



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

FIRST SECTION

CASE OF GRÜNE ALTERNATIVE WIEN v. AUSTRIA

(Application no. 13281/02)

JUDGMENT
(Striking Out)

STRASBOURG

29 November 2011

FINAL

29/02/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Grüne Alternative Wien v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President*,

Elisabeth Steiner,

Khanlar Hajiyeu,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Linos-Alexandre Sicilianos,

Erik Møse, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 8 November 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 13281/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Grüne Alternative Wien, the Vienna regional branch of an Austrian political party, on 25 March 2002.

2. The applicant was initially represented by Mr T. Prader, a lawyer practising in Vienna and subsequently by Ms M. Windhager, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador Helmut Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that the judgment of the Vienna Regional Court ordering it to pay compensation violated its freedom of expression.

4. By a decision of 2 February 2006 the Court declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The proceedings giving rise to the application

5. The applicant is the publisher of a periodical, “wien.direkt”, with a print run of 8,000. It is an “internal” paper of Grüne Alternative Wien which is delivered to sympathisers and functionaries of that party.

6. On 13 July 2000 Mr. H. Kabas, the chairman of the Vienna regional branch of the Austrian Freedom Party (FPÖ), brought compensation proceedings against the applicant claiming compensation under Section 6 of the Media Act (*Mediengesetz*) for defamation. He submitted that the applicant published in the issue no. 4 June/July 2000 of the periodical a picture of a modified election poster of the FPÖ posted in the course of the Vienna Municipal elections. Mr. H. Kabas contended that the modified picture showed him, wearing a Nazi-uniform. The poster was annotated with the following text sequence in Gothic letters:

“Our offer: honour & loyalty”

7. Mr. H. Kabas stressed that the picture implied that he stands for National Socialist ideas or at least sympathises with these ideas as the text sequence referred to the SS-maxim “Loyalty is my honour” (“*Meine Ehre heißt Treue*”) and that, therefore, the publication of the picture met the offence of defamation. He requested that the applicant be ordered to pay compensation. Furthermore, he requested supplementary measures under the Media Act, such as the publication of a notice that proceedings under that Act had been opened and the publication of the judgment.

8. On 12 September 2000 the applicant filed observations. It stressed that the picture did not imply that Mr H. Kabas stood for National Socialist ideas but was a caricature expressing that a front man of the FPÖ maintains a questionable approach to the National Socialist era. The caricature referred to a recent speech of Mr E. Windholz, the chairman of the Lower Austria regional branch of the FPÖ, given to party members in the course of a regional branch party congress. In his speech Mr E. Windholz used the expression “Loyalty is our honour”. Mr H. Kabas defended Mr. E. Windholz and his statement in public. The applicant wanted to criticise these statements by the caricature at issue.

9. On 23 October 2000 the Vienna Regional Court (*Landesgericht*) ordered the applicant to publish a notice that the proceedings under the Media Act were pending. It found that the published picture showed Mr. H. Kabas wearing a uniform similar to a SA-uniform (*Sturmabteilung*).

Instead of the swastika the tie of the uniform showed an “F” as short form of “FPÖ”. The court considered that this picture with the annotated text sequence (cited above) associated Mr. H. Kabas with National Socialism.

10. On 14 November 2000 the applicant submitted further observations. It pointed out that functionaries of the FPÖ had repeatedly used expressions which were typically used in National Socialist parlance and referred to report of September 2000 by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, who received a mandate from fourteen member states of the EU to deliver a report covering, *inter alia*, the evolution of the political nature of the FPÖ in which the experts concluded that the FPÖ is a “right wing party with extremist expressions”. The applicant stressed that it wanted to criticise the repeated use of typical National Socialist expressions in a satirical way through a caricature and to point at the questionable approach to the National Socialist era by Mr H. Kabas and other functionaries of the FPÖ. Moreover, it contended that the picture, which was printed in black-and-white, could not give the impression that Mr H. Kabas was pictured with a Nazi-uniform. The election poster was modified in that a harness was put on Mr H. Kabas and on his tie a white circle with an “F” was added. It also submitted that the court had to consider the political context in which the picture was published.

11. On 8 January 2001 Mr. H. Kabas submitted his observations. He repeated his prior allegations and contended that the FPÖ did not stand for a xenophobic policy. The wrong and distorted statement of fact of the picture, associating Mr H. Kabas with National Socialism; violated his personality rights which had to be respected.

12. On 30 January 2001 the Vienna Regional Court, after having held a hearing, awarded Mr H. Kabas a compensation of 10,000 Austrian shillings (726.73 euros (EUR)) and ordered the applicant to publish the judgment in its periodical. It found that the published picture showed Mr H. Kabas in a uniform which was clearly similar to a SA-uniform and that this was obvious to the average reader of the periodical at issue. Instead of the swastika the tie of the uniform showed an “F” as short form of the “FPÖ”. It was common knowledge that the SA was a National Socialist combat unit. Thus, the picture at issue alleged that Mr H. Kabas had a National Socialist attitude. Since the Prohibition Act (*Verbotsgesetz*) criminalises activities inspired by National Socialist ideas; the picture could violate Mr H. Kabas’ honour and, thus, meet objective elements of the offence of defamation within the meaning of Section 111 of the Criminal Code. Moreover, the used annotation associated Mr H. Kabas with National Socialism. The applicant’s submissions about the political nature of the FPÖ and the political attitude of its functionaries did not constitute sufficient evidence for proving that Mr H. Kabas performed National Socialist activities which would have been necessary pursuant to the Austrian courts constant case-law concerning media offences. Although politicians were required to

sustain a higher degree of criticism than other people, there were nevertheless limits to such criticism. The unproven allegation of National Socialist attitudes constituted a massive attack on his reputation even if he was a politician.

13. On 18 April 2001 the applicant filed an appeal. It submitted that the Regional Court had qualified the picture as statement of fact which alleges that Mr H. Kabas had performed National Socialist activities. However, referring to the case *Jerusalem v. Austria* (no. 26958/95, 27.2.2001, ECHR 2001-II, § 33), the published picture constituted a justified value judgment concerning Mr H. Kabas' questionable approach to National Socialism. Moreover, the choice of a caricature and persiflage as satirical means of expression and the publication of the picture in the periodical's rubric "commentaries" points out that the publication constituted a value judgment justified under Article 10 of the Convention. Further, the applicant stressed that the picture was published in a periodical of an opposition party, as immediate reaction to the statement of a functionary of the FPÖ, using the above mentioned SS-maxim and concerned the criticism of a high official of a ruling party. It had, therefore, to be considered as a political value judgment which by its nature is not accessible to proof of truth.

14. On 26 September 2001 the Court of Appeal dismissed the applicant's appeal. It found that the picture at issue implies that Mr M. Kabas performed National Socialist activities or, at least, had a National Socialist attitude. Although involving also the expression of a value judgment, the picture essentially constituted a statement of fact, namely that Mr H. Kabas performed National Socialist activities. Such a statement is susceptible to proof of truth. As to the applicant's submissions regarding the satirical and caricatural character of the picture, the court found that these arguments could not change its point of view as the emphasis of the publication was put on the personal statement which was insulting.

B. Reopening of the proceedings following the decision on admissibility

15. Following the decision on the admissibility of the application in the present case, the Government informed the Court that the Procurator General's Office (*Generalprokuratur*) had lodged a plea of nullity for the preservation of the law.

16. In a judgment of 8 May 2008 the Supreme Court (*Oberster Gerichtshof*) ordered the extraordinary reopening of the proceedings, set aside the judgments of 30 January 2001 and 26 September 2001 and ordered a rehearing of the case.

17. The Supreme Court found that there were serious doubts regarding the correctness of the judgments in question as to the assessment of the contents of the publication at issue.

18. Furthermore, the courts had failed to pay sufficient attention to the case-law of the European Court of Human Rights, in particular that the meaning of a picture or of a passage of text disseminated in the media had always to be considered in its context.

19. On 22 July 2008 the Regional Court discontinued the proceedings because Mr Kabas had withdrawn his action. In its decision the Regional Court also found that the plaintiff, Mr. Kabas, had to reimburse the applicant's costs of proceedings.

20. On 18 May 2009 the Regional Court fixed the amount the plaintiff had to reimburse and on 17 July 2009 the Court of Appeal dismissed his appeal against this cost order.

II. RELEVANT DOMESTIC LAW

21. Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim damages from him. Compensation can be awarded up to EUR 14,535. In this context "defamation" is defined in Section 111 of the Criminal Code as follows:

"1. As it may be perceived by a third party, anyone who accuses another of having a contemptible character or attitude, or of behaving 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."

22. Article 363a of the Code of Criminal Procedure reads as follows:

"(1) If a judgment of the European Court of Human Rights finds a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (BGBl no. 210/1958), or one of the Protocols thereto, as a result of a decision or order of a criminal court, the proceedings shall be reopened on application in so far as it cannot be ruled out that the violation may have had an adverse effect for the person concerned on the content of a decision of a criminal court.

(2) Applications to reopen proceedings shall be determined in all cases by the Supreme Court. An application may be submitted by the person affected by the violation found and by the Procurator General ..."

THE LAW

23. By letter of 21 June 2011 the Government informed the Court of the outcome of the reopened domestic proceedings, without making any specific requests regarding the further examination of the application. In their letter of 12 July 2011 the applicants stated that they “wished to pursue the application in respect of all costs”. The applicant submitted that meanwhile Mr Kabas had retransferred the compensation he had been awarded by the judgment initially complained of plus the costs of his legal representation. He had also paid the costs of the applicant’s legal representation in the domestic proceedings as fixed by the Regional Court in its decision of 18 May 2009.

24. The Court observes that in three recent comparable cases it decided to strike the applications out of its list, considering that the matter had been resolved within the meaning of Article 37 § 1 (b) of the Convention (see *Verlagsgruppe News GmbH v. Austria* (dec.), no. 43521/06, 19 October 2009; *Standard Verlags GmbH v. Austria* (dec.), no. 17928/05, 28 January 2010 and *Standard Verlags GmbH v. Austria and Rottenberg* (dec.), no. 36409/04, 1 July 2010).

25. Article 37 § 1 of the Convention, in its relevant parts, provides as follows:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

...

(b) the matter has been resolved; or

...

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.”

26. In order to conclude that the matter has been resolved within the meaning of Article 37 § 1 (b) and that there is therefore no longer any objective justification for the applicant to pursue the application, the Court reiterates that it must examine, firstly, whether the circumstances complained of directly by the applicant still obtain and secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 42, 24 October 2002, and *Shevanova v. Latvia* (striking out) [GC], no. 58822/00, § 45, 7 December 2007).

27. The Court observes that the judgments complained of by the applicant were set aside by the Supreme Court’s judgment of 8 May 2008, which referred the case back to the Regional Court for a rehearing. This rehearing, however, did not take place because the plaintiff meanwhile

abandoned his action, paid back the compensation awarded and paid the procedural costs incurred by the applicant in the proceedings at issue.

28. Since the impugned judgments have been quashed and the proceedings against it terminated, the applicant has already obtained a position, which would normally follow a finding of a violation of the Convention by the Court pursuant to Article 363a of the Code of Criminal Procedure, which also applies in proceedings under the Media Act (see above). A further examination of the present case by the Court is therefore not required.

29. As to the question whether the effects of a possible violation of the Convention have been redressed, the Court considers that this is the case as the proceedings have been terminated in the applicant's favour. In respect of the applicant's claim for remaining costs the Court notes that the Regional Court had ordered the plaintiff to pay all the costs of the proceedings, had subsequently fixed these costs and, according to information from the applicant itself; the costs have meanwhile been transferred and received. The applicant submits that it had omitted to claim back court fees in the amount of EUR 450. However, the applicant has not shown that it had been impossible to claim also this amount in the cost proceedings. As to the applicant's claim for costs incurred in civil proceedings conducted between the applicant and Mr. Kabas, the Court observes that these proceedings have not been the subject matter of the present application and consequently cannot be taken into account. The applicant, even though claiming explicitly only costs, referred to a previously submitted claim for non-pecuniary damage in the amount of EUR 10,000. However, since the Court found that the effects of a possible violation of the Convention have been redressed there is no room for any damages. Finally, the Court refers to the three cases cited above in which it has already noted that it is possible to claim compensation for publication costs under the Media Act (see *Verlagsgruppe News GmbH* (dec.); *Standard Verlags GmbH* (dec.); and *Standard Verlags GmbH and Rottenberg* (dec.) all cited above).

30. Moreover, the applicant claimed that it had not received compensation for the costs of the Convention proceedings, for which they claimed the amount of EUR 5,806.20. Pursuant to Rule 43 § 4 of the Rules of the Court, the Court has discretion to award costs if a case is struck out of the list. That the applicant still has a claim for costs does not therefore prevent the application of Article 37 § 1 of the Convention.

31. In these circumstances, the Court concludes that it is no longer justified to continue the examination of the application within the meaning of Article 37 § 1 (c) of the Convention. Furthermore, the Court finds no reasons of a general character, as defined in Article 37 § 1 *in fine*, which would require the examination of the application by virtue of that Article.

32. Accordingly, the case should be struck out of the list.

33. The Court finds it further appropriate, in the circumstances of the case, to make an award in respect of the costs of the Convention proceedings (see *Verlagsgruppe News GmbH* (dec.), *Standard Verlags GmbH* (dec.) and *Standard Verlags GmbH and Rottenberg* (dec.), all cited above). The Government commented that the applicant's claim for costs was excessive. The Court considers that the costs claimed were necessary and reasonable as to quantum and awards them in full. Furthermore, the Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to strike the case out of the list;

2. *Holds*

(a) that the Government is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,806.20 (five thousand eight hundred and six euros twenty cents), plus any tax that may be chargeable to the applicant on this amount, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 29 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Nina Vajić
President