



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

COURT (CHAMBER)

CASE OF SCHWABE v. AUSTRIA

(Application no. 13704/88)

JUDGMENT

STRASBOURG

28 August 1992

In the case of Schwabe v. Austria*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr J. CREMONA,

Mr Thór VILHJÁLMSSON,

Mr F. GÖLCÜKLÜ,

Mr F. MATSCHER,

Mr J. DE MEYER,

Mr S.K. MARTENS,

Mr R. PEKKANEN,

Mr J.M. MORENILLA,

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

Having deliberated in private on 28 February and 24 June 1992,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13704/88) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian citizen, Mr Karl Thomas Uwe Schwabe, on 1 February 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

* The case is numbered 46/1991/298/369. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The President gave them leave to use the German language during the proceedings (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 22 March 1991 Mr Matscher, having been duly delegated by the President, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr J. Cremona, Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr J. De Meyer, Mr N. Valticos, Mr R. Pekkanen and Mr J.M. Morenilla (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr S.K. Martens, substitute judge, replaced Mr Valticos who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the Delegate of the Commission and the applicant on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the resulting orders and instructions, the Registrar received the memorial of the applicant and the memorial of the Government on 23 and 31 July 1991, respectively. On 11 September the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing and on 28 January 1992 he submitted various documents at the Registrar's request.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 February 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr H. TÜRK, Ambassador,

Legal Adviser, Ministry of foreign Affairs,

Agent,

Mr S. ROSENMAJR, Federal Chancellery,

Mr S. BENNER, Federal Ministry of Justice,

Advisers;

- for the Commission

Mr M.P. PELLONPÄÄ,

Delegate;

- for the applicant

Mr W. BRUNNER, Rechtsanwalt,

Counsel.

The Court heard their addresses, as well as their replies to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Schwabe is an Austrian citizen residing at St Andrä. At the relevant time, he was Chairman of the Young Austrian People's Party (Junge Österreichische Volkspartei, ÖVP) for the District of Wolfsberg in Carinthia and councillor (Gemeinderat) of St Andrä.

A. The applicant's press release and its background

7. In December 1984 Mr Tomaschitz, Mayor of Maria Rain in Carinthia and a member of the ÖVP, was convicted of negligently causing bodily harm (fahrlässige Körperverletzung) and of abandoning the victim (Imstichlassen eines Verletzten) of a traffic accident whilst under the influence of alcohol (at least 1.75 per mille). He was sentenced to four months' imprisonment.

8. The question whether the Mayor should resign because of his conviction later became the subject of discussion in political circles and the press in Carinthia.

On 13 August 1985 the Carinthian newspaper *Kleine Zeitung* published an article headed "If Tomaschitz doesn't think it over, we will". That article quoted from an interview with the Head of the Provincial Government, Mr Wagner, who was the Chairman of the Carinthia branch of the Austrian Socialist Party (Sozialistische Partei Österreichs - SPÖ), about the question whether the Mayor should resign or not. Mr Wagner stated that, although an accident of the kind in question could happen to anybody, it was not acceptable that a person who had acted in such a way should remain in public office. He continued: "I do not intend to take part in a witch hunt, but after a period of reflection Tomaschitz ought to realise that he must resign". According to Mr Wagner, however, that was primarily a matter for the ÖVP. He nevertheless concluded by saying that if Mr Tomaschitz would not think it over, the Regional Supervisory Authority (Gemeindeaufsicht des Landes) would.

9. On 19 August 1985 Mr Schwabe issued a press release by way of reply to that article and sent it to several Carinthian newspapers. On 20 August the *Kleine Zeitung* published a summary, headed "Looking after morality in the SPÖ". A complete version of the release appeared on the same day in the *Neue Volkszeitung* (an ÖVP newspaper), under a headline "Different standards?" (Zweierlei Maß?). It read:

"Councillor Karl Schwabe, Chairman of the Young ÖVP for the Wolfsberg District, stated in a broadcast that, after being convicted for leaving the scene of an accident

without reporting it, Josef Tomaschitz, the Mayor of Maria Rain and a member of the ÖVP, would unquestionably have to resign.

However, he added that Mr Wagner, the Head of the Carinthian Government, did not have the slightest moral right to attack Mayor Tomaschitz for his refusal to resign. Mr Wagner had known for years that his Deputy, Erwin Frühbauer, had caused an accident on 10 July 1966 at Scheifling (Styria) while under the influence of alcohol (im alkoholisierten Zustand). The accident had left two children fatherless. One could not help feeling that the Head of the Carinthian Government applied stricter standards to a 'small mayor of a village', who was a member of another political party, than to his 'party friend' and Deputy, Frühbauer. Schwabe concluded that Wagner's credibility would be enhanced if he were to provide, within the SPÖ, for the political morals which he requires of others."

10. The applicant had based his press release on an article that had appeared in the Viennese magazine Profil on 9 March 1984. It referred to the circumstances of Mr Frühbauer's car accident in 1966, in which a man had died and other persons had been injured, and contained the following passage:

"...

Erwin Frühbauer was found to have a blood alcohol content of 0.8 per mille. That was the limit.

Less than a year later, on 31 May 1967, Frühbauer, whose immunity as a Member of Parliament had been lifted, was sentenced by the Leoben Regional Court to a prison term of six months, suspended for three years, for negligent homicide.

There was no conviction for intoxication (Alkoholisierung). Jurists are still guessing at the reasons because, according to Article 5 para. 1 of the 1960 Road Traffic Code, impairment by intoxication is presumed 'at 0.8 per mille or more'.

Be that as it may. I do not want (and the criminal law does not allow me) to reproach Frühbauer with his conviction at that time. After all, no one is immune from being similarly involved in a traffic accident.

My accusation is a political one. When Frühbauer was appointed Transport Minister by Kreisky in 1970, he kept quiet about his conviction, or at least about the fact that at that time he still had a criminal record (noch vorbestraft war).

In fact on 31 May 1967, the date of the judgment, the three-year period of suspension of his sentence began to run. Six weeks before the end of that period, on 21 April 1970, Mr Frühbauer was appointed Transport Minister but he continued to have a criminal record for a long time afterwards, because of the period which was then applicable with regard to the cancellation of such records. He was thus, to my knowledge, the only Minister of the Second Republic to have a criminal record ..."

The applicant had verified the contents of the Profil article in a telephone conversation with its author. Furthermore, he had taken into account the judgment of 31 May 1967 of the Leoben Regional Court (Kreisgericht). In determining sentence, that court had regarded as an aggravating

circumstance the fact that the accused had been driving after consuming alcohol in an amount that brought him close to the level at which a driver was presumed to be intoxicated (Alkoholisierung, 0.8 per mille).

B. Criminal proceedings against Mr Schwabe

1. Before the Klagenfurt Regional Court

11. On 4 September 1985 Mr Frühbauer requested the Klagenfurt Regional Court (Landesgericht, "the Regional Court") to initiate a preliminary investigation against Mr Schwabe. After completion of the investigation, Mr Frühbauer brought a private prosecution under Article 111 paras. 1 and 2 and Article 113 of the Criminal Code (see paragraphs 18 and 19 below).

12. On 26 September 1986 the applicant was convicted of defamation (Article 111 paras. 1 and 2 of the Criminal Code) and of having reproached a person with an offence for which he had already served his sentence (Article 113). The penalty imposed was a fine of 3,000 schillings or, in default of payment, thirty days' imprisonment. The Regional Court also ordered the seizure of the relevant issue of the Neue Volkszeitung and the publication of its judgment and awarded to Mr Frühbauer compensation of 10,000 schillings, to be paid by the owners of the newspaper. In addition, the latter were declared to be jointly and severally liable for the payment of the fine and the complainant's costs.

After reciting the relevant facts, the Regional Court concluded that, contrary to Article 113, Mr Schwabe had reproached Mr Frühbauer with a conviction, relating to a traffic accident, that dated back about twenty years. Furthermore, his statement that the complainant was under the influence of alcohol and his comparison of the accident in question with Mr Tomaschitz's, in addition to his criticism of the complainant for lacking political morals, amounted to defamation.

13. According to the Regional Court, Article 113 was primarily aimed at securing the reintegration of criminal offenders, but it was applicable irrespective of whether or not reproaching them with a previous conviction jeopardised that reintegration.

Mr Schwabe had not been obliged under Article 114 para. 2 of the Criminal Code (see paragraph 18 below) to make the impugned statement. The fact that a political party felt embarrassed about a car accident of one of its officials was not an excuse for "digging out" a very old accident of an official of the opposite party. Moreover, the applicant had not been under a duty to reply to a political opponent, since Mr Wagner's criticisms were addressed to Mayor Tomaschitz and not to him. In particular, Mr Schwabe, the Chairman of a small district organisation, did not need to react by defaming a third person.

14. In the Regional Court's view, moreover, it was not open to the applicant to plead that his allegation that Mr Frühbauer had been driving under the influence of alcohol was correct. The man in the street would conclude from such a statement that the latter - like Mr Tomaschitz - had had a blood alcohol content of more than 0.80 per mille at the time of the accident. In fact, a lower level was tolerated by the legislature and the public, and the applicant had not mentioned that the complainant had not been convicted of drunken driving (in alkoholbeeinträchtigtem Zustand).

Neither could Mr Schwabe maintain that he had intended to refer to a blood alcohol content lower than 0.8 per mille. The aim of his press release had been to put both accidents in moral terms on an equal footing, which would entail the same consequence, namely the resignation of the two officials concerned. That, together with the title of the article, "Different standards?", could have led the reader to believe that the complainant's blood alcohol content had also attained the forbidden level at the time of his accident.

The defendant also could not claim that his press release had been directed not against Mr Frühbauer, but against Mr Wagner. It was true that the criticism relating to a lack of political morals had been primarily aimed not at the latter, who was responsible in principle for the political morals of the SPÖ, but at the former, who had not resigned after his accident. However, that particular allegation could not in itself constitute defamation, since a politician had to be tolerant in this respect; what was decisive in the present case was the comparison of the two accidents from a moral point of view.

In respect of this defamation too, the applicant could not rely on Article 114 para. 2 of the Criminal Code, because, as he had or should have been aware, the impugned statement had been incorrect. Furthermore, in the present case proof of good faith (Article 111 para. 3; see paragraph 18 below) was not relevant, since the offence had taken place through a publication; neither was proof of proper journalistic care (section 29 of the Media Act, Mediengesetz; see paragraph 21 below), since the defendant was not a journalist. As to proof of truth, the Regional Court considered evidence given by a witness of Mr Frühbauer's accident in 1966, as well as the expert opinions submitted in the relevant criminal proceedings in 1967, and concluded that Mr Schwabe had failed to prove the truth of his allegations.

2. Before the Graz Court of Appeal

15. On 5 February 1987 the applicant lodged an appeal (Berufung) against his conviction with the Graz Court of Appeal (Oberlandesgericht). He submitted in particular that he had written his press release in the context of a political discussion and in reply to criticisms by the Head of the Carinthian Government expressed in respect of a member of the ÖVP and of

that party, and that the release had not been directed against Mr Frühbauer. He had, accordingly, felt himself obliged to defend his own party and to inform the public about the Head of the Provincial Government's political morals and apparent motives. He had then remembered the 1984 Profil article (see paragraph 10 above) and found that the two accidents raised the same problem, namely whether it was proper for a person with a criminal conviction to exercise official functions. He had thought that this question was worth discussing and wanted to draw the attention of the public to a possible information lacuna. Finally, he had considered his statement about the complainant having driven under the influence of alcohol to be correct, since it was based on the formulation used by the Leoben Regional Court in its judgment of 31 May 1967 (see paragraph 10 above); and it was also justified in the context of a political discussion.

16. On 29 April 1987 the Court of Appeal dismissed Mr Schwabe's appeal.

The court observed that the applicant's statement had clearly amounted to a reproach concerning a criminal conviction for which the sentence had already been served, within the meaning of Article 113 of the Criminal Code. In its view, he had not been compelled to reply to Mr Wagner. Neither had he been given any mandate to reply in the name of the ÖVP, nor had he himself been addressed directly as Chairman of the Young ÖVP or as a member of the party's executive committee. Someone who by his conduct has given good reason for criticising him must accept attacks on his honour to a greater extent than someone who has not. Furthermore, Mr Frühbauer himself had made no statement which called for reaction on the part of Mr Schwabe.

The court also upheld the Regional Court's judgment in all other respects.

17. The judgment was served on the applicant on 4 September 1987. He thereupon requested the Attorney-General (Generalprokurator) to file a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes), with reference, inter alia, to the right to freedom of expression under Article 10 (art. 10) of the Convention and to the Lingens v. Austria judgment of 8 July 1986 (Series A no. 103-B).

Mr Schwabe was informed on 27 October 1987 that the Attorney-General did not intend to take any action.

II. RELEVANT DOMESTIC LAW

A. The relevant provisions of the Criminal Code

18. Article 111 of the Criminal Code provides:

"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 ...".

Under Article 114 para. 1 "conduct of the kind mentioned in Article 111 ... is justified if it constitutes the fulfilment of a legal duty or the exercise of a right". Under paragraph 2 of the same provision "a person who is forced for special reasons to make an allegation within the meaning of Article 111 ... in the particular form and manner in which it was made, is not to be punished, unless that allegation is untrue and the offender could have been aware thereof if he had acted with the necessary care".

19. Article 113 of the Criminal Code reads as follows:

"Anyone who in such a way that it may be perceived by a third person reproaches another with having committed a criminal offence in respect of which the sentence has already been served, or has been waived or reduced (even if only conditionally) or in respect of which the sentence has been provisionally deferred shall be liable to imprisonment not exceeding three months or a fine ..."

B. The relevant provisions of the Media Act

20. Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim compensation from him. Furthermore, the publisher may be declared to be liable jointly and severally with the person convicted of a media offence for the fines imposed and for the costs of the proceedings (section 35).

The person defamed may request the forfeiture of the publication by which a media offence has been committed (section 33), as well as the publication of the judgment in so far as this appears necessary for the information of the public (section 34).

21. Section 29 of the Media Act provides as follows:

"1. A media owner (publisher) or media employee shall not be punishable for an offence relating to material appearing in the media, in respect of which proof of truth is admissible, not only if proof of truth has been brought but also if there was a

predominant public interest in publication and even with proper journalistic care being applied he had sufficient grounds for considering the statement to be true. However, in respect of such an offence relating to a person's private life, a media owner (publisher) or media employee shall not be punishable only if the statement is true and directly connected with public affairs.

2. Such proof is to be received only if the accused relies thereon. In cases within the first sentence of paragraph 1, the court must receive proof of truth, if tendered by the accused and admissible, even if it assumes that the exercise of proper journalistic care has been proved.

3. If an accused is acquitted only because the conditions specified in the first sentence of paragraph 1 are met, the court must, in analogous application of section 34, order publication of the finding that proof of truth has not been tendered or has not succeeded, and order that the accused is to bear the costs of the criminal proceedings including the costs of such publication.

4. Article 111 para. 3 and Article 112 of the Criminal Code shall not apply."

PROCEEDINGS BEFORE THE COMMISSION

22. Mr Schwabe applied to the Commission on 1 February 1988 citing Article 10 (art. 10) of the Convention.

On 11 October 1989 the Commission declared the application (no. 13704/88) admissible. In its report of 8 January 1991 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 10 (art. 10) (ten votes to six). The full text of its opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS MADE TO THE COURT

23. At the hearing on 24 February 1992, the Agent of the Government requested the Court "to hold in its judgment that the applicant's right to freedom of opinion under Article 10 (art. 10) of the Convention has not been violated by his being sentenced to pay a fine of 3,000 schillings".

For his part, the applicant asked the Court to find that "Article 10 (art. 10) of the Convention has been violated, and that the Austrian Republic should therefore pay [the applicant] just satisfaction of 225,644.62 schillings".

* Note by the Registrar: For practical reasons this annex will appear only in the printed version of the judgment (volume A242-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

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

24. Mr Schwabe alleged that his conviction by the Klagenfurt Regional Court for defamation and for having reproached a person with a previous criminal offence had breached Article 10 (art. 10) of the Convention, which provides:

"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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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."

This allegation was contested by the Government, but was accepted by the Commission.

25. The sanction complained of clearly constituted an "interference" with the applicant's exercise of his freedom of expression, as guaranteed by paragraph 1 of Article 10 (art. 10-1). This has not been disputed.

Nor was it contested that the interference was "prescribed by law", namely Articles 111 and 113 of the Criminal Code (see paragraphs 18 and 19 above), and had a legitimate aim, namely the protection of "the reputation or rights of others", within the meaning of Article 10 para. 2 (art. 10-2).

Argument before the Court centred on the question whether the interference could be regarded as "necessary in a democratic society".

26. According to the applicant, it should be possible in a democratic society to refer to previous offences committed by politicians, even when sentences have been served, suspended or waived. The aim of Article 113 of the Criminal Code was to secure the social reintegration of criminal offenders, and Mr Frühbauer had held public office in Austria for more than twenty-five years both before and after the press release in question. Furthermore, it had not been his intention to defame the latter, but rather to point out that Mr Wagner, the Head of the Carinthian Government, had no moral entitlement to call for the resignation of Mayor Tomaschitz after his conviction as a result of a traffic accident. This was thus a value-judgment.

27. The Government submitted, however, that the requirements of the protection of an individual's reputation, as provided for in Articles 111 and 113 of the Criminal Code, should prevail in the present case. The applicant had given an incomplete account of the facts and made misleading statements by establishing a connection between two car accidents which were not comparable. Accordingly, the Klagenfurt Regional Court had found that he had failed to prove the truth of his allegations. Furthermore, the subject of the debate was the Mayor's car accident, and there was no reason why Mr Schwabe should have referred to another accident which had occurred many years previously.

28. The Commission, while citing the previous Austrian cases already decided by the Court (see the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103-B, and the *Oberschlick v. Austria* judgment of 23 May 1991, Series A no. 204), observed that in a democratic society politicians should accept criticism even if it is based on an "annoying" comparison of two incidents which might appear far-fetched.

29. The Court will examine this question in the light of the principles which emerge from its previous case-law (see the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, pp. 22-24, paras. 48-50, the *Sunday Times (no. 1) v. the United Kingdom* judgment of 26 April 1979, Series A no. 30, pp. 35-37, para. 59, and pp. 40-41, para. 65, the above-mentioned *Lingens* judgment, Series A no. 103-B, pp. 25-26, paras. 38-42, the above-mentioned *Oberschlick* judgment, Series A no. 204, pp. 25-26, paras. 57-59, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 29-30 para. 59, the *Sunday Times (no. 2) v. the United Kingdom* judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50, and the *Castells v. Spain* judgment of 23 April 1992, Series A no. 236, pp. 22-24, paras. 42-43 and 46).

Where what is at stake is the limits of acceptable criticism in the context of public debate on a political question of general interest, the Court, in the exercise of its supervisory function, has to satisfy itself that the national authorities did apply standards which were in conformity with those principles and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts (see the above-mentioned *Oberschlick* judgment, Series A no. 204, p. 26, para. 60).

For this purpose the Court will consider the impugned judicial decisions in the light of the case as a whole, including the applicant's publication and the context in which it was written.

30. Mr Schwabe was convicted of defamation for having stated in his press release of 19 August 1985 that the Deputy Head of the Carinthian Government had caused a traffic accident in 1966 under the influence of alcohol. The Klagenfurt Regional Court considered it decisive that the applicant had compared this accident with the Mayor's, without mentioning

that, unlike Mr Tomaschitz, Mr Frühbauer had not been convicted of drunken driving. This omission, according to the Regional Court, could have led the reader to believe that the accidents were comparable, as far as the drivers' blood alcohol content was concerned. In this respect, it held that the applicant had failed to prove the truth of his allegations (see paragraph 14 above).

31. The Court notes that Mr Schwabe's press release was a reaction to the interview given by the Head of the Carinthian Government, a member of the Austrian Socialist Party, suggesting that the Mayor of Maria Rain, who was a member of the People's Party (the applicant's party), should resign because of his conviction (see paragraph 8 above).

It is apparent from the release, when read as a whole, that the applicant's main concern was to show that Mr Wagner applied different and stricter standards of political morality to a "small mayor of a village", belonging to another political party, than to his "party friend" and deputy (see paragraph 9 above). The applicant's press release did not try to compare the two traffic accidents from a legal point of view. It only sought to make a statement concerning political morality. The reference to the 1966 accident was incidental to this main issue, which was a matter of public interest.

Even if at the outset, as the Government maintained, neither the applicant nor Mr Frühbauer was directly involved in the political discussion, which concerned primarily the Mayor and the Head of the Provincial Government, the question subsequently became, following the latter's intervention, a matter of general debate on political morals between the two rival parties (ÖVP and SPÖ; see paragraph 8 above).

32. A politician's previous criminal convictions of the kind at issue here, together with his public conduct in other respects, may be relevant factors in assessing his fitness to exercise political functions.

33. The applicant had based his statements concerning the 1966 traffic accident on an article published in the magazine *Profil* on 9 March 1984, and had verified the facts with the author of that article (see paragraph 10 above). The applicant's press release was shorter than that article, and thus gave only an incomplete account of the circumstances of the accident (see paragraph 9 above). However, it must be noted that the applicant used substantially the same words as had appeared in the judgment of 31 May 1967 of the Leoben Regional Court. That court considered as an aggravating circumstance the fact that the politician had consumed alcohol before the accident (see paragraph 10 above).

34. The applicant's conviction for defamation stemmed, according to the Austrian courts, from the fact that he failed to prove the truth of his statement. They interpreted the words "while under the influence of alcohol", appearing in the press release, as meaning an alcohol content of 0.8 per mille or more, on the basis of the comparison made with Mr Tomaschitz's accident (see paragraph 14 above).

The Court does not, however, consider it established that the applicant's statement about Mr Frühbauer's alcohol consumption was misleading. It moreover points out that the two accidents were not the subject of direct comparison but were mentioned only in relation to the different attitude of Mr Wagner towards them. It is significant that the applicant described both accidents in completely different terms (see paragraph 9 above). He nevertheless concluded that they had enough features in common to warrant the resignation of both the politicians concerned.

The impugned comparison thus essentially amounted to a value-judgment, for which no proof of truth is possible (see, *inter alia*, the above-mentioned Oberschlick judgment, Series A no. 204, p. 27, para. 63). The Court notes in this connection that the facts on which the applicant based his value-judgment were substantially correct and his good faith does not give rise to serious doubts. He cannot be considered to have exceeded the limits of freedom of expression.

35. It follows from the foregoing that the interference complained of by Mr Schwabe was not "necessary in a democratic society ... for the protection of the reputation ... of others".

There has, accordingly, been a violation of Article 10 (art. 10) of the Convention.

II. APPLICATION OF ARTICLE 50 (art. 50)

36. 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."

A. Pecuniary damage

37. The applicant first claimed the sums corresponding to the fine imposed (3,000 Austrian schillings), Mr Frühbauer's costs (32,242.42 schillings) and the compensation awarded to the latter by the Regional Court (10,000 schillings) in its judgment of 26 September 1986.

38. The first two items are closely related to the violation of Article 10 (art. 10) found by the Court, and the applicant is, as the Government agreed, entitled to recover the sum of 35,242.42 schillings under these heads.

On the other hand, the amount of 10,000 schillings awarded to Mr Frühbauer was to be paid by the owners of the *Neue Volkszeitung* (see paragraph 12 above), and the applicant has not shown why he is entitled to compensation under this head.

B. Non-pecuniary damage

39. The applicant also claimed 50,000 schillings as compensation for the damage caused to his reputation by his conviction.

The Court considers, however, like the Delegate of the Commission, that in the circumstances of the case the finding of a violation contained in this judgment constitutes sufficient just satisfaction for any prejudice of this kind.

C. Costs and expenses

40. Finally, Mr Schwabe requested the reimbursement of 50,402.20 schillings for his costs and expenses in Austria. Whilst not objecting to an award in this respect, the Government stated that they were unable to comment on this claim in the absence of a detailed statement of costs from the applicant's lawyer.

In the Court's view, however, the amount claimed appears reasonable and must therefore be awarded in full.

41. As to the costs and expenses before the Convention institutions, the applicant sought 70,000 schillings in respect of fees and disbursements and 10,000 schillings for travel expenses for attending the Court's hearing.

The Government did not object to this claim.

The Court finds the sums sought to be reasonable and, accordingly, allows them in their entirety.

42. Mr Schwabe is thus entitled to 130,402.20 schillings for his costs and expenses.

FOR THESE REASONS, THE COURT

1. Holds by seven votes to two that there has been a violation of Article 10 (art. 10) of the Convention;
2. Holds unanimously that, as regards the non-pecuniary damage alleged, the present judgment constitutes sufficient just satisfaction for the purposes of Article 50 (art. 50);
3. Holds unanimously that the Republic of Austria is to pay to the applicant, within three months, 35,242.42 Austrian schillings (thirty-five thousand two hundred and forty-two schillings and forty-two groschen) for pecuniary damage and 130,402.20 Austrian schillings (one hundred and thirty thousand four hundred and two schillings and twenty groschen) for costs and expenses;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 August 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Thór Vilhjálmsson;
- (b) dissenting opinion of Mr Matscher;
- (c) concurring opinion of Mr Martens.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

It does not seem to be disputed that the only issue in this case is whether or not the interference complained of by the applicant was "necessary in a democratic society".

The facts of the case may be summarised as follows.

In a public interview in August 1985, Mr Wagner, the Head of the Carinthian Regional Government, expressed the opinion that Mr Tomaschitz, the Mayor of a town in the region, ought to resign from office. The reason he gave was that Mr Tomaschitz had recently been convicted for negligently causing bodily harm when driving under the influence of alcohol and for abandoning the victim.

The applicant, a politician and a member of the opposition in the region, issued a press statement in which he said that he agreed with Mr Wagner as to the resignation. However, he added that Mr Wagner "did not have the slightest moral right" to attack Mr Tomaschitz as he had known for years that in July 1966 his own deputy, Mr Frühbauer, had, after consuming alcohol, caused an accident which "had left two children fatherless".

The disagreement was not about whether Mr Tomaschitz should resign. The main point was the applicant's criticism of Mr Wagner's political morals. The persons involved were surely entitled to express their opinions, based on value-judgments, on both points. That is not in issue in the present case. The question is rather whether Mr Frühbauer had, under the rules on freedom of expression contained in our Convention, to tolerate being drawn into this debate in the manner described. Whilst I do not wish to minimise the problem at hand, I have to agree with Judge Matscher that it is a trivial one. The facts of the case show that what was involved was a political skirmish which did not call for the special legal protection that might be appropriate for political debate on another level.

In my opinion, it is necessary in a democratic society to protect the reputation of others, as stated in Article 10 para. 2 (art. 10-2). This rule can be further elaborated on the basis of Article 8 (art. 8). I find two features of this case to be relevant in this respect.

Firstly, in order to criticise Mr Wagner the applicant made use, in 1985, of an article which had recently appeared in an Austrian magazine and which related to a conditional sentence imposed in 1966. I am not in agreement with the majority of the Court when it states, in paragraph 32 of the judgment, that "a politician's previous criminal convictions of the kind at issue here ... may be relevant factors in assessing his fitness to exercise political functions". Without claiming expertise in criminology, it seems clear to me that twenty-year-old conditional sentences, even for acts such as those involved here, do not evidence the moral character of the persons concerned.

Secondly, I agree with the view of the Austrian courts as to the nature of the allegations contained in the press release issued by the applicant.

These two points are, in my opinion, of such a nature that the Austrian courts could convict the applicant without infringing the Convention. I therefore find no violation in this case.

DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I begin by noting that this case is a trivial one which does not deserve a lengthy statement of my views on the scope of Article 10 (art. 10), views which differ in this case from those of the majority of the Court, who found that there had been a violation of that provision.

In the context of a political quarrel at a local (or regional) level between Mr Schwabe, the Chairman of a district section of the Young Austrian People's Party (Junge ÖVP) and Mr Wagner, the Head of the Provincial Government (Landeshauptmann) and Chairman of the Socialist Party (SPÖ) in Carinthia, the former resurrected a case which was almost twenty years old and concerned Mr Frühbauer, who was Mr Wagner's deputy and a political friend, but in no way directly involved in the quarrel. Mr Frühbauer considered that he had been defamed and brought proceedings against Mr Schwabe. He accused him of having committed defamation (Article 111 of the Criminal Code) by stating the facts incorrectly and giving the public a manifestly erroneous opinion on them; he also accused him of having infringed Article 113 of the Criminal Code, which imposes criminal liability on anyone who accuses another person of having committed an offence in respect of which the sentence has been served (and the conviction long since spent). As a consequence, the relevant court convicted Mr Schwabe and imposed a small fine.

While I recognise the importance of freedom of expression and of the press, in particular in political debate, I consider that this freedom also has limits and carries with it responsibilities expressly referred to in Article 10 para. 2 (art. 10-2) of the Convention (an aspect of the question which appears not to have been accorded great weight in the Court's reasoning). In my opinion, these limits are exceeded if someone, even in the course of political debate, quite unnecessarily and stating the facts incorrectly, defames a politician who is not in fact personally involved in that debate, and thus damages his reputation, the offence being all the more serious where the defamation is committed by means of the media.

As the minority of the Commission rightly observed in their separate opinion, "it must be acknowledged that what is involved in the present case is something very different from a major political debate, which would have justified unfettered freedom of thought".

The majority of the Court considered that the interference with the applicant's freedom of expression was not "necessary": for my part, I consider that what he did - and in particular the way in which he did it - was not necessary either.

CONCURRING OPINION OF JUDGE MARTENS

1. Although I share the conclusion that there was a violation of Article 10 (art. 10) and although I agree in substance with the arguments on which this conclusion is based, my approach to this case has been slightly different from that of the Court. One of the grounds for my approach is that the applicant's conviction for defamation was based not only on his failure to prove the truth of what the Austrian courts assessed as a statement of fact, but also on their finding that he clearly had intended to defame Mr Frühbauer.

2. As in its *Lingens* and *Oberschlick* judgments, the Court makes it clear in its present judgment that, where the right to freedom of expression is at stake, there is no room for leaving to the national courts a margin of appreciation as to the assessment of the relevant statements, but that it will effect a full review of such assessments. Rightly so, for such control is indispensable, especially where freedom of public debate on political issues is at stake. Misconception of the notion of freedom of expression easily leads to misconstruction of the relevant statements, particularly by national courts which see themselves as *censor morum*, even in public debate on political issues.

3. My approach to the present case stems from the fact that it clearly illustrates the danger I have referred to, as well as the need to review fully all the elements in the national court's assessment. Unlike the Austrian judges, I think that, from an objective point of view, there can be no doubt whatsoever that the applicant's press release constituted mainly and primarily a value-judgment on Mr Wagner. That value-judgment was based on both a secondary value-judgment and a statement of fact: the secondary value-judgment was that Mr Frühbauer had been found guilty of a driving offence comparable to that committed by the Mayor and, as a consequence, should also have resigned; the factual statement was that Mr Wagner was well aware of that, but had allowed a political friend to do what he claimed the Mayor was not entitled to do.

4. I do not deny that the secondary value-judgment may seem questionable, especially if one compares the cases of the Mayor and of Mr Frühbauer from a strictly legal point of view. However, first of all, the applicant's press release was clearly devoted to comparing the two cases not from a legal point of view, but merely in terms of political morals. Secondly, questionable opinions too are protected under Article 10 (art. 10); that is a very important principle and it must be upheld.

Nor do I deny that the secondary value-judgment could have been formulated more carefully so as to avoid the possibility that a reader might think that Mr Frühbauer too had been convicted for drunken driving. But, firstly, in the context of the press release, the opinion expressed about Mr Frühbauer really was secondary and, secondly, there is an essential

difference between lack of care and intention to defame. Courts which too readily - that is, on the mere strength of their interpretation of the wording of a statement - assume such a criminal intention tend to stifle political debate and thereby violate Article 10 (art. 10).

5. All this makes it clear why the assessments made by the Austrian courts cannot be accepted. They first took the secondary value-judgment out of context, making it into a primary statement, directed against Mr Frühbauer. They then construed the statement as containing several separate reproaches, notably that of drunken driving. Finally, they turned what was - in the light of the wording of the article in *Profil* - at worst carelessness into malicious intent.

These assessments show that the Austrian courts completely failed to appreciate (a) that the statement in question was, objectively speaking, open to another interpretation; and (b) that, in such a case, the right to respect for freedom of opinion has the consequence that a criminal conviction is justified only when there are compelling grounds - which should not be derived solely from the wording of the impugned statement - for choosing the interpretation that implies criminal intent. Such grounds were lacking here.