable spatial seclusion. This did not, however, preclude giving greater consideration to the lack of informational value to the general public when weighing competing interests as necessary, than did the judgment of the Federal Court of Justice at the time. 20

The Federal Court of Justice further held that in assessing the informational value of a visual portrayal, the content 21

of the accompanying text might not be left out of account. By reference thereto, no sufficient informational value could be discerned insofar as the first complainant had also illustrated its report on the presence of a number of prominent personalities in St. Moritz using a photograph showing the third complainant on a winter holiday together with her husband. Even in the case of famous personalities a holiday fell squarely within the core area of private life, which was protected. In weighing freedom of the press against rights of personality as required, even the requirements of § 23.1 no. 1 of the Art Copyright Act were not met. The third complainant need not tolerate the intrusion into her private life and the consequent infringement of her general personality rights inherent to the publication of the images. The issue of whether there had been a possible violation of a legitimate interest pursuant to § 23.2 of the Art Copyright Act no longer arose.

The weighing of interests in respect of the other image which portrayed her together with her husband in a chair lift in ski clothing during a holiday, also favoured the third complainant. The accompanying text of the article concerning the forthcoming ball might indeed have concerned an event of general interest and therefore of contemporary history. However, this did not apply to the part of the article which the photographic representation in question had served to illustrate. This was related exclusively to the information contained in the article to the effect that the third complainant, while staying in Zürs at the time, had travelled from there to St. Moritz on the occasion of the her husband's birthday celebrations. This part of the article related exclusively to the private life of the married couple and served solely to entertain. 22

The core area of private life which, in principle, was also protected in the case of prominent persons might have been affected by the fact that the first complainant had added a picture of the third complainant, depicting her with her husband on a street in St. Moritz, to a further report concerning an illness of the third complainant's father. However, the relevance to a debate of general public interest lay in the fact that the text of the article dealt with the behaviour of family members during the illness of the then reigning Prince of Monaco. This event of contemporary history was proven and illustrated using the challenged images in an admissible manner. The quality of the editorial contribution was not relevant to the weighing of interests. No inherent effect of injury was discernible in the photographic representation of the third complainant. Similarly, it was not evident that the photograph had been taken secretly or by using special technical media. 23

2. a) In the constitutional complaint proceedings 1 BvR 1602/07, the first complainant criticises the decisions of the Regional Court and the Federal Court of Justice as having infringed its right of freedom of the press as guaranteed by Article 5.1 sentence 2 of the Basic Law, insofar as they prohibited it from disseminating photographic representations of the third complainant. The complainant argues that the Federal Court of Justice has only recognised pro forma that articles with an entertaining focus concerning the private and daily life of prominent persons are covered by the protection of freedom of the press, but has in fact negated their admissibility. It is not evident by what means, in circumstances such as the present case, the press' interest in information can ever overcome the interests of a person depicted. This fails to recognise the press' need to capture public attention by means of personalised portrayals just as it does the role-model function of prominent figures and examples of lifestyles which people reject which was emphasised in the Federal Constitutional Court judgment of 15 December 1999 (BVerfGE 101, 361). Moreover, the Federal Court of Justice has failed to recognise the fact that pursuant to § 31.1 of the Federal Constitutional Court Act it is bound by the fundamental considerations of the judgment of the First Senate of 15 December 1999 (BVerfGE 101, 361). The Federal Constitutional Court held that there was no sphere of privacy worthy of protection where the individual is in a public place and amongst many people. Only if the private sphere of the person depicted has indeed been intruded upon, can the criterion for determining this, which the Federal Court of Justice highlighted as the informational value of the report, be of any relevance at all. 24

b) In the constitutional complaint proceedings 1 BvR 1626/07, the third complainant criticises an infringement of her rights of personality as guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law, insofar as the Higher Regional Court and the Federal Court of Justice have held that use of a holiday photograph to illustrate the report on her father's illness was admissible. 25

To the extent specified in the order dated 14 October 2004 (BVerfGE 111, 307 (323 et seq.)) of the Second Senate of the Federal Constitutional Court, the other national courts, in applying the law, are required to take into account the interpretation of the protection of private life guaranteed by Article 8.1 of the Convention as developed in the relevant case-law of the European Court of Human Rights. The complainant argues that the Court, in its judgment of 24 June 2004, has highlighted the informational value of the article as a criterion for weighing interests. If the Federal Court of Justice regarded the dissemination of photographs of the third complainant in her private and everyday life to be admissible even in the context of a report on an illness of her father's, this would strip this decisive criterion for weighing interests of its limiting function. The article in no way dealt with possible consequences of her father's illness with regard to the exercise of his political functions as Head of State. It is not at all reprehensible for the third complainant to take it in turns with her siblings to care for her father over a period of several months and thereby take advantage of the opportunity to go on holiday. The protection of the private life of the third complainant, in particular 26

against continual harassment and persecution by photojournalists as required by the case-law of the European Court of Human Rights cannot be guaranteed by the minimal standards set by the case-law of the Federal Court of Justice in relation to the informational value. The complainant further argues that moreover one can see even from the information conveyed by the photographic representation approved by the Federal Court of Justice, that the third complainant believed herself to be unobserved at the time the photograph was taken and that the photograph was therefore taken by means of secret observation perhaps by means of a telephoto-lens.

The complaint proceedings 1 BvR 1606/07 27

1. The second complainant is publisher of the weekly journal "*7 Tage* ". In edition no. 13/02 of 20 March 2002 it reported under the headline: *"In Prinzessin Carolines Bett schlafen – kein unerfüllbarer Wunsch! – Caroline und Ernst August vermieten ihre Traum-Villa"* ("Sleeping in Princess Caroline's Bed – A Dream that Could Come True! – Caroline and Ernst August let out their Dream Villa"), that the husband of the third complainant owned a holiday villa in Kenya, which was let out to interested parties when the couple were absent. The headline contains the clearly highlighted sub-title: "Auch die Reichen und Schönen sind sparsam. Viele vermieten ihre Villen an zahlende Gäste." ("Even the rich and beautiful live economically. Many let their villas out to paying guests.") 28

The text of the article listed by name several private individuals in addition to the third complainant, Hollywood stars and members of the aristocracy who had "developed a propensity for thinking economically" and also let out their palaces or houses when they were not using them themselves. Interested parties could rent the holiday villa at a rent of 1,000 dollars a day. The article mentioned further details of the way the holiday villa was furnished and the terms under which it was let out; in this context it was also mentioned that the services of the staff were included in the rent. 29

In addition to several photographs of the holiday villa and its surroundings under the headline: "*In Urlaubslaune – Caroline mit ihrem Ehemann"* ("In holiday spirits – Caroline with her husband"), a photograph was added showing the third complainant on one of the streets next to her husband during a holiday visit. 30

2. In its judgment of 24 June 2005 the Regional Court prohibited any further publication of this photograph. The remaining deliberations of the Regional Court correspond from their starting point to the decision of the court of 1 July 2005 concerning the constitutional complaints 1 BvR 1602/07 and 1 BvR 1626/07 already referred to above. With regard to the photograph challenged here, the Regional Court held: The fact that the husband of the third complainant acted as letter of holiday accommodation might be considered an event of contemporary history. However, in weighing the protection of private life against freedom of the press and information, the question as to whether the publication of the photograph contributed to a public debate on questions of general interest was also significant in accordance with the case-law of the European Court of Human Rights. By reference thereto, it was not particularly significant that the husband of the third complainant rented out accommodation on his property in Kenya to wealthy holidaymakers. The third complainant was merely closely related to the prince of a state of only minor political importance and her husband, too, exercised no official functions. The second complainant had not been able to explain what informational purpose, apart from satisfying purely voyeuristic tendencies on the part of its readers, was being satisfied by the publication of a photographic representation whose informational content consisted exclusively of portraying prominent individuals carrying out private activities. 31

3. On an appeal on points of fact and law brought by the second complainant, the Higher Regional Court overturned the decision of the Regional Court in a judgment of 31 January 2006 (7 U 82/05, published in *Archiv für Presserecht – AfP* 2006, pp. 180 et seq.) and rejected the action brought by the third complainant. The reasons given correspond to the aforementioned considerations referred to in the appeal judgment of the same court in the complaint proceedings 1 BvR 1626/07 challenged by the third complainant. 32

4. In its judgment of 6 March 2007 (VI ZR 52/06, published in *Europäische Grundrechte-Zeitschrift* 2007, pp. 503 et seq.), the Federal Court of Justice quashed the appeal judgment and upheld the prohibition issued at first instance by rejecting the second complainant's appeal. In its legal arguments the Federal Court of Justice proceeded from the aforementioned considerations in the judgment on points of law of the same date challenged in the complaint proceedings 1 BvR 1602/07 and 1 BvR 1626/07 (VI ZR 51/06). A weighing of interests based on these principles would, in the case of a dispute, result in the interest in information pursued by the second complainant having to yield to the third complainant's interest in protection of her general personality rights. The text of the article on the apartment and its letting did not, even if generous standards were applied, constitute an event of general public interest in accordance with the jurisprudence of the European Court of Human Rights, nor was its subject matter an event of contemporary history. In the challenged photographic representation, neither a contribution to a debate of general public interest nor any information concerning an event of contemporary history could be discerned. 33

5. The second complainant criticises the decision of the Regional Court and its confirmation by the judgment on appeal on a point of law given by the Federal Court of Justice as an infringement of its right to freedom of press reporting guaranteed by Article 5.1, sentence 2 of the Basic Law. The complainant argues that in accordance with the case-law of the Federal Constitutional Court the illustration of a press report intended as entertainment using images 34

of the third complainant falls squarely within the protective scope of the fundamental right derived from Article 5.1, sentence 2 of the Basic Law. According to the complainant, it is the duty of the press alone to decide, by reference to journalistic criteria, what it considers to be worthy of general public interest. The courts are barred, in principle, from replacing the press' own assessment by a judgment as to the informational value of an article based on consideration of competing interests. The formation of opinion guaranteed by Article 5.1 of the Basic Law is to be interpreted broadly and may not be reduced to the sphere of political life. For even reporting on prominent persons of public life outside the political sphere contributes to the formation of opinion and permits the readers to adjust their personal attitude to life against that of such role models. The Federal Court of Justice ought not to measure the value of a piece of photojournalism by reference to the content of the accompanying text of the article. For it is not compatible with the freedom to make journalistic decisions guaranteed to the press by Article 5.1 sentence 2 of the Basic Law, to determine whether it is admissible to publish images of persons by reference to whether, in the opinion of the court, the accompanying text of the article showed sufficient informational value. If the press has affirmed the informational value through publication, the courts ought to take this as a basis too.

The complainant further argues that intrusion is not justified by the need to protect the general rights of personality of the third complainant. In accordance with the case-law of the constitutional court, protection of spatial privacy outside of the home is restricted to the conditions of spatial seclusion, which are doubtless missing in the depicted appearance of the third complainant. It represents a violation of Article 5.1 sentence 2 of the Basic Law, if the challenged decisions have nonetheless interpreted the protective scope of this fundamental right by reference to the narrower scope attached to the freedom of information guaranteed by Article 10.1 of the Convention in the case-law of the European Court of Human Rights. As a mere federal law, the European Convention on Human Rights in its interpretation by the Court ought to remain within the framework which is delineated pursuant to Article 1.3 of the Basic Law by the fundamental rights of the Basic Law as exclusive standard for decisions for national courts. 35

The first and third complainants responded to the constitutional complaint submitted by their respective opponent in the original proceedings. 36

1. The third complainant objected to the constitutional complaints of the first and second complainants on the basis of the considerations in the constitutional complaint submitted by herself. 37

2. The first complainant objected to the complaint of the third complainant. According to the first complainant, the core area of private life which enjoys absolute protection under constitutional law was not already affected by the fact that the person concerned appeared on a photograph taken during a holiday, insofar as the person was at the time in public and not in a place of spatial seclusion. The standard to be derived from Article 8.1 of the Convention was not that the third complainant may already claim a justified expectation that her private sphere be respected where she is shown during a skiing holiday but in public places. In the case of prominent persons without any official duties or profession such as the third complainant, it would not be possible on a regular basis to determine in a manner offering the required certainty that are called for in the interests of freedom of the press, which part of their private life falls within the area regarded by the Federal Court of Justice as being particularly worthy of protection. 38

The constitutional complaints of the first and third complainants are unsuccessful. The order requiring the first complainant to desist from any further dissemination of the challenged photographic representations does not, to the extent that it was maintained by the Federal Court of Justice, violate the fundamental right of freedom of the press under Article 5.1 sentence 2 of the Basic Law. It is no violation of the fundamental right of the third complainant to protection of her rights of personality pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law if the Federal Constitutional Court and the Higher Regional Court did not object to the dissemination of an image of the third complainant. 39

On the other hand, the order made in the complaint proceedings 1 BvR 1606/07, requiring the second complainant to refrain from publishing the piece of photojournalism violates the fundamental right of freedom of the press. The judgment of the Federal Court of Justice shall be overturned. 40

The orders made against the first and second complainants in the complaint proceedings 1 BvR 1602/07 and 1 BvR 1606/07 intrude upon the protective scope of the fundamental right to freedom of the press pursuant to Article 5.1 sentence 2 of the Basic Law, by virtue of the fact that the publication of photographs has been prohibited by a court. 41

At the core of the fundamental-rights guarantee of freedom of the press lies the right to freely determine the manner and focus, as well as contents and form of the organ of publication. This includes the decision as to whether and how a media product is to be illustrated. Pictorial statements are covered by the constitutional-law protection of the report which they serve to illustrate (see Federal Constitutional Court (BVerfG), Order of the First Chamber of the First Senate of 14 February 2005 – 1 BvR 240/04 –, *Neue Juristische Wochenschrift* (NJW) 2005, p. 3271 (3272)). The protection of freedom of the press thereby also includes the photographic representations of persons (see BVerfGE 101, 361 (389); BVerfG, Order of the First Chamber of the First Senate of 26 April 2001 – 1 BvR 758/97 et al. –, *Neue Juristische Wochenschrift* 2001, p. 1921 (1923)). Protection does not depend on the singularity or quality of the product 42

of the press or the text (see BVerfGE 34, 269 (283); 50, 234 (240)). The press has the right to decide according to its own journalistic criteria, what it does or does not consider worthy of public interest (see BVerfGE 97, 228 (257); 101, 361 (389)). Irrespective of what standards are applied, the protection of freedom of the press may not be made dependent on a valuation of the printed product (see BVerfGE 66, 116 (134)). Even entertaining contributions concerning prominent persons, for instance, are covered by the protection of freedom of the press (see BVerfGE 101, 361 (390)). It is only where the courts are called upon to weigh competing rights of personality that the informational value and the manner in which the article shows a relevance to questions which truly concern the public becomes important (see BVerfGE 34, 269 (283); 101, 361 (391)).

The decisions of the civil courts challenged in the complaint proceedings 1 BvR 1626/07, restrict the fundamental right of the third complainant to protection of general rights of personality pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law, insofar as the third complainant was not granted the injunction against publication of certain photographic representations sought for. 43

1. The aim of this fundamental right is to maintain the fundamental basis of social relations between the owner of the fundamental rights and his or her environment (see BVerfGE 54, 148 (153); 97, 391 (405); 114, 339 (346)). The protection of freedom of conduct and privacy safeguards elements of free development of the personality which are not the subject of expressly guaranteed freedoms in the Basic Law, but are just as important in terms of their significance for the narrowest personal sphere of life of the individual and the maintenance of its basic conditions (see BVerfGE 99, 185 (193); 118, 168 (183); BVerfG, Order of the First Senate of 13 June 2007 – 1 BvR 1783/05 –, *Neue Juristische Wochenschrift* 2008, p. 39 (41)). A concrete interest in legal protection is associated with the various aspects of protection of personality rights depending upon the type of danger to the personality. Of determining importance are the circumstances surrounding the event concerned and the expected consequences thereof which will have an impact on fundamental rights, particularly on the development of the personality and the private life of the person concerned (see BVerfGE 101, 361 (380); 106, 28 (39); 118, 168 (183 f.)). 44

2. Judicial decisions regarding the authorisation to publish photographs of the subject in private or everyday contexts can touch on different aspects of the need to protect personality rights, in particular the safeguarding of the right to one's own image and the guarantee of privacy (see BVerfGE 101, 361 (380 et seq.)). 45

a) Article 2.1 in conjunction with Article 1.1 of the Basic Law does not, however, grant a comprehensive right to control the portrayal of one's own person (see BVerfGE 101, 361 (380)). The right to one's own image does, however, grant the individual a means of exerting influence and taking decisions as far as the creation and use of pictorial recordings of his person by others is concerned. The need for protection arises above all as a result of the possibility that the image of a person in a particular context may be removed from that context and reproduced by third parties at any time under circumstances which the person concerned cannot control (see BVerfGE 101, 361 (381)). The easier it is to do this, the greater can be the need for protection. Thus, advancements in the field of recording equipment are associated with growing opportunities to endanger rights of personality (see BVerfGE 101, 361 (381)). The increasing availability of small and portable cameras, such as digital cameras built in to mobile telephones, for instance, exposes prominent persons in particular to the increased risk of being photographed in practically any situation without warning and without their knowledge, and the resulting image being published in the media. A particular need for protection can further arise in the case of a secret or surprise approach (see BVerfGE 101, 361 (394 f.)). In assessing the need for protection, the situation in which the person concerned is portrayed is also significant, for instance in the context of his usual everyday life or in situations where he is relaxing after work and the activities of the day, during which he is entitled to assume that he is not exposed to the view of photographers. 46

b) In addition to the right to one's image, the fundamental right to protection of personality rights also comprises protection of private life (on this, see BVerfGE 101, 361 (382)). There are several aspects to this protection. Thematically it affects in particular those matters which the holder of the fundamental right would tend to withhold from public mention or display. Spatially, private life includes an individual's area of retreat, which ensures that he may centre himself and relax, in particular in the domestic sphere but also outside the home (see BVerfGE 101, 361 (382 et seq.)) and which helps to realise the need "to be left alone" (see BVerfGE 27, 1 (pp. 6 and 7); see further (on Article 13 of the Basic Law) BVerfGE 32, 54 (75); 51, 97 (107)). The boundaries of the protected private sphere cannot be generally or abstractly determined (see BVerfGE 101, 361 (384)). 47

A further-reaching level of protection can arise out of the increased need to protect personality rights as required by Articles 6.1 and 6.2 of the Basic Law in situations where parents are together with their minor children in a public space (see BVerfGE 101, 361 (385); Order of the First Senate of 13 June 2007 – 1 BvR 1783/05 –, *Neue Juristische Wochenschrift* 2008, p. 39 (41)). 48

The fundamental rights of freedom of the press and protection of the personality are not guaranteed without reservation. Freedom of the press is bounded by general laws pursuant to Article 5.2 of the Basic Law. The latter include *inter alia* §§ 22 et seq. of the Art Copyright Act, but also Article 8 of the Convention (1). At the same time, the 49

provisions contained in the Art Copyright Act, as well as the freedom of expression guaranteed by Article 10 of the Convention, restrict the protection of the personality as part of the constitutional order pursuant to Article 2.1 of the Basic Law (2). The interpretation and application of such limiting provisions and their weighing association to one other by the non-constitutional courts must take into account the significance in terms of determining the fundamental-rights position affected by the limiting provision, and must have regard to the relevant guarantees contained in the European Convention on Human Rights. The Federal Constitutional Court restricts itself to a review of whether the influence of German fundamental rights, even taking into account the guarantees given by the European Convention on Human Rights, on the interpretation of civil-law norms and on the weighing of competing interests has been sufficiently taken into account. This cannot be answered in the negative merely because a different outcome would have been possible (3).

1. Pursuant to Article 5.2 of the Basic Law, freedom of the press finds its limits in the provisions of general law. This is to be understood as meaning all laws that are not directed against civil rights and liberties guaranteed by Article 5.1 sentence 1 of the Basic Law themselves, but which serve to protect a quintessential legal interest, irrespective of any particular opinion. This legal interest must be protected in the legal system generally and is thus independently of whether it may be violated by expressions of opinion or in any other manner (see BVerfGE 117, 244 (260)). 50

a) The provisions of §§ 22 et seq. of the Art Copyright Act and the legal principles of civil-law protection of personality rights enshrined in § 823.1 of the Civil Code are general laws in this sense (see BVerfGE 7, 198 (211); 25, 256 (263 et seq.); 34, 269 (282); 35, 202 (224-225)). They also set limits on the freedom of the press insofar as the protection of personality rights they guarantee within the context of legislative latitude is further-reaching than the constitutional minimum. 51

b) Another general law, as defined in Article 5.2 of the Basic Law, which places limits on freedom of communication, is the right to respect for private life enshrined in Article 8 of the Convention. In national law, the European Convention on Human Rights has the status of non-constitutional federal law (see BVerfGE 74, 358 (370); 82, 106 (114); 111, 307 (316, 317)). The guarantees of the Convention and the case-law of the European Court of Human Rights further serve as aids in interpreting the content and scope of fundamental rights at the level of constitutional law, insofar as this does not result in a limitation of or derogation from the protection offered by any human rights or fundamental freedoms under the Basic Law – which is not desired by the Convention itself (see Article 53 of the Convention) – (see BVerfGE 111, 307 (317, 329)). 52

In conformity with the constitutionally guaranteed protection of personality rights, the protection granted by Article 8.1 of the Convention in respect of the private life of the individual also covers the sum of all personal, social and financial relationships which make up the private life of each individual (see BVerfG, Order of the Second Chamber of the Second Senate of 10 May 2007 – 2 BvR 304/07 –, *Europäische Grundrechte-Zeitschrift* 2007, p. 467 (470)). In determining the scope of such protection, the extent to which, in the given situation, the individual's expectations of privacy are justified, must be considered (see BVerfG, Order of the First Chamber of the First Senate of 21 August 2006 – 1 BvR 2606/04et al. –, *Neue Juristische Wochenschrift* 2006, p. 3406 (3408)). The guarantee enshrined in Article 8.1 of the Convention can also include a right to protection from publication of images of individuals taken in their everyday life through the national courts (see European Court of Human Rights (ECHR), – Third Section –, Judgment of 24 June 2006, Application no. 59320/00, *von Hannover v. Germany* , §§ 50 et seq., *Neue Juristische Wochenschrift* 2004, p. 2647 (2648)). In the present case a decision will be taken, having regard to the guaranteed right of freedom of expression pursuant to Article 10 of the Convention and its limitations as governed by Article 10.2 of the Convention, by way of a weighing of interests (see ECHR, – Fourth Section –,Decision of 14 June 2005, Application no. 14991/02, *Minelli v. Switzerland* ; ECHR, – Second Section –, Judgment of 17 October 2006, Application no. 71678/01, *Gourguenidze v. Georgia* , §§ 38 et seq.). 53

2. The constitutionally safeguarded fundamental right to protection of personality rights, as derived from Article 2.1 in conjunction with Article 1.1 of the Basic Law, is subject to the limiting provisions of Article 2.1, half-sentence 2 of the Basic Law. 54

a) In addition to fundamental rights such as Article 5.1 of the Basic Law, the constitutional order is limited, in particular, by the provisions regarding publication of photographic representations of persons contained in § 22 et seq. of the Art Copyright Act (see BVerfGE 101, 361 (387)). In the form of the requirement for consent provided for in § 22 sentence 1 of the Art Copyright Act for the dissemination of pictures of persons, of the exceptions, particularly with regard to pictures portraying an aspect of contemporary history named in § 23.1, no. 1 of the of the Art Copyright Act and of the exception to the exception governed by § 23.2 of the Art Copyright Act for cases where legitimate interests of the person portrayed apply, these contain a graded protective concept that has regard both to the need for protection of the person portrayed and to the general public's interest in information (see BVerfGE 35, 202 (224 f.); 101, 361 (387)). 55

b) In addition to these provisions, the rights of freedom of expression and dissemination, as well as freedom to receive opinions including information as guaranteed by Article 10 of the Convention, restrict the protection granted 56

to personality rights.

The activity of the press falls within the freedom of expression ("*liberté d´expression* ") guaranteed by Article 10.1 sentence 1 of the Convention, as well as within the freedom of transmission and receipt of information and opinions ("*liberté de communiquer et recevoir des informations et idées* ") guaranteed by Article 10.1 sentence 2 of the Convention. The protection offered by Article 10.1 of the Convention covers, in particular, the publication of photographs to illustrate a media report (see ECHR, – First Section –, Judgment of 14 December 2006, Application no. 10520/02, *Verlagsgruppe News GmbH v. Austria (No. 2)* , § 29; ECHR, – Third Section –, Judgment of 24 June 2004, Application no. 59320/00, *von Hannover v. Germany* , § 59, *Europäische Grundrechte-Zeitschrift* 2004, 404 (412); ECHR, – Second Section –, Judgment of 17 October 2006, Application no. 71678/01, *Gourguenidze v. Georgia* , § 55). In accordance with the case-law of the Court, the question of whether restrictions against this right by measures ordered by national courts to protect the private life of the person depicted are admissible shall also be decided by weighing these against the right guaranteed by Article 8 of the Convention to respect for private life (see ECHR, – Second Section –, Judgment of 17 October 2006, Application no. 71678/01, *Gourguenidze v. Georgia* , § 37 with further references). 57

In weighing competing legal interests bearing in mind the assumption enshrined in Article 5.1 of the Basic Law in favour of the admissibility of press reports which are intended to contribute to the formation of public opinion (see BVerfGE 20, 162 (177)), particular importance is to be attached to the right of freedom of expression enshrined in Article 10.1 of the Convention wherever the press report makes a contribution to "information and ideas on all matters of public interest", (see ECHR, – Fourth Section –, Judgment of 16 November 2004, Application no. 3678/00, *Karhuvaara and Iltalehti v. Finland* , § 40; ECHR – First Section –, Judgment of 1 March 2007, Application no. 510/04, *Tønsbergs Blad and Others v. Norway* , § 82). 58

c) aa) The scope of protection of the right to one's own image contained in §§ 22 et seq. of the Art Copyright Act and strengthened by the fundamental rights laid down in Article 2.1 in conjunction with Article 1.1 of the Basic Law, is influenced by whether some information is conveyed to the wide audience reached by the mass media and does not thus does not remain restricted to a narrow circle of people (see BVerfG, Order of the First Chamber of the First Senate of 24 January 2006 – 1 BvR 2602/05 –, *Neue Juristische Wochenschrift* 2006, p. 1865; see also ECHR, – Second Section –, Judgment of 17 October 2006, Application no. 71678/01, *Gourguenidze v. Georgia* , § 55). On the other hand, the weight to be attached to freedom of the press, which might restrict rights of personality, depends upon by whether the report concerns a matter which significantly affects the public (see BVerfGE 7, 198 (212); established case-law). 59

Insofar as the media concern themselves with prominent persons in their reports, the mere revelation of discrepancies between public self-portrayal and private conduct of life is not of general public interest, according to the case-law of the Federal Constitutional Court. Prominent persons can also offer orientation in shaping one's own lifestyle, as well as fulfilling the function of role model or showing what one does not wish to imitate (see BVerfGE 101, 361 (390)). The circle of legitimate general public interest would be prescribed too narrowly if one were to restrict this to behaviour that is scandalous, or morally or legally questionable. Even the normality of everyday life, as well as conduct of celebrities that is in no way objectionable, may be brought to the attention of the public if this serves to form public opinion on questions of general interest (see BVerfGE 101, 361 (390)). 60

The entertainment value of the contents or its presentation is frequently an important requirement if public attention is to be won and thereby a contribution possibly made to the formation of public opinion. To deny an article its role as contributor to the formation of public opinion merely because of its entertaining presentation, might also violate the content of the fundamental-rights guarantee of Article 10 of the Convention (see ECHR, – Fourth Section –, Judgment of 13 December 2005, Application no. 66298/01 *and another* , *Wirtschafts-Trend-Zeitschriften-Verlagsgesellschaft mbH v. Austria* , §§ 49-50). 61

Even "mere entertainment", cannot per se be denied all relevance in the formation of opinions. Entertainment is an essential part of media activity which enjoys the protection of the right of freedom of the press in its subjective and objective legal aspects (see BVerfGE 35, 202 (222); 101, 361 (390)). The journalistic and economic success of the press which is in competition with other available media and sources of entertainment can be dependent upon having an entertaining content and corresponding photographic representations. In recent times the significance of visual portrayals for press reporting has in fact increased (see BVerfGE 101, 361 (392)). 62

It would be a narrow view to assume that the public's interest in entertainment is always focussed exclusively on satisfaction of a desire for amusement and relaxation, on fleeing from reality and on distraction. Entertainment can also convey images of reality and propose subjects for debate that spark off a process of discussion relating to philosophies of life, values and habitual behaviour, and thus fulfils an important social function. For this reason, entertainment in the press is not insignificant, let alone without value, when measured against the protective aim of freedom of the press (see BVerfGE 101, 361 (390)). 63

The protective sphere of freedom of the press also includes entertaining reports concerning the private and everyday life of celebrities and the social circles in which they move, particularly concerning persons who are close to them. To limit reporting on the lifestyle of this circle of persons in principle only to reports concerning their exercise of official functions would mean restricting freedom of the press to an extent that is incompatible with Article 5.1 of the Basic Law. 64

bb) However, particularly where the content is entertaining, a weighing consideration of the competing legal positions is required. In weighting the interest in information relative to the competing protection of personality rights, the subject matter of the report is of determining importance, the question, for instance, of whether private matters are being spread abroad, merely to satisfy curiosity (see BVerfGE 34, 269 (283); 101, 361 (391)). In the case of photojournalism, the reasons for, as well as the circumstances in which the image was obtained, are of importance. 65

cc) It does not automatically follow from the recognition of the importance of press reporting for the formation of public opinion and individual opinions that the particular protection of the image as part of rights of personality must always yield, i.e. that any and all illustration of media production is constitutionally guaranteed. 66

(1) While the weighing of interests must have regard to the right of the press, encompassed by the protection of Article 5.1 sentence 2 of the Basic Law, to decide, in accordance with its journalistic criteria, what constitutes public interest (see BVerfGE 101, 361 (392)). This right of self-determination of the press does not, however, also encompass deciding what weight is to be attached to the interest in information while weighing this against competing legal rights and deciding how to reconcile the legal interests concerned (see BVerfG, Order of the First Chamber of the First Senate of 26 April 2001 – 1 BvR 758/97 et al. –, *Neue Juristische Wochenschrift* 2001, p. 1921 (1922)). When deciding to print a picture of a person and to set it within the context of a particular report, the mass media use their right (which is in principle protected) to decide themselves what they consider worthy of reporting. In so doing, they are to have regard to protection of personality rights of the person concerned. In the event of a dispute, however, it is for the courts to carry out the determining valuation of the [public's] interest in information for the purposes of weighing it against the conflicting interests of the persons concerned. In the German fundamental-rights system, the restriction of a fundamental right of self-determination for the purpose of assessing diverging interests that are worthy of protection in cases of conflict also comes up in other situations (see for instance on Article 8 of the Basic Law: BVerfGE 104, 92 (111-112)). While weighting the [public's] interest in information, however, the courts are to refrain from evaluating the contents of the reporting concerned as valuable or without value, as serious and earnest or dubious, and are to restrict themselves to examining and determining to what extent the report might contribute to the process of forming public opinion. 67

Insofar as there is no significant message for the formation of public opinion inherent in the picture itself, its informational value is to be deduced in the context of the accompanying text of the article (see BGHZ 158, 218 (223); Federal Court of Justice (BGH), Judgment of 19 October 2004 – VI ZR 292/03 –, *Neue Juristische Wochenschrift* 2005, p. 594 (595-596)). Thus pictures can complement a textual report and thereby serve to expand on its message, perhaps confirming the authenticity of the report. A further purpose related to the information aspect which would be protected by Article 5.1 of the Basic Law might also consist in drawing the attention of the reader to text of the article by adding images of the persons involved in the event being reported on. If the use of pictures which were taken outside the reported event is admissible, this can help to prevent the harassing effects for the celebrities concerned which would arise if the article could only be illustrated by means of images obtained in the context of the event being reported on (see BVerfG, Order of the First Chamber of the First Senate of 26 April 2001 – 1 BvR 758/97 et al.–, *Neue Juristische Wochenschrift* 2001, p. 1921 (1924)). However, if the accompanying article is restricted solely to creating some motif for a photographic representation of a prominent person, the report does not show any contribution to the formation of public opinion. In such cases there is no constitutional reason to grant the interest in publication priority over protection of personality rights. 68

(2) In order to determine the weight to be attached to the need to protection personality rights, the situation in which the person concerned is photographed and how he or she is portrayed is also of importance, as are the circumstances under which the photograph was taken, for instance by taking advantage of secrecy or continuous harassment. The degree of detriment to the rights of personality associated with the photographic representation increases where the visual portrayal in its theme touches on private life by disseminating details of the private life [of the person concerned] which are usually excluded from public discussion. The same shall be true if the person concerned, under the circumstances under which the photograph was taken, would typically be reasonably entitled to expect that he or she will not be depicted in the media, perhaps because he or she is in a situation characterised by geographical privacy, above all in an especially protected area (see BVerfGE 101, 361 (384)). The need to protect the general rights of personality can, however, acquire a greater weight even without the requirements of spatial seclusion, where, for instance, media reporting captures the person concerned during moments where he or she is in a state of relaxation and "letting go" outside the sphere of obligations imposed by professional or everyday life. 69

Thus the allocation of the evidentiary burden in civil procedure and the burdens of proof also acquire importance 70

(see Karlsruhe Higher Regional Court, Order of 27 November 1981 – 10 W 72/81 –, *Neue Juristische Wochenschrift* 1982, p. 647 (648); Hamburg Higher Regional Court, Judgment of 20 June 2006 – 7 U 9/06 –, *Gewerblicher Rechtsschutz und Urheberrecht/Rechtsprechungs-Report* (GRUR-RR) 2006, p. 421 (422)). It must be ensured that the presentation and proof of the interests which are constitutionally significant for weighing the interests is not rendered unreasonably difficult either for the press or the person depicted. If the press wishes to publish a picture of the person concerned without his or her consent, it is, in principle, reasonable to expect that the circumstances in which the photograph was taken (see on this point Hamburg Higher Regional Court, Judgment of 20 June 2006 – 7 U 9/06 –, *Gewerblicher Rechtsschutz und Urheberrecht/* Rechtsprechungs-Report 2006, p. 421 (422)), are substantiated and presented in a form which can be reviewed by the courts, to determine whether justified expectations of the person concerned to be protected against photographic representations for the purposes of media reporting oppose the dissemination of the picture.

dd) It is the task of the non-constitutional courts to examine the informational value of reports and their illustrations in individual cases on the basis of their relevance to the formation of public opinion and to weigh freedom of the press against the detriment to the protection of personality rights associated with obtaining and disseminating the photographs. In such decisions requiring the weighing of interests the courts have a margin of assessment. In conformity with this, an independent margin of appreciation is recognised in the case-law of the Court in favour of national courts, even in respect of the prescriptions of the European Convention on Human Rights which are relevant in interpreting German fundamental rights (see ECHR, – Grand Chamber –, Judgment of 4 December 2007, Application no. 44362/04, *Dickson v. The United Kingdom* , §§ 77 et seq.). 71

The courts are called upon to take account of the fact that the guarantee of freedom of the press serves not merely the subjective rights of the press, but serves equally to protect the processes of public opinion-forming and thus the citizens' freedom to form opinions (see BVerfGE 20, 162 (174 et seq.); 66, 116 (134); 77, 346 (354)). Commentary in or via the press generally seeks to contribute to the formation of public opinion and therefore the initial presumption is that it is admissible even where it touches the sphere of other peoples' rights (see BVerfGE 20, 162 (177)). Even according to the case-law of the European Court of Human Rights, there is very little room for allowing the guarantee given by Article 10.1 of the Convention to yield if a media report shows a relevance to a factual debate of general public interest (see ECHR, – Grand Chamber –, Judgment of 22 October 2007, Application no. 21279/02 et al., *Lindon and Others v. France* , § 45; ECHR, – Grand Chamber –, Judgment of 17 December 2004, Application no. 49017/99, *Pedersen and Baadsgaard v. Denmark* , §§ 68-69). 72

The fundamental right contained in Article 5.1 of the Basic Law does not, however, demand one to assume generally that any and every visual portrayal taken from the private and daily life of prominent persons is associated with a contribution to the formation of opinion, and is in itself sufficient to justify its precedence over protection of rights of personality. To date, the Federal Constitutional Court has not recognised that the press may seek unlimited access to photographs of contemporary public figures (*Personen der Zeitgeschichte*), but has only seen publications of photographs as justified insofar as the general public would otherwise be deprived of opportunities to form opinions, for example, on questions of whether persons who are regarded as idols or role models can convincingly keep their official and private conduct in conformity (see BVerfGE 101, 361 (393)). What is not guaranteed constitutionally is that a figure of contemporary history (*Person von zeitgeschichtlichem Interesse*) may be photographed at any time without restriction for the purposes of medial use in all situations save when he or she is in a spatially secluded area. 73

3. It is primarily the task of the civil courts to have regard to the fundamental provisions of the Basic Law taking into account the prescriptions of the European Convention on Human Rights in interpreting and applying the civil-law provisions on the weighing of different interests that are protected by law. In order to do so, the courts shall ascertain the diverging interests concerned and the extent to which they have suffered detriment. The opposing positions are to be placed in relation to one another in view of the concrete circumstances of the individual event, so that they are each duly taken into account (see BVerfGE 97, 391 (401); 99, 185 (196)). 74

The role of the Federal Constitutional Court is limited to examining retrospectively whether the other national courts, in interpreting and applying the provisions of non-constitutional statutory law, particularly when weighing conflicting legal rights, have sufficiently regarded the influence of fundamental rights (see BVerfGE 101, 361 (388)). The review by the Constitutional Court of whether the non-constitutional courts have complied with their duty to integrate the decisions of the European Court of Human Rights into the respective partial legal area of the national legal system is restricted to a similar extent. 75

The fact that the weighing of legal positions in complex conflicting cases, particularly in multipolar ones, could result in a different conclusion is not a sufficient reason for a correction of a decision of the non-constitutional courts by the Federal Constitutional Court (see Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* –BVerfGK) 7, 217 (219); BVerfG, Order of the First Chamber of the First Senate of 14 February 2005 – 1 BvR 1783/02 –, *Neue Juristische Wochenschrift* 2005, p. 1857 (1858); Order of the First Chamber of the First Senate of 24 January 2006 – 1 BvR 2602/05 –, *Neue Juristische Wochenschrift* 2006, p. 1865). It would, 76

however, be a breach of the constitution leading to the challenged decision being questioned if the protective scope of a relevant fundamental right was wrongly or incompletely determined, its weight not measured accurately and thus erroneously included in the weighing, or when the weighing contradicts other standards of constitutional law, in particular also constitutionally relevant standards in the European Convention on Human Rights.

The judgment of the Federal Court of Justice (VI ZR 51/06) which was challenged in the proceedings 1 BvR 1602/07 and 1 BvR 1626/07 fulfils the fundamental-rights requirements. The question whether the decision of the Regional Court challenged by the first complainant in the complaint proceedings 1 BvR 1602/07 and the appeal judgment challenged by the third complainant in the complaint proceedings 1 BvR 1626/07 had in all respects taken into account the constitutional legal requirements, does not fall to be decided. On the other hand, the decision of the Regional Court challenged by the second complainant in the complaint proceedings 1 BvR 1606/07 and the judgment issued on appeal on points of law in respect thereof by the Federal Court of Justice (VI ZR 52/06) do not meet the standards of constitutional law. 77

1. From a constitutional-law perspective, the fact that the Federal Court of Justice should proceed to a legal evaluation of the requirements of §§ 22 et seq. of the Art Copyright Act on the basis of a concept of protection developed by it for this purpose is beyond reproach. Whereby there is nothing, in principle, to prevent it from deviating from its previous case-law and modifying the concept of protection. 78

The adjustment undertaken by the Federal Court of Justice in the challenged decisions in respect of the concept of protection previously applied and in respect of the standards of reference inherent thereto does not disregard the provisions of the Basic Law. Just as the Federal Constitutional Court in its landmark judgment of 15 December 1999 (BVerfGE 101, 361) merely examined whether the concept of protection applied at the time kept within the boundaries of constitutional law, the court, with regard to the amended concept of protection, is limited to examining the violation of constitutional prescriptions from the Federal Court of Justice. The fact that the criteria applied by the Federal Court of Justice were not questioned by the Federal Constitutional Court at the time meant only that they satisfied constitutional standards; this does not mean, however, that a modified concept of protection could not also satisfy the constitutional requirements. 79

a) In particular, there was nothing in constitutional law to prevent the Federal Court of Justice dispensing with the use of the legal concept of the “contemporary public figure” previously applied by the court by reference to legal writings. It could, instead, seek a solution to the case purely in the context of a weighting and weighing of interests and could examine the issue of whether a visual portrayal was to be categorised as belonging to the category of contemporary history factually required by § 23.1 no. 1 of the Art Copyright Act and therefore, in the absence of conflicting legitimate interests of the person depicted (§ 23.2 of the Art Copyright Act), may be disseminated even without the consent which is required in principle pursuant to § 22 of the Art Copyright Act. 80

It is no contradiction to the previous case-law of the Federal Constitutional Court to dispense with the figure of the absolute or relative figure of contemporary history. The Federal Constitutional Court did not, however, question the use of such legal concept for the purposes of weighting the informational value for the public of photographic representations of prominent persons, which is important for the weighing; the court did add, however, that these concepts under non-constitutional law were merely to be understood as short form descriptions of persons whose image the public considered worthy of regard by virtue of the depicted person. The Federal Constitutional Court described the use of such legal concepts as constitutional only when the accompanying weighing of informational value to the general public against the legitimate interests of the person concerned in the case concerned was not omitted as a result (see BVerfGE 101, 361 (392); BVerfG, Order of the First Chamber of the First Senate of 26 April 2001 – 1 BvR 758/97 et al. –, *Neue Juristische Wochenschrift* 2001, p. 1921 (1923-1924)). 81

As the concept of the figure of contemporary history (*Person der Zeitgeschichte*) is not constitutionally prescribed, the non-constitutional courts are free under constitutional law not to use the term at all in future or to use it only in limited circumstances, and to decide instead by considering in each individual case whether the image concerned is part of the “sphere of contemporary history” (§ 23.1, no. 1 of the Art Copyright Act). There is, however, also nothing to stop them using other auxiliary concepts that are based on the definition of typical facts or creating case groups in weighing freedom of communication and protection of personality rights; indeed it can serve the purpose of legal certainty to do so. In developing appropriate types to be incorporated into the context of the German legal system, the classifications on which the European Court of Human Rights bases this could also become significant (on this point see in greater detail IV 2 d aa). The uncertainty about the outcome frequently associated with weighing interests in multipolar disputes can as a general rule only be overcome at the risk of a generalisation which would run counter to the aim of taking into account situation-related factors. Thus one cannot, as a rule, dispense with additional considerations in individual cases. 82

b) By reference thereto, the general standards applied in the challenged decisions of the Federal Court of Justice are constitutionally unobjectionable. 83

The object of the present constitutional dispute is – just as it was in the proceedings leading to the landmark judgment of 15 December 1999 (BVerfGE 101, 361) – not the admissibility of the text of the article. Insofar, – i.e. also in respect of the reports on the publicly recognisable private life of the persons depicted – the press is being subjected to no restrictions through the challenged decisions. In the present case, a decision is merely required on the question of the extent to which such articles may be illustrated using photographs showing the private life of celebrities. 84

aa) The Federal Court of Justice attempts the categorisation of images into the "sphere of contemporary history" factually required by § 23.1, no. 1 of the Art Copyright Act in a manner which is in principle constitutionally unobjectionable by weighing the public's interest in information against the legitimate interests of the person depicted. In so doing it must be ensured that the rights of information guaranteed by Article 5.1 of the Basic Law are comprehensively included at that stage within the element "images from the sphere of contemporary history" (§ 23.1, no. 1 of the Art Copyright Act) (see BVerfGE 101, 361 (391); BVerfG, Order of the First Chamber of the First Senate of 26 April 2001 – 1 BvR 758/97 et al. –, *Neue Juristische Wochenschrift* 2001, p. 1921 (1922)). The other relevant element which is open to the influence of fundamental rights is that of the "legitimate interest" which in § 23.2 of the Art Copyright Act relates from the outset only to figures of contemporary history and consequently cannot sufficiently include the interests of freedom of the press if these were previously ignored when delimiting the circle of persons affected (see BVerfGE 101, 361 (391-392)). 85

bb) In the challenged decisions, the Federal Constitutional Court regarded the contribution to a debate of general public interest or the portrayal of events of general public interest as a possible basis for informational value. In so doing it demonstrated in the constitutionally required manner that the interest in protecting personality rights may be outweighed by an interest in information not only in spectacular and unusual events, but also in the portrayal of topical circumstances and situations in life, and that the portrayal of the private and everyday life of prominent persons outside the realm of state and political functions need not be excluded therefrom, insofar as it is of general public interest. 86

cc) Similarly, in basing its evaluation under non-constitutional law essentially on the question of whether the "core area of private life", which is protected as a general rule even in the case of prominent persons, suffers detriment through visual portrayals, the Federal Court of Justice is not going against constitutional prescriptions. The concept of the "core area of private life" signifies an interest of the person concerned which is particular worthy of protection according to the case-law of the civil courts. This regularly takes precedence over an interest in being informed which serves essentially only to entertain and to satisfy curiosity (see BGHZ 131, 332 (338); Federal Court of Justice, Judgment of 9 December 2003 – VI ZR 373/02 –, *Versicherungsrecht – VersR* 2004, p. 522 (523); Judgment of 9 December 2003 – VI ZR 404/02 –, *Versicherungsrecht* 2004, p. 525 (526)). 87

The concept of the "core area of private life" *("Kernbereich der Privatsphäre"*) is not identical to the concept of the core area guaranteed by fundamental rights ("*grundrechtlich gewährleisteter Kernbereich "*) of the constitutionally guaranteed protection of personality rights as used in the case-law of the Federal Constitutional Court. This formulation is intended to express the idea that the constitutional protection of personality rights (see BVerfGE 109, 279 (311-312); 113, 348 (390-391), Judgment of the First Senate of 27 February 2008 – 1 BvR 370/07, 1 BvR 595/07 –, JURIS [legal database], marginal nos. 252 et seq.) is narrower than that assured by non-constitutional law. Ultimately, the Federal Court of Justice takes this into account by avoiding founding the protection of the element which it has called the "core area" of the concept of rights of personality under non-constitutional law solely on the right to protection which arises out of Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law. 88

2. In accordance with the standards delineated, the constitutional complaints of the first and third complainants in the proceedings 1 BvR 1602/07 and 1 BvR 1626/07 are held to be unfounded. The Federal Court of Justice has classified the respective affected interests in the decision challenged by both parties to the original dispute (VI ZR 51/06) in a manner that is constitutionally unobjectionable and in so doing has considered the relevant prescriptions in the case-law of the European Court of Human Rights. 89

a) The first complainant's fundamental right under Article 5.1 of the Basic Law is not violated if the Federal Court of Justice in its judgment of 6 March 2007 (VI ZR 51/06) in accordance with the constitutionally plausible standards it used, found the dissemination of the photograph of the third complainant in the 9/03 edition of the magazine "*Frau im Spiegel "* in connection with a report on her winter holiday to be inadmissible. 90

The Federal Court of Justice took into account the fact that the third complainant had been portrayed during an appearance in public and outside an area of spatial seclusion. It did, however, consider it of determining importance that it was exclusively a report about patterns of behaviour on holiday, which in accordance with its jurisprudence falls within the "core area of private life". The Federal Court of Justice could rightly regard it as significant that the third complainant was exposed to the photojournalism by the media just as she was enjoying a holiday visit dedicated to her need to relax. The Federal Court of Justice, in a manner which is beyond reproach under constitutional law, denied that the report showed an interest in information to the public going beyond the satisfaction of curiosity about the private 91

affairs of the third complainant.

The public's interest in information, contrary to the comment of the first complainant in the proceedings before the non-constitutional courts, was not sufficiently shown, not even by putting forward that the fashionably extravagant design of the third complainant's winter sports clothing was directed at the readers' interest in fashion choices. This circumstance is not even mentioned in the text of the accompanying article. 92

b) Similarly, for the same reasons, the fact that the Federal Court of Justice assumed that the need to protect the personality rights outweighed, even with respect to the publication of the photograph in the first complainant's article in edition no. 12/04 of the magazine "*Frau im Spiegel* ", which reports on the fact that the third complainant had travelled to St. Moritz with her husband from their skiing holiday in Zürs on the occasion of his birthday, cannot be criticised under constitutional law. The Federal Court of Justice refers to constitutionally significant arguments for the overriding importance of the need to protect the personality rights of the third complainant, when it argues that the complainant was depicted in the context of a holiday sojourn dedicated to her need to relax – namely during a winter sport holiday in a chair lift. An overriding interest in information on the part of the general public going beyond the satisfaction of mere curiosity about the private affairs of the third complainant cannot be discerned in the text of the article on this photograph, which draws attention solely to the private reason for making the trip to St. Moritz. Thus no connection is shown between the photograph and the subsequent mention of the third complainant's attendance at the "Rose Ball" (which the Federal Court of Justice describes as being possibly an event of contemporary history) and such a connection is therefore not relevant either for the question of whether publication of the photographic representation of the third complainant was to be allowed. 93

c) Nor does the decision underlying the complaint proceedings 1 BvR 1626/07, namely the decision of the Federal Court of Justice (VI ZR 51/06) which did not question a piece of photojournalism in edition no. 9/02 of the magazine "*Frau im Spiegel*" , fail to recognise the significance of the third complainant's fundamental right to protection of personality rights as guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law. Against the background of the text of the accompanying article concerning the fact that the father of the third complainant (at the time the reigning Prince of Monaco) had been taken ill, the Federal Court of Justice found the inclusion of a photograph of the third complainant in the article, showing her during a shared holiday on one of the streets with her husband, to be justified. 94

In arguing that the illness of the reigning Prince of Monaco constitutes an event of general public interest and that the press should also be allowed, in connection with such an event, to report on the way his children including the third complainant were managing to reconcile their duties towards solidarity within the family with their legitimate interest in safeguarding the needs of their own private lives including the desire to go on holiday, the Federal Court of Justice has not failed to acknowledge the constitutional standards required of the weight of the informational value of a piece of journalism justifying publication of a photograph. The Federal Court of Justice found that the piece of journalism concerning the illness of the Prince and the reaction of the closest members of his family thereto constituted an event of general public interest, which in its opinion showed a sufficient connection to the published photographic representation. This is constitutionally unobjectionable. 95

The Federal Court of Justice had regard to the fact that the right to protection of general rights of personality under constitutional law may take precedence where the photograph was taken under circumstances of particular inconvenience, for instance secretly or under continual harassment by photographic reporters. However, the first complainant had made representations as to the circumstances in which the photograph was taken. The third complainant did not criticise these representations as being insufficient either before the courts of first instance or during appeal proceedings. In particular, she did not assert that the photograph which she was contesting had been taken under circumstances which had been burdensome to her. 96

d) The criticism of the third complainant to the effect that the Federal Court of Justice in the decision to which it came in conclusion had disregarded, or not sufficiently regarded the case-law of the European Court of Human Rights, is erroneous. Such a criticism can be raised, on the basis of relevant German fundamental law, in constitutional proceedings (see BVerfGE 111, 307 (323 et seq., 329 - 330)). In the proceedings in hand, however, it is unfounded. 97

The Federal Court of Justice took into account the judgment of the European Court of Human Rights of 24 June 2004, as well as a further decision of the Court of 16 November 2004 (Application no. 53678/00, *Karhuvaara and Iltalehti v. Finland* , see the (unofficial) translation of this judgment in *Neue Juristische Wochenschrift* 2006, pp. 591 et seq.). Relying on this case-law, the court saw a scope for a differentiation in judging the photographic representations. It is not evident that the Federal Court of Justice thereby breached its obligation to observe the standards of the European Convention on Human Rights. 98

aa) The European Court of Human Rights, essentially in concordance with the protection of the press enshrined in Article 5.1 of the Basic Law, also sees it as a requirement that a decision concerning the admissibility of the publication of images of persons for the purposes of press reports must be taken by means of weighing the interests in 99

protection of the private sphere against freedom of expression. The Court considers the determining element to be the contribution which the photographic representation and the other information offered makes to the general public's formation of opinion (see ECHR, – Second Section –, Judgment of 17 October 2006, Application no. 71678/01, *Gourguenidze v. Georgia* , § 59). The Court uses the distinction between politicians (*"personnes politiques"*) and other persons who are part of public life or the focus of public attention (*"public figures/personnes publiques"*) and the ordinary private individual *("ordinary person/personne ordinaire"*) as a means for lending concrete shape to the weighing. It emphasises that reporting on ordinary citizens is subject to greater restrictions than in respect to the circle of other public figures, with the protection of the politician being the least strong. In accordance with the jurisprudence of the Court, the third complainant would not be classified as belonging to the group of politicians, but certainly to the group of persons who are the focus of public attention. The Court accordingly in later decisions listed the judgment of 24 June 2004 regarding the protection of the image of the third complainant, as an example of a decision concerning public figures (*Personen des öffentlichen Lebens*) (see ECHR – Second Section –, Judgment of 17 October 2006, Application no. 71678/01, *Gourguenidze v. Georgia* , § 57; ECHR, – Fourth Section –, Judgment of 11 January 2005, Application no. 50774/99, *Sciacca v. Italy* , §§ 27 et seq.).

bb) According to the jurisprudence of the Court, classification within this group of persons makes it possible to publish photographs of the person concerned even if they are taken from the context of public everyday life, if there is a public interest in the report. According to the jurisprudence of the Court, a contribution of general interest guaranteed by Article 10 of the Convention can consist in allowing public control of even the private behaviour of influential people for instance from the economic, cultural or media sector (see ECHR, – First Section –, Judgment of 1 March 2007, Application no. 510/04, *Tønsbergs Blad and Others v. Norway* , §§ 87-89; ECHR, – First Section –, Judgment of 14 December 2006, Application no. 10520/02, *Verlagsgruppe News GmbH v. Austria* , § 35 et seq.; ECHR, – Fourth Section –, Order of 14 June 2005, Application no. 14991/02, *Minelli v. Switzerland*). If the national courts apply a too restrictive standard to the question of whether media reporting on the private life of a person who is not part of state and political life allows one to discern the treatment of questions of general public interest, this has been criticised by the Court (see ECHR, – First Section –, Judgment of 1 March 2007, Application no. 510/04, *Tønsbergs Blad and Others v. Norway* , § 87). In accordance with this case-law, it is sufficient if the report deals with political or other significant questions at least to a certain extent (see ECHR, – Fourth Section –, Judgment of 16 November 2004, Application no. 53678/00, *Karhuvaara and Iltalehti v. Finland* , § 45). 100

cc) The Federal Court of Justice, in specifically evaluating the informational content of the present relevant article, reached the conclusion that it dealt with relevant factual topics that affect a democratic society. The European Court of Human Rights in its judgment of 24 June 2004 did not categorically exclude the possibility that a report which contributes to the treatment of important factual issues are of interest to the general public may also be illustrated using pictures taken from the everyday life of persons who are part of public or political life. In this decision, the Court having regard to the publications which were adjudged by it, arrived at the conclusion that even such informational value itself was lacking (see ECHR, – Third Section –, Judgment of 24 June 2004, Application no. 59320/00, *von Hannover v. Germany* , § 64). It is constitutionally unobjectionable that the Federal Court of Justice exercised its duty to evaluate and assess in the specific case taking consideration of the case-law of the Court and found that the present case showed sufficient informational value. 101

3. On the other hand, the fundamental right of freedom of the press under Article 5.1 sentence 2 of the Basic Law is violated by the decisions of the Regional Court and of the Federal Court of Justice challenged by the complainant. 102

a) The subject of the proceedings was a photographic representation of the plaintiff in the original proceedings, the third complainant, and her husband in the context of a report concerning the letting of a villa located in Kenya. One cannot criticise from a constitutional-law perspective the fact that the Federal Court of Justice has denied that the accompanying photograph of the person depicted in informal clothing in a public space had an informational value in and of itself. Nonetheless, it is not sufficiently clear from the considerations of the Federal Court of Justice and the judgment of the Regional Court which it confirmed, why the subject of the textual report having regard to Article 5.1 sentence 2 of the Basic Law did not justify the inclusion of such a visual portrayal. The Federal Court of Justice limits restricts itself to ascertaining that the wording of the article concerning the apartment and its letting was not, even if generous standards are applied, an event of general public interest – here the decision of the European Court of Human Rights of 24 June 2004 is cited – and did not concern an event of contemporary history, and even the Regional Court in denying a general interest in the object of the article written, relied solely on the fact that the husband of the third complainant exercises no official functions and that the third complainant was merely closely related to the prince of a state which is moreover of only minimal importance in global political terms. 103

Thus the challenged decisions failed to evaluate the article more closely as regards its informational content. In the relevant article in this case it was not a description of a scene on holiday as part of private life. Instead, it was reported that third complainant and her husband let out a villa on an island in Kenya which they only used on occasion for holiday purposes to third parties. This fact was commented on with value-laden commentary that could stimulate 104

critical thoughts on the part of the reader. The resulting thrust of the article is summed up in the words that were in bold print and particularly highlighted by centring them in the middle of the article: “Even the rich and beautiful live economically. Many let their villas out to paying guests.” In the text of the article, a number of private individuals, Hollywood stars and members of the aristocracy – were listed by name as having developed “a propensity for thinking economically” and having also let out their castles or houses when they were not using them themselves. As regards the villa which forms the centrepiece of the article it was pointed out in respect to the amount of rent at “a stiff price” of $1,000 dollars a day, that the “[services of the] staff are included in the price”. Furthermore, detailed information was given on the style of the apartment and the furnishings, thereby awakening an interest in the associated interest in the life choices underlying the furnishing.

If, in the guise of an entertaining report, the readers are thus given information concerning changing patterns of behaviour within a small group of well-to-do prominent individuals, who in other contexts are the focus of public attention through their own efforts and consequently act as role models or as persons who one does not want to imitate for a large section of the population, then in a democratic society, this may well be occasion for a factual debate of interest to the general public and also to generally justify portraying the prominent lessors of the property who are the subject of the article pictorially. 105

b) The sweeping statement by the Federal Court of Justice to the effect that holidays per se are always classified as belonging as a general rule to the protected core area of private life of prominent individuals such as the third complainant, does not readily show an overriding need to protect personality rights. The second complainant used a small-format photograph for the illustration which, according to its caption, shows the third complainant and her husband “in a holiday mood” and portrays them at a location which is not identifiable to the readers in leisure clothing and amongst other people. With regard to the admissibility of its inclusion in the magazine, it is of no importance in the present context whether the photograph was taken during the couple’s stay in the villa in Kenya or on another occasion. Concrete clues as to the leisure and holiday habits of the third complainant cannot be extracted from the photograph when seen in conjunction with the text of the article. The situation portrayed, of being together with other people, does not show either that the third complainant was depicted in the course of an activity which is particularly typical of the need to relax and consequently requiring a greater degree of protection from media attention and portrayal. Such an increased requirement for protection does not relate to the holiday in itself, but must be consciously derived and lent concrete shape from the circumstances of the situation portrayed. This conscious concretisation has been taken from the non-constitutional courts even as regards the scope for evaluation and weighing when assessing the weight of competing interests in the circumstances of the case; in the interests of concrete protection of fundamental rights, they have to make it clear by manifesting the grounds which were decisive in reaching the conclusion to which they came, that the relevant circumstances in this respect have been incorporated in the assessment. The reflections of the Federal Court of Justice do not do credit to this, any more than those of the Regional Court did. 106

c) The prohibition confirmed by the Federal Court of Justice disallowing the dissemination of these photographs therefore needs to be examined anew in the light of the constitutional aspects set out above. It cannot be ruled out that an examination of the photographic representation by reference to these standards and including the accompanying text of the article might lead to a different result. 107

The judgment of the Federal Court of Justice is thus to be overturned and the matter referred back to that court for a renewed decision. 108

The decision on costs is based on § 34a.2 of the Federal Constitutional Court Act. 109

Judges:	Papier,	Hohmann-Dennhardt,	Hoffmann-Riem,	Bryde,	Gaier,	Eichberger,	Schluckebier,	Kirchhof