



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

FIFTH SECTION

CASE OF LEWIT v. AUSTRIA

(Application no. 4782/18)

JUDGMENT

STRASBOURG

10 October 2019

FINAL

20/11/2019

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

In the case of Lewit v. Austria,

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

Angelika Nußberger, *President*,

Gabriele Kucsko-Stadlmayer,

Ganna Yudkivska,

André Potocki,

Síofra O’Leary,

Mārtiņš Mits,

Lado Chanturia, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 10 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 4782/18) 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 an Austrian national, Mr Aba Lewit (“the applicant”), on 18 January 2018.

2. The applicant was represented by Ms M. Windhager, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Austrian Ministry for Europe, Integration and Foreign Affairs.

3. The applicant alleged, in particular, that the Austrian courts had failed to comply with their positive obligation under Article 8 of the Convention to protect his reputation and his personal integrity against untrue, defamatory statements made in a right-wing periodical.

4. On 21 June 2018 notice of the application was given to the Government.

5. On 1 October 2018 the Polish Government were granted leave by the President of the Chamber to intervene as a third party in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court). They filed their written observations on 4 February 2019.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

6. The applicant was born in 1923 and lives in Vienna.

A. Background to the case

7. The applicant is a survivor of the Holocaust. In 1940 he was arrested by the SS during a raid, following which he was subjected to forced labour by the Nazi regime. Subsequently, he was deported to the Mauthausen concentration camp, and was liberated from its Gusen II sub-camp in May 1945.

8. In its July/August 2015 issue, the right-wing periodical *Aula* published an article entitled “The liberated from Mauthausen as mass murderers” (“*Mauthausen-Befreite als Massenmörder*”; hereinafter “the 2015 article”). It contained, among other things, the following passages:

“The fact that a not inconsiderable number of prisoners freed from Mauthausen became a plague for the people is deemed proved by the judiciary and is nowadays only disputed by concentration camp fetishists. ...

[O]n 7 May [1945] Mauthausen and Gusen were under the control of the Americans. All of a sudden, 18,000 registered prisoners were free, in addition to an unknown number of unregistered prisoners. Robbing and plundering, murdering and defiling, the criminals plagued the country as it suffered from the ‘liberation’ [from the Nazi regime].”

German original:

“Die Tatsache, dass ein nicht unerheblicher Teil der befreiten Häftlinge aus Mauthausen den Menschen zur Landplage gereichte, gilt für die Justiz als erwiesen und wird heute nur noch von KZ-Fetischisten bestritten. ...

[A]m 7. Mai [1945] war Mauthausen samt Gusen in amerikanischer Hand. Auf einen Schlag waren über 18.000 registrierte Häftlinge frei, noch dazu eine unbekannte Anzahl nicht erfaßter Insassen. Raubend und plündernd, mordend und schändend plagten die Kriminellen das unter der ‘Befreiung’ [vom NS-Regime] leidende Land.”

9. Because of this article, an Austrian member of parliament from the Green Party (*Die Grünen*), H.W., submitted a statement of facts to the Graz public prosecutor’s office (*Staatsanwaltschaft*) in September 2015, requesting an investigation into whether the text of the article amounted to a violation of the National Socialism Prohibition Act (*Verbotsgesetz*). The investigations launched in respect of the author of the article, M.W.D., for possible offences under the National Socialism Prohibition Act, libel and false suspicion (Article 297 of the Criminal Code) and incitement to hatred (Article 283 of the Criminal Code), were ultimately discontinued by the public prosecutor’s office, with the following reasoning, *inter alia*:

“According to the [dictionary], the term ‘Landplage’ [literally ‘plague on the country’] is to be understood as a plague that represents considerable nuisance in vast areas and causes great damage. It is understandable that the release of several thousand people from the Mauthausen concentration camp represented a nuisance to the areas affected in Austria. Since, in addition to the predominantly Jewish camp inmates, those liberated also included prisoners who had been deposited in Mauthausen because of violent and property-related offences, it cannot be ruled out

that in the context of the liberation criminal acts ... were committed by those who were liberated. ... The constituent element of the offence of false suspicion ... is therefore not fulfilled.”

German original:

“Unter dem ... verwendeten Begriff ‘Landplage’ ist laut Duden eine Plage, die in weiten Gebieten eine große Belästigung darstellt und durch die großer Schaden entsteht, zu verstehen. Es ist nachvollziehbar, dass die Freilassung mehrerer tausend Menschen aus dem Konzentrationslager Mauthausen eine Belästigung für die betroffenen Gebiete Österreichs darstellte. Da zu den Befreiten neben den überwiegend jüdischen Lagerinsassen, auch aufgrund von Gewalt- und Eigentumsdelikten in Mauthausen deponierte Häftlinge zählten, kann auch nicht ausgeschlossen werden, dass im Rahmen der Befreiung strafbare Handlungen ... von Befreiten begangen wurden. ... Das Tatbestandsmerkmal der falschen Verdächtigung ... ist daher nicht erfüllt.”

10. This reasoning prompted the same member of parliament to submit a parliamentary question (*parlamentarische Anfrage*) to the Minister of Justice. In his answer of 25 March 2016 the Minister explained that the termination of the proceedings had ultimately corresponded to the factual and legal situation. However, he criticised the formulation of the reasons given for discontinuing the investigation.

11. In February 2016 the same periodical published another article by the same author entitled “The greatest rogue in the whole country is, and will always be, the informer” (“*Der größte Lump im ganzen Land ist und bleibt der Denunziant*”; hereinafter “the 2016 article”). It was directed against the parliamentarian H.W. The author reported on the discontinuation of the criminal proceedings against him, summarised the 2015 article, and repeated the impugned statements verbatim (see paragraph 8 above). He concluded that the investigation “was crushed by the objectivity of the public prosecutor’s office” and discontinued because of the absence of a criminal offence.

12. The Austrian Press Council (*Österreichischer Presserat*) issued a decision on 30 March 2016 (GZ 2016/S 002 – III), in which it concluded that the publication of the 2015 article “The liberated from Mauthausen as mass murderers” constituted a grave violation of section 7 (protection against libel and discrimination) of the Code of Ethics of the Austrian Press. It found as follows:

“... The Chamber finds particularly reprehensible the passage which first of all refers to all those liberated from Mauthausen and immediately afterwards states that ‘robbing and plundering, murdering and defiling, the criminals plagued the country as it suffered from the ‘liberation’.

The author has evidently aimed to stigmatise concentration camp victims as criminals, similarly to what the Nazi regime tried to do before the end of the Second World War.

The Chamber considers this to be a perpetrator-victim reversal. The State-organised mass murder that took place in the Mauthausen concentration camp is not mentioned in the article. ...

The Chamber also views the terms used in the article ‘concentration camp fetishists’ ... as extremely critical and as evidence that the author demonstrates a trivialising stance towards the atrocities committed in the Mauthausen concentration camp.”

B. Proceedings concerning the 2015 article

13. On 30 June 2016 eight former Mauthausen concentration camp prisoners, the daughter of a deceased former Mauthausen prisoner, and a former prisoner at the Theresienstadt concentration camp lodged a civil action under Article 1330 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) in respect of the 2015 article, seeking an interim injunction (*Einstweilige Verfügung*), an injunction (*Unterlassung*), the retraction of the impugned statements and the publication of the retraction. The applicant was not among the claimants.

14. By a decision of 5 August 2016 the Graz Civil Court (*Landesgericht für Zivilrechtssachen*) granted an interim injunction to secure the claim, in which the defendants (the Aula Publishing Company Ltd (*Verlags GmbH*) and the author of the article, M.W.D.) were obliged to refrain from repeating and/or spreading the impugned statements literally or synonymously, until a final decision had been given.

15. The interim injunction was upheld by the Graz Court of Appeal (*Oberlandesgericht*) on 7 October 2016, as well as by the Supreme Court (*Oberster Gerichtshof*) in a decision of 29 November 2016. Much of the legal discussion in the domestic proceedings revolved around the question whether the claimants were sufficiently affected by the impugned statements and therefore had *locus standi* to seek the injunction. The Supreme Court concluded as follows in respect of that issue:

“In the instant case, those imprisoned by the National Socialist regime because of their faith, their origins or their political views were not only described as ‘criminals’ in the impugned article entitled ‘The liberated from Mauthausen as mass murderers’, but they were also accused of having committed very serious crimes. If, given this factual situation, the lower courts have concluded that the claimants (resistance fighters and persons persecuted on political or racial grounds, and the heir of a person who was persecuted on racial grounds) were sufficiently affected by the impugned statements ..., and that the statements were not only morally lacking in respect for the victims of National Socialism, but also contained untrue accusations of criminal behaviour which can hardly be surpassed in their intensity, such a conclusion cannot be seen as an incorrect assessment to be addressed by the Supreme Court.”

German original:

“Im vorliegenden Fall wurden im inkriminierten Artikel unter der Überschrift ‘Mauthausen-Befreite als Massenmörder’ die vom NS-Regime auch aufgrund ihres Glaubens, ihrer Herkunft oder ihrer politischen Gesinnung inhaftierten Häftlinge nicht nur als ‘Kriminelle’ bezeichnet, sondern diesen auch noch pauschal unterstellt,

schwerste kriminelle Handlungen begangen zu haben. Wenn die Vorinstanzen bei dieser Sachlage zu der Einschätzung gelangten, dass die Kläger (Widerstandskämpfer bzw. politisch und aus rassistischen Gründen Verfolgte bzw. eine Erbin eines aus rassistischen Gründen Verfolgten) von den inkriminierten Äußerungen in ausreichendem Maß betroffen sind ..., und es den Vorwürfen nicht nur in moralischer Hinsicht an Respekt vor den Opfern des Nationalsozialismus mangle, sondern es sich um unwahre und an Intensität kaum zu überbietende Vorwürfe von kriminellem Verhalten handle, so ist darin keine vom Obersten Gerichtshof aufzugreifende Fehlbeurteilung zu erblicken.”

16. On 14 February 2017 the injunction proceedings were terminated by a court settlement before the Graz Civil Court, by which the defendants undertook, on pain of judicial enforcement, “to henceforth refrain from repeating and/or spreading the literal and/or synonymous assertion that the former prisoners liberated from the Mauthausen concentration camp, its sub-camps or other concentration camps were mass murderers and/or a plague for the population and/or plagued the country by robbing and plundering, murdering and defiling, and committed the most serious crimes”. Moreover, they were obliged to retract the impugned statements and to publish the retraction in the periodical *Aula*.

17. The applicant, not having been a party to the civil proceedings, was therefore not a party to the court settlement either.

C. Proceedings concerning the 2016 article

18. In a separate set of proceedings, on 15 July 2016, the applicant and nine of the ten claimants who had been party to the civil proceedings described above (see paragraphs 13-16) brought a claim for compensation against the owner of the periodical *Aula* and requested publication of a subsequent judgment under section 8a in conjunction with section 6 of the Media Act (*Mediengesetz*) on account of the statements cited in the 2016 article (see paragraph 11 above). They argued that the offences of defamation (Article 111 of the Criminal Code (*Strafgesetzbuch*)) and insult (Article 115 of the Criminal Code) had been committed by the impugned media article and that their human dignity had been violated. The 2015 article was not the subject matter of those proceedings.

19. The claimants argued that in defamation cases against a group of people, it was decisive for the question of their legal standing that every individual belonging to that group was identifiable, even if not named personally – which was the case here. They reiterated that they had all been victims of the National Socialist regime, and had been imprisoned because of their origins, their beliefs or their faith. At the time of their arrest and/or deportation to the concentration camps, some of them had been children, and others political detainees. They had never committed any criminally significant acts, either before their imprisonment or after their liberation from the concentration camps.

20. The claimants further argued that the author of the 2016 article had not only repeated the impugned statements in a triumphant manner; he had also indicated that he identified with them. Moreover, because of the discontinuation of the criminal investigation, he had received confirmation of his own point of view that the statements had been permissible.

21. On 9 September 2016 the Graz Regional Criminal Court (*Landesgericht für Strafsachen*; hereinafter “the Criminal Court”) dismissed the claim for compensation and the application for publication. The decisive question for the court was whether an average consumer would individually recognise the claimants and would associate the defamatory allegations with them. It reiterated that in May 1945 about 20,000 people had been liberated from Mauthausen. Because of this large number, the court found that it could not be established that the applicants were individually identifiable in the article in question. It held as follows:

“In principle, statements covering several persons under a collective name can be punishable under Articles 111 and 115 of the Criminal Code and can therefore give rise to a claim under section 6(1) of the Media Act. ... According to the now established and consistent case-law, the size of the group affected by such a statement is decisive, as is whether the recipient of the statement may associate a particular accusation, on the basis of its meaning, with a single member of the group ... If the claimants are counted as part of the group of approximately 18,000 to 20,000 prisoners liberated from Mauthausen, they cannot have legal standing, that is, they cannot be personally affected, since in the case of groups the entitlement of any individual to bring a claim has to be limited where the group comprises more than approximately fifty people ... A group of 18,000 to 20,000 people is in any event too large for each individual member of the group to be entitled to bring the claim.”

German original:

“Grundsätzlich können auch Äußerungen, die mehrere Personen bloß unter einer Kollektivbezeichnung erfassen, strafbar im Sinne der §§ 111 und 115 StGB [Strafgesetzbuch] und somit anspruchsbegründend für § 6 Abs. 1 Medien[gesetz] sein. Die Identifizierbarkeit muss sich aus dem Medienbericht selbst ergeben. ... Nach nunmehr gefestigter und ständiger Judikatur kommt es einerseits auf die Größe des von einer Äußerung betroffenen Kollektivs an aber auch darauf, ob der Erklärungsempfänger den jeweiligen Vorwurf nach dessen Sinngehalt auf ein einzelnes Mitglied des Kollektivs beziehen kann ... Zählt man die Antragsteller als dem Kollektiv der rund 18.000 bis 20.000 befreiten Mauthausen-Häftlinge zugehörig, können sie daher nicht aktivlegitimiert sein, somit nicht persönlich betroffen sein, da bei Kollektiven die Antragsberechtigung jedes Einzelnen dort zu limitieren ist, wo das Kollektiv mehr als etwa 50 Personen umfasst ... Ein Kollektiv von 18.000 bis 20.000 Personen ist nach Ansicht des Erstgerichts jedenfalls zu groß, um die Antragslegitimation jedem einzelnen Mitglied dieses Kollektivs zuzusprechen.”

22. In addition, the Criminal Court reiterated that in criminal law, the rule *in dubio pro reo* (as opposed to the “rule of ambiguity” (*Unklarheitenregel*) under civil law – see paragraph 32 below) meant that if the semantic content (*Bedeutungsinhalt*) of a statement was ambiguous or disputed, the court always had to interpret it in the most favourable way for the accused. It summarised the article in question and, applying this rule,

concluded that it did not contain any separate – defamatory – statements, but that it only described, albeit in a highly polemical and sensationalistic manner (*in äußerst polemischer und reißerischer Art und Weise*), the outcome of the investigation by the Graz public prosecutor’s office in respect of M.W.D.

23. The claimants appealed, arguing, in particular, that they had indeed been individually identifiable to readers of the 2016 article. While it was true that initially there had been about 20,000 people liberated from Mauthausen, this group today only consisted of those few former prisoners who were still alive. In addition, all of the claimants were known to the public, some of them in particular because of their activism as Holocaust survivors. It followed that they had legal standing to bring their claim. Moreover, they reiterated that the manner in which the article was written expressed the author’s identification with and confirmation of the impugned statements. The average reader of the article would conclude that it was permissible to call all former Mauthausen prisoners “criminals” who had been “robbing and plundering, murdering and defiling” and had constituted a “plague”.

24. The Graz Court of Appeal (*Oberlandesgericht*) dismissed the appeal in a decision of 21 July 2017. It did not elaborate on the question of the claimants’ legal standing. The Court of Appeal held that despite the lack of an explanation from the Criminal Court as to which different interpretations had prompted it to have recourse to the principle *in dubio pro reo*, it agreed – without any further explanation – with the outcome of this legal assessment, namely that the statements in question did not have a separate meaning from those published in the 2015 article, even if the average reader of the periodical *Aula* were to understand the article as confirming that such statements were not criminally significant.

25. Moreover, it held that nobody could personally be affected within the meaning of section 6 (1) of the Media Act by the verbatim repetition of a statement (which could have fulfilled the objective factual elements of the offences under Articles 111, 115 and 297 of the Criminal Code) aimed at helping readers to understand the report on the outcome of the criminal proceedings.

26. On 19 January 2018 the applicant suggested that the Attorney General (*Generalprokuratur*) lodge a plea of nullity for observance of the law (*Nichtigkeitsbeschwerde zur Wahrung des Gesetzes*) with the Supreme Court under Article 23 (1) of the Code of Criminal Procedure (*Strafprozessordnung*) against the Graz Court of Appeal’s judgment of 21 July 2017. The Attorney General did not act on that suggestion, but explained the following, *inter alia*:

“The fact that the article in question could also have been interpreted differently, to the effect that an opportunity was taken to publish the impugned statements once

again, does not lead to a legal presumption of arbitrariness in the sense of manifestly insufficient reasoning ...”

German original:

“Dass auch eine andere Interpretation des gegenständlichen Artikels, nämlich dahin dass darin gleichsam die Gelegenheit genutzt wurde, die inkriminierten Äußerungen ein weiteres Mal zu publizieren, im Bereich des Möglichen gelegen wäre, führt nicht zur rechtlichen Annahme von Willkür im Sinne einer offenbar unzureichenden Begründung ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Proceedings under Article 1330 of the Civil Code

27. Article 1330 of the Civil Code defines the legal consequences of defamation and regulates the requirements for an action for damages and an injunction. It reads as follows in its relevant parts:

“(1) Anyone who has suffered material damage or loss of profit as a result of defamation may claim compensation.

(2) The same applies if anyone disseminates statements of fact which jeopardise another person’s credit, income or livelihood and if the untruth of the statement was known or must have been known to him or her. In such a case the public retraction of the statement may also be requested ...”

28. According to the Supreme Court’s case-law, in the case of defamation of a group, individuals belonging to the group are entitled to bring a claim if the group is limited in size. The intensity of an accusation is naturally higher if the group is smaller in size, and is reduced if the group is larger. The decisive factor is whether the individual was personally identifiable (see Supreme Court judgment of 8 November 2001, no. 6 Ob 231/01s).

29. Pursuant to Article 1490 (2) of the Civil Code, the three-year limitation period under Article 1489 of the Civil Code applies to claims for damages and for an injunction on account of false defamatory statements of fact (Article 1330 (2) of the Civil Code), even if they also damage a person’s reputation for the purposes of Article 1330 (1) of the Civil Code (see Supreme Court judgment of 14 May 2009, no. 6 Ob 265/08a).

30. Pursuant to section 1 of the Enforcement Act (*Exekutionsordnung*), court judgments or settlements concerning complaints under Article 1330 of the Civil Code constitute enforceable legal instruments. Therefore, if one party breaches the injunction agreed upon in a court settlement, the other party to the settlement may request the enforcement of the injunction pursuant to section 355 of the Enforcement Act, which may result in a fine or imprisonment for up to one year in total and/or an obligation to provide collateral for damage resulting from any further violations.

31. According to the Supreme Court's case-law (see, for example, judgment of 10 April 1991, no. 1 Ob 36/89), claims in respect of non-pecuniary damage sustained as a result of humiliation caused by a media report can only be asserted under the Media Act (see paragraph 37 *in fine* below), whereas Article 1330 of the Civil Code does not provide for compensation for non-pecuniary damage.

32. The Supreme Court's case-law further states that the assessment of the semantic content of a statement in civil proceedings is, in general, a question of law (*Rechtsfrage*), which depends on the particular circumstances of the specific case, in particular the concrete wording and the context in which the statement was made (see judgment of 12 October 2006, no. 6 Ob 159/06k). The so-called "rule of ambiguity" (*Unklarheitenregel*) states that what is decisive in establishing the semantic content is how the statements in question are understood within their context by a significant part of the addressees (RIS-Justiz RS0031883, most recently reiterated in the judgment of 27 February 2019, no. 6 Ob 220/18y). In the case of ambiguous statements, the defendant must, in principle, accept the less favourable interpretation (RIS-Justiz RS0079648; see, among many other authorities, Supreme Court judgment of 22 September 2015, 4 Ob 127/15b). However, the application of the "rule of ambiguity" has to be weighed against the basic right to freedom of expression (judgment of 20 October 2009, 4 Ob 132/09d).

B. Proceedings under the Media Act

33. In cases of alleged violations of personality rights, sections 6 et seq. of the Media Act regulate an affected person's entitlement to compensation from the owners of media publications in which the violation of personality rights occurred. Section 6 (1) of the Media Act reads as follows:

"If the objective factual elements [*objektiver Tatbestand*] of the offences of defamation, insult, ridicule or false accusation are fulfilled by media content, the person affected shall be entitled to claim compensation from the media owner for the prejudice suffered. The amount of the damage has to be assessed on the basis of the extent and the consequences of the publication, and in particular also the manner and the extent of the dissemination of the media content; the preservation of the media owner's economic existence must be taken into account. The amount of the compensation may not exceed 20,000 euros, and in cases of false accusation or of defamation with particularly serious consequences [it may not exceed] 50,000 euros."

34. According to the Supreme Court's case-law, not all principles of tort law are applicable to claims for compensation under the Media Act, as they are essentially claims under civil law *sui generis* (see Supreme Court judgment of 7 October 1997, no. 14 Os 75/97). It is not relevant whether the media owner was guilty, nor does the claimant have to provide proof of a specific amount of damage (see Supreme Court judgment of 20 September 1995, no. 13 Os 127, 128/95). Despite their civil-law nature,

such claims are examined in criminal proceedings. According to the Supreme Court, the ruling on compensation amounts to a criminal sanction (see Supreme Court judgment of 12 November 2002, no. 14 Os 118/02).

35. A person who was affected by a statement falling under section 6 of the Media Act and is thus entitled to claim compensation must in principle be an individual, that is, a natural person and not a legal entity or a group (see Supreme Court judgment of 29 June 2011, no. 15 Os 151/10k). Concerning defamatory statements affecting groups, the question whether each individual of the group is entitled to claim compensation under section 6 of the Media Act depends on his or her identifiability, which is closely connected to the size of the group (see Supreme Court judgment of 22 January 1979, no. 13 Os 172/78). With regard to small groups, the Supreme Court has held that the statement would normally be meant in such a way that every individual of the group was affected. Thus, every individual is entitled to file a claim.

36. If the group consists of a large number of people, the domestic courts have generally found that individuals were not affected. However, in certain cases the Supreme Court has accepted that members of larger groups were personally affected (see for instance judgments of 11 January 1978, no. 10 Os 196/77 and 29 June 2011, no. 15 Os 151/10k).

37. Under section 8 (1) of the Media Act, an affected person may claim compensation under sections 6 to 7c of the Media Act in criminal proceedings in which the media owner is the defendant, or a party for the purposes of section 41 (6) of the Media Act in separate proceedings for publication of the judgment under section 34 (2) of the Media Act. In this case, the ruling on the claim for compensation will be included in the judgment terminating the proceedings.

38. If no such criminal proceedings have been initiated – for example, because the affected person has not brought a private prosecution for defamation under Article 71 of the Code of Criminal Procedure in conjunction with Article 111 and Article 117 (1) of the Criminal Code – the claim for damages may be lodged in a separate application under section 8a of the Media Act. In this case, the ruling on compensation will be given in a separate judgment.

39. In accordance with section 8a (1) of the Media Act, in proceedings concerning a separate application for compensation the provisions governing criminal proceedings based on a private prosecution are applicable *mutatis mutandis* unless the Media Act provides otherwise. Pursuant to section 8a (2) of the Media Act, the application must be lodged within six months after the impugned statement was first disseminated, broadcast or made downloadable; otherwise the claim becomes time-barred.

40. In addition to the claims under sections 6 et seq. of the Media Act for (financial) compensation, the third chapter of the Media Act provides for the right to have counterstatements published free of charge (section 9 of the

Media Act). According to the prevailing opinion, such a claim is to be classified as an action for the removal of interference (*Beseitigungsanspruch*).

41. Pursuant to section 12 of the Media Act, actions under sections 9 and 10 of the Media Act for the removal of interference (so-called counterstatement proceedings – *Gegendarstellungsverfahren*) must first be brought by means of a request for publication directed at the media owner or the editorial staff of the media company. If the request for publication is not complied with and a counterstatement or subsequent notice has not been published at all or has not been published in a satisfactory manner, the affected person may apply to the competent criminal court for an order to publish a counterstatement or a subsequent notice against the media owner as a defendant pursuant to section 14 (1) of the Media Act.

42. For the purposes of section 6 (1) of the Media Act, the criminal offence of “defamation” is to be understood as defined in Article 111 of the Criminal Code, which reads as follows:

“(1) Anybody who, in such a way that it may be noticed by a third person, attributes to another a contemptible characteristic or sentiment or accuses him or her of behaviour contrary to honour or morality and such as to make him or her contemptible or otherwise lower him or her 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 [acting] 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 offender shall not be punished if the statement is proved to be true. In the case of the offence defined in paragraph 1, he or she shall also not be liable if circumstances are established which gave him or her sufficient reason to believe that the statement was true.”

43. The term “insult” within the meaning of section 6 (1) of the Media Act is defined by Article 115 (1) of the Criminal Code, which reads as follows:

“Anybody who publicly or in front of multiple other people insults or ridicules another, does bodily harm to another or threatens another with bodily harm is liable to imprisonment for up to three months or a fine not exceeding 180 daily rates, unless this conduct is punishable by an offence with a more severe penalty.”

44. The term “false accusation” is defined in Article 297 (1) of the Criminal Code, which reads as follows:

“Anybody who puts another at risk of official prosecution by falsely suspecting the person of an offence requiring official prosecution or of breaching official or professional duties, knowing (Article 5 (3)) that the suspicion is false, shall be liable to imprisonment for up to one year or a fine not exceeding 720 penalty units; the penalty shall be imprisonment for six months to five years if the offence of which the other person is falsely accused is punishable by more than one year’s imprisonment.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

45. The applicant complained that the Austrian courts had failed to comply with their positive obligation under Article 8 of the Convention to protect his reputation and his personal integrity against untrue, defamatory statements made in the right-wing periodical “Aula” in 2016. Article 8 reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

1. *Applicability of Article 8 of the Convention*

46. The Court has held that any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 58, ECHR 2012). The Court considers that similar considerations apply in the instant case, when it comes to the defamation of former Mauthausen prisoners, who, as survivors of the Holocaust, can be seen as constituting a (heterogeneous) social group. Furthermore, while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking there may be positive obligations inherent in effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *Aksu*, cited above, § 59; *Tavlı v. Turkey*, no. 11449/02, § 28, 9 November 2006; and *Ciubotaru v. Moldova*, no. 27138/04, § 50, 27 April 2010).

47. The Court considers that the facts underlying the instant case fall within the scope of the applicant’s private life, even though he was not named personally in the article in question (compare *Aksu*, cited above, § 58), which is why Article 8 of the Convention is applicable.

2. Exhaustion of domestic remedies

(a) The Government's arguments

48. The Government contended that the applicant had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They argued that he could have brought an action under Article 1330 of the Civil Code in respect of the 2015 article within the time-limit of three years and could possibly have reached a settlement, as ten other former concentration camp prisoners had done (see paragraph 16 above). However, the applicant had only challenged the 2016 article in proceedings under sections 6 and 8a of the Media Act. As judgments adopted under the Media Act did not have binding effect on subsequent civil proceedings under Article 1330 of the Civil Code, the applicant could also have brought an action under Article 1330 of the Civil Code in respect of the 2016 article.

49. Next, the Government submitted that in his application under section 8a of the Media Act, the applicant's claim for compensation in accordance with section 6 of the Media Act had solely concerned the 2016 article. He had not, however, brought such a claim in respect of the 2015 article, although that article had been the source of the impugned statements, whereas the main object of the 2016 article had been to describe the criminal proceedings subsequent to the earlier article. Instead, the applicant had let the six-month deadline for a claim for compensation expire as far as the 2015 article was concerned (see paragraph 39 above).

50. Furthermore, the Government argued that the applicant had not made an application for publication in accordance with section 12 of the Media Act, or an application under section 14 (1) of the Media Act for a court order to publish a counterstatement against the media owner, both these remedies being aimed at removing untrue statements.

51. Finally, the Government submitted that the applicant had had the opportunity to report the impugned statements to the authorities under Articles 111, 115 and/or 297 of the Criminal Code. During such criminal proceedings, he could have brought his claim for compensation under section 8 of the Media Act. However, he had not made use of that remedy either.

52. The Government concluded from the above that the application had to be declared inadmissible for non-exhaustion of domestic remedies.

(b) The applicant's arguments

53. The applicant argued that taking legal action in connection with the 2015 article would not have been a suitable remedy for preventing the violation of his rights under Article 8 of the Convention in the present case. By the time the second article forming the subject matter of the instant application had been published in February 2016, any claims under the Media Act in relation to the 2015 article had already become time-barred

(on account of the time-limit of six months pursuant to section 8a (2) of the Media Act; see paragraph 39 above). The applicant contended that the fact that no legal action had been taken in relation to previously published content which had breached the law did not prompt the conclusion that legal action in relation to different published content was not justified.

54. The applicant submitted that the institution of counterstatement proceedings (see paragraph 41 above) under sections 12 et seq. of the Media Act did not constitute an effective remedy for the purposes of Article 35 of the Convention either. Proceedings of that kind were aimed at securing an entirely different form of legal protection. By means of his application under sections 6 and 8a of the Media Act, the applicant had sought compensation for the non-pecuniary damage resulting from the humiliation he had suffered. By contrast, counterstatement proceedings had the purpose of rectifying false media coverage and offered no possibility of enforcing compensation payments. Such proceedings would therefore also have been unsuitable for setting aside judgments that dismissed claims and thus for redressing the violation of the Convention in his case.

55. The applicant argued that the same applied to a civil action under Article 1330 of the Civil Code: it would not have been capable of providing financial compensation for the non-pecuniary damage he had suffered. Even though cease-and-desist claims and claims in respect of pecuniary damage could be brought under Article 1330 of the Civil Code, the Supreme Court's case-law suggested that there was no right to compensation for non-pecuniary damage. Moreover, a civil action could not bring about the setting aside of judgments by which claims under the Media Act were dismissed.

56. Lastly, the applicant found that the Government's suggested remedies of requesting a criminal investigation with respect to the impugned statements under Articles 111 and/or 115 of the Criminal Code or reporting them to the authorities under Article 297 of the Criminal Code would not have been effective either. Fulfilling the elements of the offence defined in section 6 of the Media Act merely required the presence of the *actus reus* as defined in the above Articles of the Criminal Code. In addition, Articles 111 and 115 governed offences subject to private prosecution, which could only be prosecuted by the injured party, and not by the public prosecutor's office of its own motion. Thus, a prosecution would in addition have required proof of fault and would therefore have been less likely to be successful than the claims for damages which the applicant himself had brought. A prosecution pursuant to Article 297 of the Criminal Code would also have been unlikely to be successful, as it required the victim to have been exposed to prosecution himself, which had not been the case with the applicant.

(c) The Court's assessment

(i) General principles

57. The Court reiterates that, pursuant to Article 35 § 1 of the Convention, it may only deal with the matter after all domestic remedies have been exhausted. Article 35 § 1 requires that the complaints intended to be made subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, and further, that any procedural means that might prevent a breach of the Convention should have been used (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV). The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

58. The obligation to exhaust domestic remedies requires applicants to make normal use of remedies which are available and sufficient in respect of their Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 85, 9 July 2015, with further references).

59. An applicant who has made use of a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III). Where a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009).

(ii) Application of the above principles to the instant case

60. The Court notes that under domestic law, in order to have his reputation protected from defamatory statements, the applicant had the choice between several different legal avenues (see paragraphs 27-44 above), which will be examined in turn below. The Court reiterates that the applicant's goals in the domestic proceedings were: (1) to have the domestic courts establish that the impugned passages of the 2016 article were defamatory and violated his personality rights as protected under Article 8 of the Convention, and to have the statements retracted and the retraction

published; and (2) to obtain compensation for the non-pecuniary damage he (allegedly) had suffered as a result of the defamatory article.

(α) Effectiveness of the remedies under Article 1330 of the Civil Code and sections 12 and 14 (1) of the Media Act

61. Concerning the Government's argument that the applicant failed to bring actions under Article 1330 of the Civil Code in relation to both the 2015 and 2016 articles, the Court considers that this would have been an effective remedy for the applicant's first declared aim, namely to have the statements in question retracted.

62. Concerning his second goal, namely to obtain compensation for non-pecuniary damage, the Court considers it necessary to examine its case-law on a related issue, namely whether, in privacy cases, an applicant's victim status depends on the absence of such compensation.

63. The Court reiterates its settled case-law to the effect that a decision or measure favourable to the applicant is not, in principle, sufficient to deprive him or her of his or her status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see *Nada v. Switzerland* [GC], no. 10593/08, § 128, ECHR 2012). As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see *Gäfgen v. Germany* [GC], no. 22978/05, § 116, ECHR 2010; compare also *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 186, ECHR 2006-V).

64. When it comes to compensation for non-pecuniary damage in privacy cases, the Court has held that a victim of a violation cannot expect that a breach of Article 8 of the Convention will automatically follow if he or she does not receive a certain amount of pecuniary compensation (see *Mertinas and Mertinienė v. Lithuania* (dec.), no. 43579/09, § 51, 8 November 2016, and, *mutatis mutandis*, *Kahn v. Germany*, no. 16313/10, § 75, 17 March 2016). The Contracting States may regulate questions of compensation for non-pecuniary damage differently, and the imposition of financial limits is not in itself incompatible with a State's positive obligation under Article 8 of the Convention (see *Mertinas and Mertinienė*, cited above, § 51). However, such limits must not be such as to deprive the individual of his or her privacy and thereby empty the right of its effective content (see *Biriuk v. Lithuania*, no. 23373/03, § 45, 25 November 2008, and *Armonienė v. Lithuania*, no. 36919/02, § 46, 25 November 2008).

65. Whether it is appropriate in a particular case to award compensation for non-pecuniary damage in addition to the finding of a violation depends on the circumstances of the case. The fact that an applicant was refused

compensation in respect of a violation of his right to respect for his private life does not automatically disclose a failure on the domestic authorities' part to protect the applicant's right to respect for his private life (see *Egill Einarsson v. Iceland* (no. 2), no. 31221/15, § 39, 17 July 2018; *Rothe v. Austria*, no. 6490/07, § 78, 4 December 2012; and *Küchl v. Austria*, no. 51151/06, § 95, 4 December 2012). However, in a case where the Supreme Court of Cyprus denied applicants equitable relief in respect of damage caused by an unlawful administrative act without sufficiently explaining its reasoning, the Court has found a violation of Article 8 (see *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, § 58, 16 October 2008). The Court observes that all these cases presuppose that the domestic courts operated under a legal framework which allowed them to conduct an assessment as to whether or not compensation for non-pecuniary damage should be granted in a given case.

66. The Court notes in this context that it has regularly made awards in respect of non-pecuniary damage in cases where an applicant's personality rights had been violated by media publications (see, among many other authorities, *Armonienè*, cited above, § 52, *Biriuk cited above*, § 51, and *Pfeifer v. Austria*, no. 12556/03, § 53, 15 November 2007). In other cases, it has held that the finding of a violation of Article 8 of the Convention constituted sufficient just satisfaction and rejected the claim for non-pecuniary damage (see, among other authorities, *Egill Einarsson v. Iceland*, no. 24703/15, § 57, 7 November 2017, and *Buck v. Germany*, no. 41604/98, § 63, ECHR 2005-IV).

67. The Court concludes that it follows *a fortiori* from its case-law concerning privacy cases triggered by media publications as set out above that a remedy available at national level must give the domestic courts at least the possibility of making an award in respect of damage, if appropriate in the specific case. Consequently, a remedy which does not allow a claim to be made in respect of non-pecuniary damage cannot be considered effective for the purposes of privacy cases under Article 8 of the Convention such as the instant one.

68. Since the applicant's declared goal was additionally to obtain compensation for the non-pecuniary damage resulting from the publication of the statements in question, it follows that a claim under Article 1330 of the Civil Code cannot be considered effective for his purposes, as based on the Supreme Court's case-law, it does not entail the possibility of obtaining redress for non-pecuniary damage in the event of a finding of a violation of his personality rights (see paragraph 31 above).

69. The same considerations apply to the remedies under sections 12 and 14 (1) of the Media Act (see the Government's objections in paragraph 50 above), which, contrary to claims under sections 6 to 7c of the Media Act, do not provide for the possibility of a claim for compensation (see paragraph 41 above).

70. The applicant therefore was not obliged to make use of the above remedies, and the Government's objections of non-exhaustion of domestic remedies in this respect must be dismissed.

(β) Effectiveness of reporting the impugned statements to the public prosecutor's office under Article 297 of the Criminal Code

71. The Government argued that the applicant could have reported the impugned statements to the authorities under Article 297 of the Criminal Code (see paragraph 51 above). The Court notes that the statements in question had already been investigated in that respect, but that the public prosecutor was of the opinion that the constituent elements of the offence had not been fulfilled. The Federal Minister of Justice later confirmed that the discontinuation corresponded to the factual and legal situation (see paragraph 10 above). The Court therefore cannot but conclude that pursuing this legal avenue would not have been effective. The Government's objection of non-exhaustion of domestic remedies in this respect must therefore be dismissed.

(χ) Effectiveness of requesting a criminal investigation under Articles 111 and 115 of the Criminal Code

72. According to the Government, the applicant could also have requested the criminal investigation of the impugned statements under Articles 111 and/or 115 of the Criminal Code. The Court notes that this legal remedy is closely related to bringing a claim under section 6 and 8a of the Media Act (see below), as the terms "defamation" and "insult" contained in section 6 of the Media Act are to be understood as defined in Articles 111 and 115 of the Criminal Code respectively (see paragraphs 42-43 above). Claimants can either choose between bringing a private prosecution and bringing a separate claim under the Media Act, or pursue both of these legal avenues at the same time. In the applicant's case, they served the same purpose, namely to have the impugned statements retracted and to obtain compensation for non-pecuniary damage.

73. The Court reiterates that where a remedy has been pursued, the use of another remedy which has essentially the same objective is not required (see *Micallef*, cited above, § 58). A claim under section 6 and 8a of the Media Act requires solely the proof of the *actus reus*, whereas a private prosecution would have required to prove in addition the *mens rea* of the defendant. Moreover, the applicant has explained why he found that a private prosecution appeared less likely to be successful for his purposes (see paragraph 56 above), a choice which he was entitled to make under the circumstances. The Government's objection of non-exhaustion of domestic remedies in this respect must therefore likewise be dismissed.

(δ) Effectiveness of the claim under sections 6 and 8a of the Media Act in respect of the 2015 article

74. The Court reiterates that the applicant stated that he had chosen to bring a claim under sections 6 and 8a of the Media Act in respect of the 2016 article, as under Article 1330 of the Civil Code, he could not have been awarded compensation for the non-pecuniary damage resulting from the alleged defamation suffered. However, given that section 8a (2) of the Media Act requires such a claim to be brought in relation to the first publication with allegedly defamatory content, the Government argued that in the instant case, this was the 2015 article, in respect of which the applicant had failed to exhaust domestic remedies by missing the six-month deadline.

75. The Court notes that such a claim was, in principle, suitable to provide compensation for non-pecuniary damage in addition to a retraction of the (allegedly) defamatory statements. However, when the article in question was published in February 2016, the six-month deadline (see paragraph 39 above) for bringing a claim in respect of the 2015 article (which was published in the July/August 2015 issue of the periodical) had already expired. If the Government's logic were to be followed, this would mean that the applicant no longer had a remedy available in respect of the first article when the second one was published. However, the domestic courts did not explain whether this deadline, provided for the "first dissemination" of an article (see paragraph 39 above), was applicable at all in the present case of a repetition of statements in a new context in another press article. The lack of an explanation is all the more relevant as the article was published under a different heading and added new comments about the alleged "objectivity of the public prosecutor's office" – elements which were not present in the first article.

76. The Government's objection of non-exhaustion of domestic remedies in this respect must therefore also be dismissed.

(ε) Conclusion as to the admissibility of the application

77. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions and third-party comments

78. The applicant alleged that the Austrian courts had failed to comply with their positive obligation to protect his reputation and his personal integrity against the defamatory, untrue statements made in the periodical

Aula. During the Nazi regime, the dehumanising description “plague on the country” (*Landplage*) had been used in connection with persons who in Nazi ideology were considered inferior human beings (*Untermenschen*). The average reader could only have understood the 2016 article as meaning that the applicant had been imprisoned in the concentration camp because of a judgment based on the rule of law, and that those liberated from the camp had gone on to commit very serious crimes. Even if it were assumed that the allegations in the article had been directed against a group of people, every single member of the group had also been individually concerned because of the seriousness of the accusations.

79. The Government reiterated their arguments in relation to the admissibility of the application. In relation to the proceedings in question, they referred to the reasons given by the domestic courts, which they considered well argued, for dismissing the claim.

80. The Government pointed out, however, that they found it particularly regrettable that the tragic past of the applicant and the other Mauthausen concentration camp survivors had been described by the periodical *Aula* in such a disgraceful manner.

81. The Polish Government submitted that in cases where there were indications that statements concerning the past which were inconsistent with historical facts could actually lead to incitement of racial hatred and discrimination against ethnic, religious and social groups, it might be justified or even necessary to limit the freedom of expression as regards the publication of such statements. When balancing the right to freedom of expression against the right to respect for private life, the Convention States were entitled to treat cases regarding the denial of the Holocaust and other statements relating to Nazi crimes as a separate category, and to adopt a policy that such statements demonstrating disdain towards the victims of the Holocaust did not deserve State protection under the head of freedom of speech (with reference to *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005).

2. The Court’s assessment

82. The Court reiterates that under both the State’s positive and negative obligations under Article 8, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Aksu*, cited above, § 62, with further references). In the instant case, however, the domestic courts never reached the stage of conducting a balancing exercise between the competing Convention rights, as they essentially considered that the applicant could not possibly be personally affected by a publication which reiterated the course of criminal proceedings, or by statements repeated therein which did not have a separate meaning from their first publication in 2015.

83. At the outset, the first-instance court found that the claimants lacked legal standing to bring the claim. It based its interpretation of the domestic law relating to the legal standing of a group on previous domestic case-law (see paragraph 21 above). The very particular question of whether members of a group can be personally affected by a statement which concerns a historical event involving a group that was large at the time but has since been reduced to a rather small number of individuals, as in the instant case, appears not to have yet been dealt with by the domestic courts (see paragraph 35 above). The Court of Appeal, as the second- and last-instance court in the proceedings, did not mention the question of legal standing at all, notwithstanding this apparent lack of established case-law, the extensive arguments raised by the applicant in his initial claim and in his appeal (see paragraphs 18-20 and 23 above), and the fact that the determination of this preliminary question was essential for the examination of the merits of the claim. Since no finding was made on this issue, the core of the applicant's claim – namely that in his view, he had indeed been personally affected by the defamatory nature of the statements, because the group had meanwhile been reduced to a very small number of members – was consequently never examined by the domestic courts. As explained above, the courts failed to adduce relevant and sufficient arguments to support their point of view.

84. In substance, the Criminal Court considered that the 2016 article merely described the course of the preliminary investigation by the public prosecutor's office and its result. It held that there was no separate meaning to the statements. The question how it reached that conclusion was left unanswered, even though it should have been necessary to examine this point in detail.

85. The Court of Appeal explicitly noted that the first-instance court had not explained how it had reached the conclusion that, *in dubio pro reo*, there was no separate meaning to the 2016 article. Nonetheless, it limited itself to simply agreeing with the outcome of the lower court's interpretation without making any findings in that respect itself. The Court of Appeal dismissed the claim, with the additional argument that no one could be offended by a report on the course of a criminal investigation, despite its own finding that the average reader could have understood the 2016 article as meaning that the statements in question were permissible.

86. When looking at the statements in question within the context of the 2016 article, the Court is not persuaded by the domestic courts' view that the claimants could not have been personally affected by them. The whole context of the 2016 article was very different from that of the 2015 article: while the 2015 article focused on the historical event of the liberation of the Mauthausen prisoners, the 2016 article concerned the criminal investigations in respect of the author of the articles and the person who had reported him to the public prosecutor's office. Therefore, the Court takes the

view that a comprehensive explanation of the reasons for the domestic courts' interpretation should have been required.

87. The Court concludes that because of the lack of a comprehensive examination of the questions of legal standing and whether the statements had the same or a separate meaning in the context of the 2016 article, the domestic courts never actually examined the core of the applicant's claim of defamation. The domestic courts have therefore failed to comply with their procedural obligation under Article 8 of the Convention to conduct a comprehensive assessment of a matter affecting the applicant's privacy rights (see *Taliadorou and Stylianou*, cited above, § 58).

There has accordingly been a violation of Article 8.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. Article 41 of the Convention provides:

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

A. Damage

89. Under the head of pecuniary damage, the applicant claimed the sum of 4,984.80 euros (EUR; this sum includes VAT), which he had had to reimburse the defendant company for its legal representation; EUR 150 in court fees for the domestic proceedings; as well as EUR 20,000, which he expected he would have been granted in respect of non-pecuniary damage had he succeeded with his claim at national level. He further claimed EUR 15,000 in respect of non-pecuniary damage.

90. The Government pointed out that not only the applicant but all claimants in the proceedings under the Media Act had been ordered to reimburse the procedural costs of the opposing party. It could not be verified from the documents provided whether or how much the applicant had actually contributed to the reimbursement of these costs. In relation to the damages the domestic courts could have awarded, the Government submitted that they could not accept this claim under the head of pecuniary damage, and that the applicant had failed to substantiate his claims.

91. In respect of the claim for non-pecuniary damage, the Government submitted that the finding of a violation in comparable cases often constituted sufficient reparation in itself (citing, for example, *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 51, ECHR 2003-XI, and *Albert-Engelmann-Gesellschaft mbH v. Austria*, no. 46389/99, § 38, 19 January 2006), as a judgment by the Court guaranteed applicants broad

public attention and therefore restored their reputation. They found the applicant's claims in any event excessive and not substantiated.

92. Concerning the defendant company's costs and expenses, the Court reiterates that the absence of proof of actual payment is not justification for rejecting a claim for costs and expenses that is in itself well-founded (see *Krejčíř v. Czech Republic*, nos. 39298/04 and 8723/05, § 137, 26 March 2009). However, it agrees with the Government that the applicant can only claim his share of the costs, which, in the light of the fact that there were ten claimants altogether, can be assessed at 10% of the defendant company counsel's bill. Under the head of pecuniary damage, the Court therefore awards the applicant EUR 498.48, as well as the sum of EUR 150 which he had to pay in court fees – hence EUR 648.48 in total.

93. In relation to the applicant's claim that he would have been granted EUR 20,000 in damages had he succeeded in the domestic proceedings, the Court does not discern a causal link between this hypothetical sum and any pecuniary damage suffered. It therefore dismisses the claim.

94. Under the head of non-pecuniary damage, the Court considers it appropriate to award EUR 5,000.

B. Costs and expenses

95. The applicant claimed EUR 8,834.92 for the costs and expenses incurred before the domestic courts for his legal representation, and EUR 5,949.36 for those incurred before the Court (all sums including VAT).

96. The Government submitted in relation to the costs and expenses incurred in the domestic proceedings that the applicant had not shown that they had actually served the purpose of preventing the alleged violation of the Convention. As to the costs incurred before the Court, they argued that under the Lawyers' Remuneration Act (*Rechtsanwaltstarifgesetz*), the applicant could only claim EUR 866.00 plus a 50% standard rate for the instant application, as well as the same amount again for the observations submitted to the Court – hence EUR 2,598.00 in total.

97. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred in order to prevent the violation of the Convention and are reasonable as to quantum. The Court considers that in the instant case, the question of the granting of the defendant company's legal costs and the applicant's own legal costs in the domestic proceedings are inseparably related. Since it has concluded (see paragraph 92 above) that the applicant was entitled to reimbursement of the former, it must inevitably follow that he is also entitled to be granted the latter. As the lawyer's bill presented was addressed to all ten claimants, the

Court considers it justified to grant 10% of that sum, namely EUR 883.49 (including VAT).

98. For the costs and expenses incurred in the Convention proceedings the Court awards the full sum claimed, namely EUR 5,949.36 (including VAT).

C. Default interest

99. The Court considers it appropriate that the default interest rate 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. *Declare* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 648.48 (six hundred and forty-eight euros and forty-eight cents), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 6,832.85 (six thousand eight hundred and thirty-two euros and eighty-five cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President