***Nikowitz and Verlagsgruppe News GmbH v. Austria* (ECtHR) | Columbia Global Freedom of Expression**

**Case Analysis #5**

9.03 PM – 11.13pm

***Analysis:***

* **Summary and Outcome**:

The European Court of Human Rights (ECtHR) held, unanimously, that the applicants’ right under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had been violated due to the excessiveness of the conviction and penalty for defamation imposed on them by the Austrian judiciary for authoring and publishing a satirical article about the national hype surrounding a celebrated Austrian skier who had sustained an injury in a road-traffic accident. The ECtHR held that the Austrian judiciary’s interference with the applicants’ right to freedom of expression was not necessary, even if it pursued the legitimate aim of protecting the reputation or rights of a rival sportsman, as the justifications offered by it for the interference were not “relevant or sufficient” and the statement about him was within the limits of satirical commentary acceptable in a democratic society. Further, the Court recognized the intent of the satirical article to be the endeavour to contribute to an issue of general interest, namely that of the attitude of a society to sports stars. Pertinently, the ECtHR also held that the foremost assessment of the interference hinged not on whether the judiciary had displayed moderation in penalizing the applicants but on whether there were justifications for any penalty at all.

The European Court of Human Rights (ECtHR) unanimously held that a defamation conviction and penalty for authoring and publishing a satirical article about the injury of a celebrated Austrian skier excessively infringed the applicants’ right to freedom of expression. Following defamation proceedings by another Austrian skiing champion, the Austrian judiciary held that the article was not discernibly satirical nor fictious to the average reader and as such, had caused the defendant reputational damage. The ECtHR held that the Austrian judiciary’s interference with the applicants’ right to freedom of expression was unnecessary, not “relevant or sufficient” and the statement in question was within the limits of satirical commentary acceptable in a democratic society. Crucially, when considering the statement as a whole, the Court recognized the pertinent characteristics of a satirical article and its important ability to contribute to an issue of general interest, namely that of the attitude of a society to sports stars. Further, the ECtHR held that their main assessment of the interference also had to consider not on whether the judiciary had displayed moderation in penalizing the applicants, but on whether there were justifications for any penalty at all.

* **Facts**:

The two applicants in this case were Rainer Nikowitz, an Austrian national and a journalist, and Verlagsgruppe News GmbH, a Limited Liability Company (LLC) based in Austria which owns and publishes a weekly magazine titled “Profil”. In the issue of Profil published on September 3, 2001, in the section reporting on society matters, Verlagsgruppe News GmbH had published a two-page article by Nikowitz. The article pertained to the media and public reaction to the accident in which Hermann Maier, the Austrian ski-racing champion, had injured his leg. The article was titled “*Ouch*” with the sub-heading “*Hermann Maier. Austria is limping. Rainer Nikowitz too is suffering from acute phantom pains as a result of the national broken leg*” [para 5] and was accompanied by a portrait of Maier captioned “*Hero Hermann’s leg is causing millions of Austrians pain*” [para 5]. The article, intended to be an ironic commentary, cited statements from Austrian and German newspapers, Maier’s webpage, as well as made mention of another Austrian ski-racing champion, Stefan Eberharter. The excerpt mentioning Eberharter was styled as a comment made by him on Maier’s accident, and read as, “*Even Maier’s dear friend Stefan Eberharter had to say something, and he presumably decided against it at the last moment: ‘Great, now I’ll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too*’” [para 6].

It was out of this excerpt that a private prosecution for defamation was initiated by Eberharter against Nikowitz. Eberharter also brought a claim for compensation under the Media Act against Verlagsgruppe News GmbH. He had initiated legal action after his request to Verlagsgruppe News GmbH to publish his comment had been unsuccessful. To justify his legal claim, Eberharter asserted that the excerpt authored by Nikowitz and published by Verlagsgruppe News GmbH pertaining to him threatened a “*significant loss of value in his standing as a communication medium*” [para 7] as it attached reproachable competitiveness and disdainful conduct towards colleagues to his image. As, much like all top athletes, public-relations activities for sponsors contributed substantially to his income, any such adverse communication about him would detrimentally impact his image and his attractiveness as a communication medium.

On December 6, 2001, the Vienna Regional Criminal Court convicted Nikowitz on the charge of defamation under S. 111 of the Criminal Code. He was sentenced to a fine, ordered to pay the costs of the proceedings, as well as suspended for a probationary period of three years. Verlagsgruppe News GmbH was held jointly and severally liable alongside Nikowitz for the fine and the costs of the proceedings, and was also ordered to pay compensation to Eberharter under S. 6 of the Media Act. The Court reasoned that the assessment of whether the excerpt damaged Eberharter’s reputation hinged on the manner in which it would be perceived by an average reader. It noted that while a majority of Profil’s readers could be expected to ascertain the satirical nature of the article and of the excerpt in particular, the same could not be said for readers who read the article perfunctorily and without concentrating on its nuances. The Court substantiated its observation by emphasizing that the excerpt, which conveyed “*jealousy, rudeness and schadenfreude*” [para 9] as being Eberharter’s characteristics, was positioned towards the beginning of the article and did not recur elsewhere in it. The remainder of it was largely devoted to informing the readers about the coverage of the accident across other media. The Court also noted that to a reader who had missed the markers of humor in the article, the statement would not seem exaggerated or far-fetched due to Eberharter’s reputation as the “*eternal bridesmaid*” [para 9] vis-à-vis Maier.

The applicants appealed against the decision of the Vienna Regional Criminal Court. They argued, firstly, that the Court ought not to have applied the standard of a “*hasty and unfocused reader*” [para 10] in assessing how the excerpt would be perceived. Secondly, they asserted that Eberharter’s personal interests were outweighed by their right to freedom of artistic expression. The applicants contended that the article was a satirical take on an issue of public interest and that the excerpt mentioning Eberharter was meant to be a humorous and exaggerated representation of the reactions of all of Maier’s competitors given his unrivalled prowess at skiing. The applicants further added that given that Verlagsgruppe News GmbH published articles by Nikowitz often, readers were well-acquainted with the humorous and satirical style of his writing.

On June 26, 2002, the applicants’ appeal was dismissed by the Vienna Court of Appeal, which concluded that Eberharter’s personal interests outweighed the applicants’ right to freedom of artistic expression. The Court noted that the article was very demanding [para 11], and affirmed the Regional Court’s assessment of the manner in which Eberharter could be perceived by the readers who were unable to ascertain its satirical nature. Further, as per the Court, that the statement purported to be made by Eberharter was purely fictitious and a humorous representation of the sentiments of all of Maier’s competitors was not discernable for such readers. The Court also emphasized on the assumption likely to be made by any reader that even satire or humorous exaggeration was undergirded by some real background. According to the Court, the article communicated to the readers a negative image of Eberharter, as an egocentric athlete who wished his competitors harm as opposed to one who could be expected to win fairly.

On February 3, 2003, the applicants lodged an application with the ECtHR against the Republic of Austria (the defendant), alleging a breach of their right to freedom of expression under Article 10 of the Convention.

The two applicants were Rainer Nikowitz, an Austrian national and a journalist, and Verlagsgruppe News GmbH, an Austrian-based company that owns and publishes a weekly magazine titled “Profil”. In its September 3 2001 issue, Profil published a two-page article by Nikowitz regarding the media coverage and public reaction to a recent accident in which Hermann Maier, the Austrian ski-racing champion, had injured his leg. The article was titled “Ouch” with the sub-heading “Hermann Maier. Austria is limping. Rainer Nikowitz too is suffering from acute phantom pains as a result of the national broken leg” and was accompanied by a portrait of Maier captioned “Hero Hermann’s leg is causing millions of Austrians pain” [para 5]. Intended as an ironic commentary, the article cited statements from Austrian and German newspapers, Maier’s webpage, and created fictitious quotes that it attributed to Austrian ski-racing champion, Stefan Eberharter. Eberharter’s fake commentary read: “Even Maier’s dear friend Stefan Eberharter had to say something, and he presumably decided against it at the last moment: ‘Great, now I’ll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too’” [para 6].

Following the article’s publication, Eberharter requested that Profil publish his comment to combat any “negative image” and public relations issues that may have resulted from Nikowitz’s satirical commentary, which he submitted “suggested disdainful behavior towards a colleague” [para 7]. Following their refusal, Eberharter initiated a private prosecution for defamation against Nikowitz and brought a compensation claim under the Media Act against Verlagsgruppe News GmbH. Eberharter asserted that sponsor companies contributed substantially to his income, and the article’s adverse publicity (suggesting he was problematically competitive and disdainful) thus threatened a “significant loss of value in his standing as a communication medium” [para 7].

On December 6 2001, the Vienna Regional Criminal Court convicted Nikowitz of defamation under section 111 of the Criminal Code. He was sentenced to a fine, ordered to pay the costs of the proceedings, and was suspended for a probationary period of three years. Verlagsgruppe News GmbH was held jointly and severally liable for the fine and costs of the proceedings, and was ordered to pay compensation to Eberharter under section 6 of the Media Act. When assessing whether Eberharter had suffered reputational damage, the Court reasoned that it should assess Nikowitz’s article in the samemanner in which an average reader would understand it.  It noted that while a majority of Profil’s readers could be expected to ascertain the satirical nature of the article (particularly Eberharter’s excerpt), the same could not be said for readers who read the article perfunctorily and without concentrating on its nuances. The Court emphasizing that the relevant passage, which conveyed “jealousy, rudeness and schadenfreude” [para 9] as Eberharter’s characteristics, was positioned towards the beginning of the article and did not recur elsewhere in it. The remainder of it was largely devoted to informing the readers about the coverage of the accident across other media. The Court also noted that, to a reader who had missed the markers of humor in the article, the statement would not seem exaggerated or far-fetched due to Eberharter’s reputation as the “eternal bridesmaid” [para 9] to renowned champion Maier.

The applicants took this decision to the Vienna Court of Appeal. They argued, firstly, that the Court ought not to have applied the standard of a “hasty and unfocused reader” [para 10] in assessing how the excerpt would be perceived. Secondly, they asserted that their right to freedom of artistic expression clearly outweighed Eberahrter’s personal interests, given the exaggerated and satirical nature of the article pertaining to a subject of public interest. Further, the applicants added that Profil often published articles by Nikowitz, and as such, readers were well acquainted with the humorous and satirical style of his columns.

The Court dismissed their appeal on June 26 2002, by concluding that Eberharter’s personal interests outweighed the applicants’ right to freedom of artistic expression. In its reasoning, the Court noted that the article demanded a “very high level of intelligence and concentration” of its readers [para 11], and, as such, the Vienna Regional Criminal Court was right to consider those who may only skim the first few paragraphs of the article without understanding neither its satirical nature nor the fictitious nature of Eberharter’s supposed statements. The Court particularly emphasized the reader’s assumption given Eberharter was Maier’s main opponent and thus a natural beneficiary of his injury. Indeed, the Court believed that the article communicated to the readers a negative image of Eberharter, as a “most egocentric” athlete who “would stop at nothing” to win, and wished his competitors harm [para 11].

On February 3, 2003, the applicants lodged an application with the ECtHR against the Republic of Austria (the defendant), alleging a breach of their right to freedom of expression under Article 10 of the Convention.

* **Decision Overview**:

On May 22, 2007, the Court unanimously held that the applicants’ right to freedom of expression under Article 10 of the Convention had been violated. Having ascertained at the outset that the Austrian domestic courts’ interference with the applicants’ right to freedom of expression was prescribed by law as well as pursued the legitimate aim of protecting the reputation or rights of others, the main issue to be determined by the Court was whether the interference was necessary in a democratic society. This determination involved a two-part inquiry – *first*, whether the justifications for the interference put forth by the domestic authorities were “relevant and sufficient”, and *second*, whether the measures taken were “proportionate” to the legitimate aim pursued.

*Parties’ Submissions*

The applicants submitted that the article authored by Nikowitz was intended to critique the “*national hysteria*” [para 18] surrounding Maier’s accident. They argued that the excerpt capturing Eberharter’s thought about Maier’s accident, which was a part of this article, was meant to satirically convey sentiments any athlete might feel about the dropping out of their strong rival but not speak openly about. This was all the more human and imaginable given the success enjoyed by Eberharter in ski-races post Maier’s injury, they contended, and did not carry connotations of any “*reprehensible character traits*” [para 18] possessed by him. They further asserted that regardless of the foregoing argument, the statement was authored in a manner which clearly communicated its fictitious nature to even the hastiest of readers. Moreover, the title of the article indicated its humorous approach as did the other fictitious satirical remarks made in it such as the comment that Maier’s first replaced bandage had been interviewed by an ORF reporter or that Maier had been beseeched for help directly by God [para 17]. The applicants further emphasized that readers had come to expect Nikowitz’s articles to employ satire, as his satirical essays were a characteristic feature of Profil. They argued against the Austrian domestic courts basing their decision instead on unfocused or hasty readers who might misunderstand the intent of the ideas expressed, asserting that not only were they not responsible for such ignorant readers but also that their right under Article 10 of the Convention could not be restricted on such an assessment.

The defendant agreed that an interference with the applicants’ right to freedom of expression had indisputably occurred. The defendant, however, submitted that the interference was prescribed by law, pursued the legitimate aim of protecting the reputation or rights of others, and was necessary and proportionate to the aim pursued. The defendant contended that the statement attributed to Eberharter was the sole fictitious statement in the article authored by Nikowitz, while the remainder of the article consisted of headlines and passages from other reportage about the accident. Relying on the decision of the domestic courts, the defendant supplemented this contention by arguing that in such a context, only a very focused reader could have possibly realized the fictitious and satirical nature of the excerpt. The defendant further submitted that the excerpt communicated to the readers an image of Eberharter as a jealous competitor of Maier’s who was inappropriately gleeful about his accident. They asserted that even if the excerpt was satirical, it transgressed the limits of the guarantee under Article 10 of the Convention as it conveyed a negative image of Eberharter without any factual substantiation. The defendant further claimed that the article was not contributory to or of significant public interest. On the basis of the foregoing, the defendant submitted that Eberharter’s right to protection of his reputation as a sportsman outweighed the applicants’ interests in freely expressing themselves through the impugned statement, and that the interference was proportionate as only a suspended penalty had been imposed on Nikowitz and a minor compensatory amount on Verlagsgruppe News GmbH.

*General Principles*

The Court reiterated that in order to determine whether interference with the right of a party could be considered necessary in a democratic society, it had to ascertain whether the interference responded to a “pressing social need” [para 21]. It noted that while Contracting States do enjoy a margin of appreciation in assessing the existence of such a need and in restricting a right in pursuance of it, the discretion is limited by European supervision. The ECtHR can, thus, conclusively rule on the compatibility of an “interference” or “restriction” with the right to freedom of expression protected by Article 10 of the Convention.

However, given that the role of the ECtHR is to review rather than to replace the decisions of the domestic authorities, the assessment of the alleged interference with the right to freedom of expression must be undertaken within the wider context of the case. Particularly, the Court must undertake two inquiries – *first*, whether the justifications offered by the domestic authorities are “relevant and sufficient”, and *second*, whether the measures taken are “proportionate to the legitimate aims pursued” [para 23]. In carrying out this assessment, the Court has to attend to whether the domestic authorities have taken their decisions pursuant to an acceptable assessment of the relevant facts, and whether the standards applied by them are in compliance with those embodied by Article 10 [para 23].

*The Court’s findings*

The Court first undertook an inquiry into whether the reasons offered by the Austrian domestic courts for the interference with the applicants’ right to freedom of expression were “relevant and sufficient”. It observed that the article at issue was intended to be a humorous commentary on the manner in which Maier’s accident had garnered public and media attention, and which sought to make a “*critical contribution to an issue of general interest, namely society’s attitude towards a sports star*” [para 25]. The Court noted that it was written in a satirical and ironic style which was evident from its heading as well as caption accompanying Maier’s portrait. The Court, in finding as such, expressly departed from the domestic courts’ assessment of the inability of the average reader to discern the satirical nature of the article and of the excerpt pertaining to Eberharter in particular. The Court added that the “*passage could at most be understood as the author’s value judgment on Mr. Eberharter’s character, expressed in the form of a joke*” [para 25] about what he “*could have said but did not actually say*” [para 25]. The Court conceded that if a statement conveyed that a sportsman was truly gleeful about the benefits to be reaped from his competitor’s accident and wished him further harm, it would cause serious damage to their image [para 26]. However, the Court could not hold the humorous statement in Nikowitz’s article to attribute to Eberharter such feelings as his true feelings. The Court also noted that Eberharter had already publicly commented on Maier’s accident, and that the comment was not resonant with the impugned statement. On the basis of such reasoning, the Court concluded that the justifications offered by the Austrian domestic authorities were not “relevant and sufficient”, and that the excerpt about Eberharter was within the limits of satirical commentary acceptable in a democratic society.

Furthermore, the Court rejected the defendant’s argument about the moderation displayed by the Austrian domestic courts in interfering with the applicants’ right to freedom of expression, as it convicted Nikowitz of defamation and ordered Verlagsgruppe News GmbH to pay compensation and publish the judgment. Relying on [*Lopes Gomes da Silva v. Portugal* ECHR [2000] 37698/97](https://hudoc.echr.coe.int/eng#{"fulltext":["Lopes%20Gomes%20da%20Silva%20v.%20Portugal"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58817"]}), the Court pertinently noted that as regards Nikowitz “*what matters is not that he was sentenced to a relatively minor suspended penalty, but that he was convicted at all*” [para 27].

The Court concluded that the interference with the applicants’ right to freedom of expression was not necessary for the protection of the reputation or rights of others in a democratic society. Accordingly, a violation of the applicants’ rights pursuant to Article 10 of the Convention was pronounced. The Court ordered the defendant to pay the applicants EUR 7,058.13 as pecuniary damages and EUR 4,831.40 as costs and expenses.

On May 22, 2007, the Court unanimously held that the applicants’ right to freedom of expression under Article 10 of the Convention had been violated. Because both parties had already agreed that the Austrian domestic courts’ interference with the applicants’ right to freedom of expression was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others, the main issue left to be determined by the Court was whether the interference was necessary in a democratic society. This determination involved a two-part inquiry – first, whether the justifications for the interference put forth by the domestic authorities were “relevant and sufficient”, and second, whether the measures taken were “proportionate” to the legitimate aim pursued (per paragraph 2 of Article 10 of the Convention).

*Parties’ Submissions*

The applicants submitted that their article was intended to critique the “*national hysteria*” [para 18] surrounding Maier’s accident. They argued that the commentary capturing Eberharter’s supposed thoughts about Maier’s accident was clearly meant to satirically convey sentiments any athlete might secretly feel about the injury of their strong rival. This was all the more human and imaginable given the success enjoyed by Eberharter in ski-races post Maier’s injury, and did not carry connotations of any “*reprehensible character traits*” [para 18] possessed by him. But regardless of the foregoing argument, the applicants argued that the commentary was clearly drafted to be humorous, exaggerated and fictional, even to the hastiest of readers. Moreover, the title of the article indicated its humorous approach as did the other fictitious satirical remarks made in it - such as the comment that Maier’s first replaced bandage had been interviewed by an ORF reporter, or that God contacted Maier to ask for help [para 17]. Importantly, the applicants emphasized that readers had come to expect Nikowitz’s articles to employ humor and satire, as his satirical essays were a characteristic feature of Profil. They critiqued the Austrian courts’ assessment of the statement by reference to the standard of unfocused, hasty readers who may misunderstand the article, crucially asserting that not only were they not responsible for any ignorant readers, but also that their right under Article 10 of the Convention could not be restricted on such assessment.

The defendant agreed that an interference with the applicants’ right to freedom of expression had clearly occurred. However, this interference was prescribed by law, pursued the legitimate aim of protecting the reputation or rights of others, and was necessary and proportionate to the aim pursued (per the requirements of the Convention). The defendant contended that the quote attributed to Eberharter was the sole fictitious statement in the article, while the remainder of the article consisted of headlines and passages from other reportage about the accident. Relying on the decision of the domestic courts, the defendant reasoned that in such a context, only a “highly concentrated” reader could have possibly realized the article’s fictitious and satirical nature [para 19]. The defendant further submitted that the excerpt conjured an image of Eberharter as a jealous competitor who was inappropriately gleeful about Maier’s accident. Even if the commentary was satirical, it nevertheless transgressed the limits of the right to freedom of expression under Article 10 of the Convention in its blatantly negative image of Eberharter without any factual substantiation. Further, the defendant claimed that the article was not contributory to or of significant public interest. As such, Eberharter’s right to protection of his reputation as a sportsman outweighed the applicants’ interests in freely expressing themselves through the impugned statement, and that the interference was proportionate given the relatively minor penalties imposed on Nikowitz and Verlagsgruppe News GmbH.

*General Principles*

The Court reiterated that, in order to determine whether interference with the right of a party could be considered necessary in a democratic society per Article 10 of the convention, it must first ascertain whether the interference responded to a “pressing social need” [para 21]. While states do enjoy a margin of appreciation in assessing the existence of that need (and in restricting a right in pursuance of it), discretion is limited by European supervision. The ECtHR can, thus, conclusively rule on the compatibility of an “interference” or “restriction” with the right to freedom of expression protected by Article 10.

However, given that the role of the ECtHR is to review rather than to replace the decisions of the domestic authorities, the assessment of any alleged interference with the right to freedom of expression must be undertaken within the wider context of the case. Particularly, the Court must undertake two inquiries – *first*, whether the justifications offered by the domestic authorities are “relevant and sufficient”, and *second*, whether the measures taken are “proportionate to the legitimate aims pursued” [para 23]. In carrying out this assessment, the Court has to attend to whether the domestic authorities have taken their decisions pursuant to an acceptable assessment of the relevant facts, and whether the standards applied by them are in compliance with those embodied by Article 10 [para 23].

*The Court’s findings*

The Court first undertook an inquiry into whether the reasons offered by the Austrian domestic courts for the interference with the applicants’ right to freedom of expression were “relevant and sufficient”. It observed that the article at issue was intended to be a humorous commentary on the manner in which Maier’s accident had garnered public and media attention, and which sought to make a “*critical contribution to an issue of general interest, namely society’s attitude towards a sports star*” [para 25]. The Court noted that it was written in a satirical and ironic style which was evident from its heading as well as caption accompanying Maier’s portrait. The Court, in finding as such, expressly departed from the domestic courts’ assessment of the inability of the average reader to discern the satirical nature of the article and of the excerpt pertaining to Eberharter in particular. The Court added that the “*passage could at most be understood as the author’s value judgment on Mr. Eberharter’s character, expressed in the form of a joke*” [para 25] about what he “*could have said but did not actually say*” [para 25]. The Court conceded that if a statement conveyed that a sportsman was truly gleeful about the benefits to be reaped from his competitor’s accident and wished him further harm, it would cause serious damage to their image [para 26]. However, the Court could not hold the humorous statement in Nikowitz’s article to attribute to Eberharter such feelings as his true feelings. The Court also noted that Eberharter had already publicly commented on Maier’s accident, and that the comment was not resonant with the impugned statement. On the basis of such reasoning, the Court concluded that the justifications offered by the Austrian domestic authorities were not “relevant and sufficient”, and that the excerpt about Eberharter was within the limits of satirical commentary acceptable in a democratic society.

Furthermore, the Court rejected the defendant’s argument about the moderation displayed by the Austrian domestic courts in interfering with the applicants’ right to freedom of expression, as it convicted Nikowitz of defamation and ordered Verlagsgruppe News GmbH to pay compensation and publish the judgment. Relying on [*Lopes Gomes da Silva v. Portugal* ECHR [2000] 37698/97](https://hudoc.echr.coe.int/eng#{"fulltext":["Lopes%20Gomes%20da%20Silva%20v.%20Portugal"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58817"]}), the Court pertinently noted that as regards Nikowitz “*what matters is not that he was sentenced to a relatively minor suspended penalty, but that he was convicted at all*” [para 27].

The Court concluded that the interference with the applicants’ right to freedom of expression was not necessary for the protection of the reputation or rights of others in a democratic society. Accordingly, a violation of the applicants’ rights pursuant to Article 10 of the Convention was pronounced. The Court ordered the defendant to pay the applicants EUR 7,058.13 as pecuniary damages and EUR 4,831.40 as costs and expenses.

*The Court’s findings*

The Court first considered whether the reasons offered by the Austrian domestic courts for the interference with the applicants’ right to freedom of expression were “relevant and sufficient”. The Court noted that the article was clearly written in a satirical and ironic style, and was accompanied by a similarly humorous headline and caption. As such, the Profil article was blatantly intended to be a humorous commentary on the public and media attention of Maier’s injury, and that it sought to make a “critical contribution to an issue of general interest, namely society’s attitude towards a sports star” [para 25]. Indeed, it was not swayed by the notion of a hasty, unfocused reader failing to grasp the satirical nature of the article and Eberharter’s fictitious quote. The Court, in finding as such, expressly departed from the domestic courts’ assessment of the inability of the average reader. It added that the “passage could at most be understood as the author’s value judgment on Mr. Eberharter’s character, expressed in the form of a joke” [para 25] about what he “could have said but did not actually say” [para 25].

The Court conceded that a statement conveying that a sportsman was truly gleeful about the benefits to be reaped from his competitor’s accident, and wishing him further harm, would indeed cause serious damage to their image [para 26]. However, in this instance, the Court held that the humorous commentary clearly suggested Eberharter did not indeed reflect his true feelings on the incident. Moreover, the Court noted that Eberharter had already publicly commented on Maier’s accident, and “obviously” did not say the words in the Profil column [para 26]. On the basis of such reasoning, the Court concluded that the justifications offered by the Austrian domestic authorities were not “relevant and sufficient”, and that the excerpt about Eberharter sat rightly within the limits of satirical commentary acceptable in a democratic society.

Additionally, the Court rejected the defendant’s argument that the applicants’ penalties for defamation reflected only a moderate interference with their right to freedom of expression. Relying on [Lopes Gomes da Silva v. Portugal ECHR [2000] 37698/97](https://hudoc.echr.coe.int/eng#{"fulltext":["Lopes%20Gomes%20da%20Silva%20v.%20Portugal"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58817"]}), the Court pertinently noted that as regards Nikowitz “what matters is not that he was sentenced to a relatively minor suspended penalty, but that he was convicted at all” [para 27].

The Court concluded that the interference with the applicants’ right to freedom of expression was not necessary for the protection of the reputation or rights of others in a democratic society. As such, Eberharter’s personal interests could not outweigh the applicants’ right to freedom of expression. Accordingly, a violation of the applicants’ rights pursuant to Article 10 of the Convention was pronounced. The Court ordered the defendant to pay the applicants EUR 7,058.13 as pecuniary damages and EUR 4,831.40 as costs and expenses.

***Direction:***

* **Outcome**: Expands Expression
* **Information**:

The decision of the ECtHR in *Nikowitz and Verlagsgruppe News GmbH v. Austria* expands expression by recognizing a “fictitious interview” ([para 174, Case Guide of the ECtHR on Article 10](https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf)) as a variant of a satirical expression which is capable of offering a social commentary and contributing critically to an issue of general interest. The decision showcases that since satire, by its very nature is likely to exaggerate, provoke, and agitate, a certain leniency has to be exercised in determining the protection it merits. Though the Court doesn’t do so explicitly, implied in its reasoning is the consideration of the link between the tone employed in the impugned expression and its impact on the reputation of the aggrieved, such that if the tone of the statement is clearly satirical or humorous, restricting it deprives the applicants of the right to freedom of expression while minimally impacting the aggrieved ([Smet](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1700&context=auilr)). Consequently, the decision conveys that caution must be exercised by domestic authorities in interfering with the right of the press to employ satire as a means of expression and that the ECtHR must examine any such interference carefully. This decision is also reflective of the pertinent distinction made by the ECtHR between facts and value judgments in cases involving satirical expressions, aimed at ascertaining the permissible limits of satirical or humorous forms of expression in democratic societies ([para 191, Case Guide of the ECtHR on Article 10](https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf)). While there is much cause to welcome this decision for the way in which it expands expression, its authoritative and sweeping declaration of “apparent” or “obvious” humour is one to be cautioned against, particularly as the Court itself lacks objective criteria for the identification of or a consistent approach to the manner in which to deal with such texts ([Feldmane](https://dspace.lu.lv/dspace/bitstream/handle/7/50064/Feldmane_Paula.pdf?sequence=1&isAllowed=y); [Godioli](https://olh.openlibhums.org/articles/10.16995/olh.571/)).

This ECtHR decision expands expression by recognizing the concept of a “fictitious interview” ([para 174, Case Guide of the ECtHR on Article 10](https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf)) as a variant of a satirical expression which is capable of offering a social commentary and contributing critically to an issue of general interest. Because satire by its very nature is likely to exaggerate, provoke, and agitate, this decision illustrates that a certain leniency has to be exercised by courts when determining the merits of its protection. Though the Court doesn’t explicitly mention any such link in its reasoning, some scholars have implied the Court’s natural consideration of the relationship between the tone employed in the impugned expression and its impact on the reputation of the aggrieved. [Smet](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1700&context=auilr) in particular notes that if the tone of a statement (such as that of the applicants) is clearly satirical, exaggerated and/or humorous, restricting it deprives the applicants of the right to freedom of expression while having an arguably minor impact on the aggrieved and their reputation. Consequently, the ECtHR’s decision in this case conveys that caution must be exercised by domestic authorities in interfering with the right of the press to employ satire as a means of expression and that the ECtHR will certainly examine any such interference carefully. This decision is also reflective of the important distinction previously made by the ECtHR between facts and value judgments in cases involving satirical expressions, aimed at ascertaining the permissible limits of satirical or humorous forms of expression in democratic societies ([para 191, Case Guide of the ECtHR on Article 10](https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf)). However while there is much cause to welcome this decision for the way in which it expands expression, its authoritative and sweeping declaration of the applicants’ “apparent” or “obvious” humour is not necessarily legally sound, particularly as the Court itself lacks objective criteria for the identification of or a consistent approach to the manner in which to deal with such texts ([Feldmane](https://dspace.lu.lv/dspace/bitstream/handle/7/50064/Feldmane_Paula.pdf?sequence=1&isAllowed=y); [Godioli](https://olh.openlibhums.org/articles/10.16995/olh.571/)).

***Perspective***:

* **Outcome**: National Perspective (Pursuant to the note on the Style Guide, Pg. 23)
* **Related International and/or regional laws**:

[ECHR, art. 10](https://www.echr.coe.int/Documents/Convention_ENG.pdf);

[ECtHR, Cumpǎnǎ and Mazǎre v. Romania, App. No. 33348/96 (2004)](https://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["33348/96"],"documentcollectionid2":["GRANDCHAMBER"],"itemid":["001-67816"]});

[ECtHR, Lopes Gomes da Silva v. Portugal, App. No. 37698/97 (2000)](https://hudoc.echr.coe.int/eng#{"fulltext":["Lopes%20Gomes%20da%20Silva%20v.%20Portugal"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58817"]}).

* **National law or jurisprudence**:

Austria, Criminal Code s. 111;

Austria, Media Act s. 6.

* **Other national law or jurisprudence**: N/A

***Significance***:

* **Significance:** The decision establishes a binding or persuasive precedent within its jurisdiction.
* **Related Cases**: Self-generated
* **Date updated**: Saturday, December 19, 2020

***Documents:***

* **Official Case Documents**:

Judgment (ECtHR) (in English) [Attached]

Press Release issued by the Registrar of the ECtHR dated 22.02.2007 (in English) [Attached]

* **Amicus briefs and other legal authorities**:

[Case Guide of the ECtHR on Article 10 (Freedom of Expression) (in English)](https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf) [Attached]

* **Reports, Analysis, and News Articles**:

[Freedom of Expression and the Right to Reputation: Human Rights in Conflict – Stijn Smet](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1700&context=auilr) [Attached]

[Cartoon Controversies at the European Court of Human Rights: Towards Forensic Humor Studies – Alberto Godioli](https://olh.openlibhums.org/articles/10.16995/olh.571/) [Attached]

[Restrictions on Satire, Parody and Caricature in the Case Law of the European Court of Human Rights – Paula Feldmane](https://dspace.lu.lv/dspace/bitstream/handle/7/50064/Feldmane_Paula.pdf?sequence=1&isAllowed=y) [Attached]

[Freedom of Expression, the Media and Journalists: Case-Law of the European Court of Human Rights – IRIS *Themes*, Vol. III (2015) (pp. 158)](https://mediacompolicy.univie.ac.at/wp-content/uploads/2016/04/IRIS-Themes-Vol-III-Ed-2015-EN.pdf)

[Freedom of Expression, Media Law and Defamation: A Reference and Training Manual for Europe – MLDI and IPI (2015) (pp. 46-48)](https://ipi.media/wp-content/uploads/2015/06/FoE-MediaLaw-Defamation_ENG_WEB.pdf)