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

COURT (PLENARY)

CASE OF LINGENS v. AUSTRIA

(Application no. 9815/82)

JUDGMENT

STRASBOURG

8 July 1986

In the Lingens case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. J. CREMONA,
Mr. G. WIARDA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 November 1985 and 23-24 June 1986,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), on 13 December 1984 by the European Commission of Human Rights ("the Commission") and, subsequently, on 28

* Note by the Registrar: The case is numbered 12/1984/84/131. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

January 1985, by the Federal Government of the Republic of Austria ("the Government"). The case originated in an application (no. 9815/82) against Austria lodged with the Commission on 19 April 1982 under Article 25 (art. 25) by Mr. Peter Michael Lingens, an Austrian national.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Republic of Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46), and the Government's application referred to Article 48 (art. 48). They sought a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr. Lingens stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 23 January 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Sir Vincent Evans, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). After consulting, through the Deputy Registrar, the Agent of the Government, the Commission's Delegate and Mr. Lingens' lawyer, he

- decided, on 11 February 1985, that there was no call at that stage for memorials to be filed (Rule 37 para. 1);

- directed, on 4 July, that the oral proceedings should open on 25 November 1985 (Rule 38).

On 30 January, the President had granted the applicant's lawyer leave to use the German language during the proceedings (Rule 27 para. 3).

5. On 4 May 1985, the International Press Institute (IPI), through Interights, sought leave to submit written observations under Rule 37 para. 2. On 6 July, the President agreed, subject to certain conditions.

After an extension of the time-limit originally granted, these observations were received at the Court's registry on 1 October 1985.

6. On 25 September 1985, the Chamber had decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

In a letter received at the registry on 13 November the applicant submitted his claims under Article 50 (art. 50) of the Convention.

7. The hearings, presided over by Mr. Ryssdal who had become President of the Court on 30 May 1985, were held in public at the Human Rights Building, Strasbourg, on 25 November 1985. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:
- for the Government
  Mr. H. TÜRK, Legal Adviser,
  Ministry of Foreign Affairs, *Agent*,
  Mr. W. OKRESEK, Federal Chancellery,
  Mr. G. FELSENSTEIN, Ministry of Justice, *Advisers*;
- for the Commission
  Mr. H.G. SCHERMERS, *Delegate*;
- for the applicant
  Mr. W. MASSER, Rechtsanwalt, *Counsel*,
  Mr. P.M. LINGENS, *Applicant*.

The Court heard addresses by Mr. Türk and Mr. Okresek for the Government, by Mr. Schermers for the Commission and by Mr. Masser for the applicant and Mr. Lingens himself, as well as their replies to its questions.

On 6 December 1985 and 17 March 1986, Mr. Masser, complying with a request by the President, filed with the registry several documents giving further particulars of the applicant's claims for just satisfaction. The Government replied on 18 March 1986.

AS TO THE FACTS

8. Mr. Lingens, an Austrian journalist born in 1931, resides in Vienna and is editor of the magazine Profil.

I. THE APPLICANT'S ARTICLES AND THEIR BACKGROUND

9. On 9 October 1975, four days after the Austrian general elections, in the course of a television interview, Mr. Simon Wiesenthal, President of the Jewish Documentation Centre, accused Mr. Friedrich Peter, the President of the Austrian Liberal Party (Freiheitliche Partei Österreichs) of having served in the first SS infantry brigade during the Second World War. This unit had on several occasions massacred civilians behind the German lines in Russia. Mr. Peter did not deny that he was a member of the unit, but stated that he was never involved in the atrocities it committed. Mr. Wiesenthal then said that he had not alleged anything of the sort.

10. The following day, Mr. Bruno Kreisky, the retiring Chancellor and President of the Austrian Socialist Party (Sozialistische Partei Österreichs), was questioned on television about these accusations.

Immediately before the television interview, he had met Mr. Peter at the Federal Chancellery. Their meeting was one of the normal consultations between heads of parties with a view to forming a new government; it had

aroused great public interest because before the elections on 5 October the possibility of a Kreisky-Peter coalition government had been canvassed.

At the interview, Mr. Kreisky excluded the possibility of such a coalition because his party had won an absolute majority. However, he vigorously supported Mr. Peter and referred to Mr. Wiesenthal's organisation and activities as a "political mafia" and "mafia methods". Similar remarks were reported the next day in a Vienna daily newspaper to which he had given an interview.

11. At this juncture, the applicant published two articles in the Vienna magazine Profil.

12. The first was published on 14 October 1975 under the heading "The Peter Case" ("Der Fall Peter"). It related the above events and in particular the activities of the first SS infantry brigade; it also drew attention to Mr. Peter's role in criminal proceedings instituted in Graz (and later abandoned) against persons who had fought in that brigade. It drew the conclusion that although Mr. Peter was admittedly entitled to the benefit of the presumption of innocence, his past nevertheless rendered him unacceptable as a politician in Austria. The applicant went on to criticise the attitude of Mr. Kreisky whom he accused of protecting Mr. Peter and other former members of the SS for political reasons. With regard to Mr. Kreisky's criticisms of Mr. Wiesenthal, he wrote "had they been made by someone else this would probably have been described as the basest opportunism" ("Bei einem anderen würde man es wahrscheinlich übelsten Opportunismus nennen"), but added that in the circumstances the position was more complex because Mr. Kreisky believed what he was saying.

13. The second article, published on 21 October 1975, was entitled "Reconciliation with the Nazis, but how?" ("Versöhnung mit den Nazis - aber wie?"). It covered several pages and was divided into an introduction and six sections: "'Still' or 'Already'", "We are all innocent", "Was it necessary to shoot defenceless people?", "Why is it still a question for discussion?", "Helbich and Peter" and "Politically ignorant".

14. In the introduction Mr. Lingens recalled the facts and stressed the influence of Mr. Kreisky's remarks on public opinion. He criticised him not only for supporting Mr. Peter, but also for his accommodating attitude towards former Nazis who had recently taken part in Austrian politics.

15. Under the heading "'Still' or 'Already'" the applicant conceded that one could not object to such attitudes on grounds of "Realpolitik". According to him "the time has passed when for electoral reasons one had to take account not only of Nazis but also of their victims ... the former have outlived the latter ...". Nevertheless Austria, which had produced Hitler and Eichmann and so many other war criminals, had not succeeded in coming to terms with its past; it had simply ignored it. This policy risked delivering the country into the hands of a future fascist movement.

With regard to the then Chancellor, he added: "In truth Mr. Kreisky’s behaviour cannot be criticised on rational grounds but only on irrational grounds: it is immoral, undignified" ("In Wahrheit kann man das, was Kreisky tut, auf rationale Weise nicht widerlegen. Nur irrational: es ist unmoralisch. Würdelos"). It was, moreover, unnecessary because Austrians could reconcile themselves with the past without seeking the favours of the former Nazis, minimising the problem of concentration camps or maligning Mr. Wiesenthal by exploiting anti-Semitism.

What was surprising was not that one "still" spoke about these things thirty years later but, on the contrary, that so many people were "already" able to close their eyes to the existence of this mountain of corpses.

Finally, Mr. Lingens criticised the lack of tact with which Mr. Kreisky treated the victims of the Nazis.

16. The second section commented on the attitude of Austrian society in general with regard to Nazi crimes and former Nazis. In the author’s opinion, by sheltering behind the philosophic alternative between collective guilt and collective innocence the Austrians had avoided facing up to a real, discernible and assessable guilt.

After a long disquisition on various types of responsibility, he stressed that at the time it had in fact been possible to choose between good and evil and gave examples of persons who had refused to collaborate. He concluded that "if Bruno Kreisky had used his personal reputation, in the way he used it to protect Mr. Peter, to reveal this other and better Austria, he would have given this country - thirty years afterwards - what it most needed to come to terms with its past: a greater confidence in itself".

17. The third and fourth sections (which together amounted to a third of the article) also dealt with the need to overcome the consciousness of collective guilt and envisage the determination of real guilt.

Under the title "Was it necessary to shoot defenceless people?", Mr. Lingens drew a distinction between the special units and the regular forces in the armies of the Third Reich; he pointed out that no one was forcibly enlisted in the former: one had to volunteer.

In the following section he stressed the difference between individuals guilty of criminal offences and persons who, morally speaking, had to be regarded as accomplices; he maintained that if Austria had tried its Nazis earlier, more quickly and more thoroughly, it would have been able to view its past more calmly without complexes and with more confidence. He then set out the reasons why that had not been possible and defended Mr. Wiesenthal from the charge of belonging to a "mafia". Finally, he considered the possibility of showing clemency after so many years and concluded: "It belongs to every society to show mercy but not to maintain an unhealthy relationship with the law by acquitting obvious murderers and concealing, dissembling or denying manifest guilt."

18. The fifth section of Mr. Lingens' article compared the Peter case with another affair of a more economic nature relating to Mr. Helbich, one of the leaders of the Austrian People's Party (Österreichische Volkspartei), and compared Mr. Kreisky's different reaction in each case. The author argued that the circumstances of the first case made Mr. Peter unfit to be a member of parliament, a politician and a member of the government, and added: "This is a minimum requirement of political ethics" ("ein Mindesterfordernis des politischen Anstandes"). The "monstrosity" ("Ungeheuerlichkeit") was not, in his opinion, the fact that Mr. Wiesenthal had raised the matter, but that Mr. Kreisky wished to hush it up.

19. The article ended with a section criticising the political parties in general owing to the presence of former Nazis among their leaders. The applicant considered that Mr. Peter ought to resign, not to admit his guilt but to prove that he possessed a quality unknown to Mr. Kreisky, namely tact.

II. PRIVATE PROSECUTIONS BROUGHT BY MR. KREISKY

20. On 29 October and 12 November 1975, the then Chancellor brought two private prosecutions against Mr. Lingens. He considered that certain passages in the articles summarised above were defamatory and relied on Article 111 of the Austrian Criminal Code, which reads:

> "1. Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine.
>
> 2. Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine.
>
> 3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."

Under Article 112, "evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith ...".

A. First set of proceedings

1. Decision of the Vienna Regional Court

21. On 26 March 1979, the Vienna Regional Court found Mr. Lingens guilty of defamation (üble Nachrede - Article 111 para. 2) for having used

the expressions "the basest opportunism", "immoral" and "undignified". However, it held that certain other expressions were not defamatory in their context ("minimum requirement of political ethics", "monstrosity"). It fined him 20,000 Schillings, considering as mitigating circumstances the fact that the accused intended to voice political criticism of politicians on political questions and that the latter were expected to show greater tolerance of defamation than other individuals. In view of the defendant's good faith it awarded Mr. Kreisky no damages but, on his application, ordered the confiscation of the articles complained of and the publication of the judgment.

22. In its decision, which contained a lengthy statement of reasons, the Regional Court first examined the objectively defamatory character of each of the passages complained of. It held that the expressions "basest opportunism", "immoral" and "undignified" were defamatory and were directly or indirectly aimed at Mr. Kreisky personally, whereas the words "minimum requirement of political ethics" and "monstrosity" did not go beyond the accepted limits of political criticism.

According to Mr. Lingens, the first three expressions were value-judgments and therefore as such not contrary to Article 111 of the Criminal Code. However, the Regional Court considered that the unfavourable conclusions drawn with regard to the then Chancellor's behaviour fell within the scope of that provision. Nor could the defendant rely on his right to freedom of expression, since the relevant provisions of the Constitution and Article 10 (art. 10) of the Convention authorised limitations of this right: a balance had to be struck between this right and the right to respect for private life and reputation. In the instant case the applicant had gone beyond the permissible limits.

23. As regards Mr. Kreisky's use of a private prosecution, the Regional Court pointed out that he had been criticised not in his capacity as Federal Chancellor but as a leading member of his party and a politician. Article 117 para. 2 of the Criminal Code therefore did not apply in the instant case : it made defamation of an office-holder punishable, but solely by means of a public prosecution commenced with the consent of the person concerned, who could not bring a private prosecution unless the prosecuting authorities refused to act.

24. The Regional Court then considered the question of proving truth (preuve de la vérité) (see paragraph 20 above). It held that as the applicant had not provided evidence to justify the expression "basest opportunism", that was sufficient to lead to his conviction.

With regard to the words "immoral" and "undignified", the accused had used them in relation to Mr. Kreisky's attitude consisting in minimising Nazi atrocities, referring to Mr. Wiesenthal's activities as being of a mafia-type and insinuating that the latter had collaborated with the Gestapo. On this last point the Regional Court admitted evidence produced by Mr.

Lingens in the form of a court decision finding a journalist guilty of defamation for having made a similar allegation.

In so far as Mr. Kreisky had spoken of "mafia methods" and "mafia", the Regional Court pointed out that these expressions normally referred to an organised form of criminal behaviour but were sometimes used in a different sense. Even if one did not accept the argument put forward by the private prosecutor, his conception of the "mafia" was a possible one and deserved to be examined. It was not for the prosecutor to prove the truth of his allegations but for Mr. Lingens to prove the truth of his. Mr. Wiesenthal himself had conceded that in order to attain his various aims he relied on an organisation with numerous ramifications. Moreover, the then Chancellor's statements (see paragraph 10 above) must be seen in the context of a political struggle between political opponents, each of them using such weapons as were at his disposal. Seen from this angle they did not reflect an absence of morality or dignity but constituted a possible defence and were in no way unusual in the bitter tussles of politics.

In truth, Mr. Kreisky's attitude towards Nazi victims and Nazi collaborators was far from clear and unambiguous; it appeared in a form which allowed different conclusions. It was therefore logically impossible for the defendant to establish that the only possible interpretation of this attitude was the one he put on it.

2. Appeal to the Vienna Court of Appeal

25. Mr. Kreisky and Mr. Lingens both appealed against the judgment to the Vienna Court of Appeal. On 30 November 1979, the Court of Appeal set the judgment aside without examining the merits, on the ground that the Regional Court had failed to go sufficiently into the question whether the then Chancellor was entitled to bring a private prosecution in spite of the provisions of Article 117 of the Criminal Code (see paragraph 23 above).

B. Second set of proceedings

1. Decision of the Vienna Regional Court

26. The Vienna Regional Court, to which the Court of Appeal had returned the case, gave judgment on 1 April 1981.

After examining the circumstances surrounding the statements by the then Chancellor, it came to the conclusion that he had been criticised not in his official capacity but as head of a party and as a private individual who felt himself under an obligation to protect a third person. It followed therefore that he was entitled to bring a private prosecution.

As regards the legal definition of the acts imputed to Mr. Lingens, the Regional Court confirmed its judgment of 26 March 1979.

With regard to the defence of justification, it again noted that the accused had not produced any evidence to prove the truth of the expression "the basest opportunism". As regards the expressions "immoral" and "undignified", the evidence he had produced related solely to the allegations of collaboration with the Nazis made against Mr. Wiesenthal. These, however, were not relevant because Mr. Kreisky had made them after the publication of the articles in question.

In so far as these expressions were directed at other behaviour and attitudes of the Chancellor, the Regional Court maintained its previous findings unchanged. It considered that Mr. Lingens' criticisms went far beyond the question of Mr. Kreisky's attacks on Mr. Wiesenthal. The fact that the former had been able to prosecute the applicant but could not himself be prosecuted for defamation by Mr. Wiesenthal was due to the existing legislation on parliamentary immunity. The obligation to prove the truth of his statements was also based on the law and it was not for the courts but for the legislature to make this proof less difficult. Nor was the Regional Court responsible for the lack of tolerance and the litigious tendencies of certain politicians.

It therefore passed the same sentence as in the original judgment (see paragraph 21 above).

2. Appeal to the Vienna Court of Appeal

27. Both sides again appealed to the Vienna Court of Appeal, which gave judgment on 29 October 1981; it reduced the fine imposed on the applicant to 15,000 Schillings but confirmed the Regional Court's judgment in all other respects.

28. Mr. Kreisky disputed the statement that different criteria applied to private life and to political life. He argued that politicians and private individuals should receive the same treatment as regards the protection of their reputation.

The Court of Appeal, however, pointed out that Article 111 of the Criminal Code applied solely to the esteem enjoyed by a person in his social setting. In the case of politicians, this was public opinion. Yet experience showed that frequent use of insults in political discussion (often under cover of parliamentary immunity) had given the impression that statements in this field could not be judged by the same criteria as those relating to private life. Politicians should therefore show greater tolerance. As a general rule, criticisms uttered in political controversy did not affect a person's reputation unless they touched on his private life. That did not apply in the instant case to the expressions "minimum requirement of political ethics" and "monstrosity". Mr. Kreisky's appeal was therefore dismissed.

29. The Court of Appeal then turned to Mr. Lingens' grounds of appeal and first of all examined the evidence taken at first instance, in order to decide in what capacity Mr. Kreisky had been subjected to his criticism. It

too found that he was criticised in his capacity both as a party leader and as a private individual.

The expression "the basest opportunism" meant that the person referred to was acting for a specific purpose with complete disregard of moral considerations and this in itself constituted an attack on Mr. Kreisky's reputation. The use of the words "had they been made by someone else" (see paragraph 12 above) could not be understood as a withdrawal of the criticism. As the defendant had not succeeded in proving the truth of it, the court of first instance had been right to find him guilty of an offence.

According to the applicant, the expressions "immoral" and "undignified" were his personal judgment of conduct which was not disputed, a judgment made in exercise of his freedom of expression, guaranteed by Article 10 (art. 10) of the Convention. The Court of Appeal did not accept this argument; it pointed out that Austrian law did not confer upon the individual an unlimited right to formulate value-judgments and that Article 10 (art. 10) authorised limitations laid down by law for the protection, inter alia, of the reputation of others. Furthermore, the task of the press was to impart information, the interpretation of which had to be left primarily to the reader. If a journalist himself expressed an opinion, it should remain within the limits set by the criminal law to ensure the protection of reputations. This, however, was not the position in the instant case. The burden was on Mr. Lingens to establish the truth of his statements; he could not separate his unfavourable value-judgment from the facts on which it was based. Since Mr. Kreisky was personally convinced that Mr. Wiesenthal used "mafia methods", he could not be accused of having acted immorally or in an undignified manner.

30. The appeal judgment was published in Profil on 22 February 1982, as required by the accessory penalty imposed on Mr. Lingens and his publisher.

PROCEEDINGS BEFORE THE COMMISSION

31. In his application of 19 April 1982 to the Commission (no. 9815/82), Mr. Lingens complained of his conviction for defamation through the press (Article 111 para. 2 of the Criminal Code).

32. The Commission declared the application admissible on 5 October 1983. In its report of 11 October 1984 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a breach of Article 10 (art. 10). The full text of the Commission's opinion is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT

33. At the hearing on 25 November 1985, the Government requested the Court "to hold that the provisions of Article 10 (art. 10) of the European Convention on Human Rights were not violated in the instant case", and the applicant asked for a decision in his favour.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

34. Under Article 10 (art. 10) of the Convention,

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Mr. Lingens claimed that the impugned court decisions infringed his freedom of expression to a degree incompatible with the fundamental principles of a democratic society.

This was also the conclusion reached by the Commission. In the Government's submission, on the other hand, the disputed penalty was necessary in order to protect Mr. Kreisky's reputation.

35. It was not disputed that there was "interference by public authority" with the exercise of the applicant's freedom of expression. This resulted from the applicant's conviction for defamation by the Vienna Regional Court on 1 April 1981, which conviction was upheld by the Vienna Court of Appeal on 29 October 1981 (see paragraphs 26 and 27 above).

Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10 (art. 10-2). It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and was "necessary in a democratic society" for the aforesaid aim or aims (see, as the most recent authority, the Barthold judgment of 25 March 1985, Series A no. 90, p. 21, para. 43).

36. As regards the first two points, the Court agrees with the Commission and the Government that the conviction in question was indisputably based on Article 111 of the Austrian Criminal Code (see paragraph 21 above); it was moreover designed to protect "the reputation or rights of others" and there is no reason to suppose that it had any other purpose (see Article 18 of the Convention) (art. 18). The conviction was accordingly "prescribed by law" and had a legitimate aim under Article 10 para. 2 (art. 10-2) of the Convention.

37. In their respective submissions the Commission, the Government and the applicant concentrated on the question whether the interference was "necessary in a democratic society" for achieving the above-mentioned aim.

The applicant invoked his role as a political journalist in a pluralist society; as such he considered that he had a duty to express his views on Mr. Kreisky’s condemnations of Mr. Wiesenthal (see paragraph 10 above). He also considered - as did the Commission - that a politician who was himself accustomed to attacking his opponents had to expect fiercer criticism than other people.

The Government submitted that freedom of expression could not prevent national courts from exercising their discretion and taking decisions necessary in their judgment to ensure that political debate did not degenerate into personal insult. It was claimed that some of the expressions used by Mr. Lingens (see paragraphs 12 and 15 above) overstepped the limits. Furthermore, the applicant had been able to make his views known to the public without any prior censorship; the penalty subsequently imposed on him was therefore not disproportionate to the legitimate aim pursued.

Moreover, the Government asserted that in the instant case there was a conflict between two rights secured in the Convention - freedom of expression (Article 10) (art. 10) and the right to respect for private life (Article 8) (art. 8). The fairly broad interpretation the Commission had adopted of the first of these rights did not, it was said, make sufficient allowance for the need to safeguard the second right.

38. On this latter point the Court notes that the words held against Mr. Lingens related to certain public condemnations of Mr. Wiesenthal by Mr. Kreisky (see paragraph 10 above) and to the latter’s attitude as a politician towards National Socialism and former Nazis (see paragraph 14 above). There is accordingly no need in this instance to read Article 10 (art. 10) in the light of Article 8 (art. 8).

39. The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need" (see the above-mentioned Barthold judgment, Series A no. 90, pp. 24-25, para. 55). The Contracting States have a certain margin of appreciation in assessing whether such a need exists (ibid.), but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see the Sunday Times judgment

of 26 April 1979, Series A no. 30, p. 36, para. 59). The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10) (ibid.).

40. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the articles held against the applicant and the context in which they were written (see, mutatis mutandis, the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 50). The Court must determine whether the interference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the Austrian courts to justify it are "relevant and sufficient" (see the above-mentioned Barthold judgment, Series A no. 90, p. 25, para. 55).

41. In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see the above-mentioned Handyside judgment, Series A no. 24, p. 23, para. 49).

These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, mutatis mutandis, the above-mentioned Sunday Times judgment, Series A no. 30, p. 40, para. 65). In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader (see paragraph 29 above).

42. Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10

para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

43. The applicant was convicted because he had used certain expressions ("basest opportunism", "immoral" and "undignified") apropos of Mr. Kreisky, who was Federal Chancellor at the time, in two articles published in the Viennese magazine Profil on 14 and 21 October 1975 (see paragraphs 12-19 above). The articles dealt with political issues of public interest in Austria which had given rise to many heated discussions concerning the attitude of Austrians in general - and the Chancellor in particular - to National Socialism and to the participation of former Nazis in the governance of the country. The content and tone of the articles were on the whole fairly balanced but the use of the aforementioned expressions in particular appeared likely to harm Mr. Kreisky's reputation.

However, since the case concerned Mr. Kreisky in his capacity as a politician, regard must be had to the background against which these articles were written. They had appeared shortly after the general election of October 1975. Many Austrians had thought beforehand that Mr. Kreisky's party would lose its absolute majority and, in order to be able to govern, would have to form a coalition with Mr. Peter's party. When, after the elections, Mr. Wiesenthal made a number of revelations about Mr. Peter's Nazi past, the Chancellor defended Mr. Peter and attacked his detractor, whose activities he described as "mafia methods"; hence Mr. Lingens' sharp reaction (see paragraphs 9 and 10 above).

The impugned expressions are therefore to be seen against the background of a post-election political controversy; as the Vienna Regional Court noted in its judgment of 26 March 1979 (see paragraph 24 above), in this struggle each used the weapons at his disposal; and these were in no way unusual in the hard-fought tussles of politics.

In assessing, from the point of view of the Convention, the penalty imposed on the applicant and the reasons for which the domestic courts imposed it, these circumstances must not be overlooked.

44. On final appeal the Vienna Court of Appeal sentenced Mr. Lingens to a fine; it also ordered confiscation of the relevant issues of Profil and publication of the judgment (see paragraphs 21, 26, 27 and 30 above).

As the Government pointed out, the disputed articles had at the time already been widely disseminated, so that although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future; the Delegate of the Commission rightly pointed this out. In the context of political debate such a sentence would be likely to deter journalists from

contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog (see, mutatis mutandis, the above-mentioned Barthold judgment, Series A no. 90, p. 26, para. 58).

45. The Austrian courts applied themselves first to determining whether the passages held against Mr. Lingens were objectively defamatory; they ruled that some of the expressions used were indeed defamatory - "the basest opportunism", "immoral" and "undignified" (see paragraph 21 above).

The defendant had submitted that the observations in question were value-judgments made by him in the exercise of his freedom of expression (see paragraphs 22 and 29 above). The Court, like the Commission, shares this view. The applicant's criticisms were in fact directed against the attitude adopted by Mr. Kreisky, who was Federal Chancellor at the time. What was at issue was not his right to disseminate information but his freedom of opinion and his right to impart ideas; the restrictions authorised in paragraph 2 of Article 10 (art. 10-2) nevertheless remained applicable.

46. The relevant courts then sought to determine whether the defendant had established the truth of his statements; this was in pursuance of Article 111 para. 3 of the Criminal Code (see paragraph 20 above). They held in substance that there were different ways of assessing Mr. Kreisky's behaviour and that it could not logically be proved that one interpretation was right to the exclusion of all others; they consequently found the applicant guilty of defamation (see paragraphs 24, 26 and 29 above).

In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. The Court notes in this connection that the facts on which Mr. Lingens founded his value-judgment were undisputed, as was also his good faith (see paragraph 21 above).

Under paragraph 3 of Article 111 of the Criminal Code, read in conjunction with paragraph 2, journalists in a case such as this cannot escape conviction for the matters specified in paragraph 1 unless they can prove the truth of their statements (see paragraph 20 above).

As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of the Convention.

The Vienna Regional Court held that the burden of proof was a consequence of the law and that it was not for the courts but for the legislature to make it less onerous (judgment of 1 April 1981; see paragraph 26 above). In this context the Court points out that it does not have to specify which national authority is responsible for any breach of the Convention; the sole issue is the State's international responsibility (see,

inter alia, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 13, para. 32).

47. From the various foregoing considerations it appears that the interference with Mr. Lingens' exercise of the freedom of expression was not "necessary in a democratic society ... for the protection of the reputation ... of others"; it was disproportionate to the legitimate aim pursued. There was accordingly a breach of Article 10 (art. 10) of the Convention.

II. THE APPLICATION OF ARTICLE 50 (art. 50)

48. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

49. In a letter received at the registry on 18 November 1985 the applicant sought just satisfaction in pecuniary form. At the hearings on 25 November the Government, while disputing that there had been a breach, agreed to certain items of the claim but sought further particulars in respect of others. Mr. Lingens provided these on 6 December 1985 and 17 March 1986, and the Government commented on them on 18 March. The Commission submitted its comments on 22 April 1986.

The question is accordingly ready for decision (Rule 53 para. 1 of the Rules of Court).

50. The applicant claimed firstly repayment of the 15,000 Schillings fine and of the 30,600 Schillings costs awarded against him by the Vienna Court of Appeal (see paragraph 27 above). He is indeed entitled to recover these sums by reason of their direct link with the decision the Court has held to be contrary to the freedom of expression (see, mutatis mutandis, the Minelli judgment of 25 March 1983, Series A no. 62, p. 21, para. 47). The Government moreover did not dispute this.

51. With regard to the expenditure incurred as a result of the accessory penalty of having to publish the judgment in the magazine Profil (see paragraph 30 above, taken together with paragraph 21), the applicant claimed 40,860 Schillings on the basis of the scale in force at the time.

The Government contended that this amount included, firstly, a loss of profit and, secondly, actual financial outlay; they claimed that only the latter should be taken into account for the purposes of Article 50 (art. 50).

The Court cannot speculate on the amount of profit Mr. Lingens might have derived from any paying advertisements that might hypothetically have been put in the magazine in place of the judgment of 29 October 1981. But it does not rule out that the applicant may thereby have suffered some

loss of opportunity which must be taken into account. There are also the costs indisputably incurred for reproducing the judgment in question.

The foregoing items cannot be calculated exactly. Assessing them in their entirety on an equitable basis, the Court awards Mr. Lingens compensation of 25,000 Schillings under this head.

52. The applicant further claimed 54,938.60 Schillings for costs and expenses incurred for his defence in the Regional Court and the Vienna Court of Appeal. This claim deserves consideration, as the proceedings concerned were designed to prevent or redress the breach found by the Court (see the above-mentioned Minelli judgment, Series A no. 62, p. 20, para. 45). Furthermore, the amount sought appears reasonable and should accordingly be awarded to the applicant.

53. As to the costs and expenses incurred in the proceedings before the Convention institutions, Mr. Lingens - who did not have legal aid in this connection - initially put them at 197,033.20 Schillings. The Government challenged both the amount, which they considered excessive, and the method of calculation. Subsequently counsel for the applicant submitted a fee note for 189,305.60 Schillings.

The Court reiterates that in this context it is not bound by the domestic scales or criteria relied on by the Government and the applicant in support of their respective submissions, but enjoys a discretion which it exercises in the light of what it considers equitable (see, inter alia, the Eckle judgment of 21 June 1983, Series A no. 65, p. 15, para. 35). In the instant case it was not disputed that the costs were both actually and necessarily incurred; the only matter in issue is whether they were reasonable as to quantum. The Court shares the Government’s reservations in this respect, and considers it appropriate to award the applicant 130,000 Schillings in respect of the costs in question.

54. Lastly, Mr. Lingens claimed 29,000 Schillings in respect of his travel and subsistence expenses for the hearings before the Commission and subsequently the Court.

Applicants may appear in person before the Commission (Rule 26 para. 3 of the Rules of Procedure), and this was what happened in the present case. Although they do not have the standing of parties before the Court, they are nonetheless entitled under Rules 30 and 33 para. 3 (d) of the Rules of Court to take part in the proceedings on certain conditions. Furthermore, their presence in the court-room is an undoubted asset: it can enable the Court to ascertain on the spot their view on issues affecting them (Rules 39 and 44 of the Rules of Court - see the König judgment of 10 March 1980, Series A no. 36, p. 19, para. 26). Nor does the sum claimed by Mr. Lingens under this head appear unreasonable.

55. The amounts awarded to Mr. Lingens under Article 50 (art. 50) of the Convention total 284,538.60 Schillings.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 10 (art. 10) of the Convention;

2. Holds that the Republic of Austria is to pay to the applicant 284,538.60 Schillings (two hundred and eighty-four thousand five hundred and thirty-eight Schillings sixty Groschen) as "just satisfaction".

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 8 July 1986.

Rolv RYSSDAL
President

For the Registrar
Jonathan L. SHARPE
Head of Division in the registry of the Court

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the separate opinion of Mr. Thór Vilhjálmsson is annexed to the present judgment.

R.R.
J.L.S.

CONCURRING OPINION OF JUDGE THÓR VILHJÁLMSSON

In this case, I have with certain hesitation joined my colleagues in finding a violation of Article 10 (art. 10) of the Convention. I have the following comment to make on the reasons set out in the judgment.

In the first sub-paragraph of paragraph 29, it is stated that the Vienna Court of Appeal found that Mr. Lingens had criticised Mr. Kreisky in his capacity both as a party leader and as a private individual (my underlining). Keeping this in mind, I find it difficult to agree with the last part of paragraph 38 of the judgment. I agree, though, with the other judges that it is Article 10 (art. 10) of the Convention that has to be interpreted and applied in the present case. This is to be done by taking the right to respect for private life, stated in Article 8 (art. 8), as one of the factors relevant to the question whether or not in this case the freedom of expression was subjected to restrictions and penalties that were necessary in a democratic society for the protection of the reputation of others. The text of paragraphs that follow paragraph 38 shows that this is in fact taken into account when the Court weighs the relevant considerations. As already stated, I agree with the conclusion stated in paragraph 47 and the operative provisions of the judgment.