



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

THIRD SECTION

CASE OF ANDREAS WABL v. AUSTRIA

(Application no. 24773/94)

JUDGMENT

STRASBOURG

21 March 2000

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In the case of ANDREAS WABL v. AUSTRIA,

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

Mr J.-P. COSTA, *President*,
Mr P. KÜRIS,
Mrs F. TULKENS,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*

Having deliberated in private on 25 January 2000 and on 7 March 2000;

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”) and by Mr Andreas Wabl (“the applicant”), an Austrian national, on 2 November 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (24773/94) against Austria lodged with the Commission under former Article 25 by the applicant on 7 July 1994. The applicant is represented by Mr T. Prader, a lawyer practising in Vienna. The Government of Austria are represented by their Agent, Mr. F. Cede, Ambassador, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

The Commission’s request referred to former Articles 44 and 48 and to the declaration whereby Austria had recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach of Article 10 of the Convention.

2. On 14 January 1999 the Panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the application would be examined by one of the Sections. It was, thereupon, assigned to the Third Section.

3. The Chamber constituted with the Section included *ex officio* Mr W. Fuhrmann, the judge elected in respect of Austria (Article 27 § 2 of the Convention and Rule 26 § 1 (a) of the Rules of Court) and Mr J.-P. Costa, Vice-President of the Section (Rules 12 and 26 § 1 (a)). The other members

designated by the latter to complete the Chamber were Mr P. Küris, Mrs F. Tulkens, Mr K. Jungwiert, Mrs H.S. Greve and Mr K. Traja.

4. In accordance with Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues in the application. The Registrar received both the applicant's and Government's memorials on 19 May 1999.

5. After consulting the Agent of the Government and the applicant, the Chamber decided not to hold a hearing in the case.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. In June 1988 the applicant participated in a protest campaign against the stationing of interceptor fighter planes (*Abfangjäger*) near Graz airport. In the course of a police action, Police Officer Fellner charged the applicant with having scratched his right arm, and he subsequently requested that the applicant be prosecuted for having caused grievous bodily harm (*schwere Körperverletzung*). In July 1988 the Graz Public Prosecutor's Office (*Staatsanwaltschaft*) informed the applicant that the investigation proceedings against him had been discontinued.

7. On 14 August 1988 the "Neue Kronen-Zeitung - Steirerkrone", issued in Graz, published the following article, under the title "Styrian Green politician and member of Parliament injured civil servant/Request for him to be handed over on account of the risk of infection" and with the headline "Police Officer claims: AIDS test for Wabl!". The article read as follows:

"Dramatic contribution to the debate on the privilege of members of Parliament: Police Officer Walter Fellner (34) from Aflenz not only requests that Styrian Green politician and member of Parliament Andreas Wabl be handed over, but also that the member of Parliament - who is immune because of privileges, be subjected to an AIDS-test. Reason: Wabl scratched Fellner and drew blood.

'I don't dare to touch my wife and I can't even kiss my children' - Since he has been involved in a police action against the opponents of the [planes] the family life of Police Officer Walter Fellner is ruined. The fear of the immune deficiency syndrome paralyses the social relations and the sexual life of the father of three.

The explosive background: On 10 June, shortly after the [planes] had been stationed, the Police Officer, a senior Police Inspector, participated in a police action in the area of a camp of opponents of the [planes] at Graz-Thalerhof airport. On this occasion, 'friction' developed between the demonstrators and the police. The result of an altercation between Fellner and the Green politician Andreas Wabl was two bleeding scratches, one five, the other ten, centimetres long, to Fellner's right lower arm. Two witnesses and the local medical officer confirmed the injuries.

Fellner does not claim that the immune member of Parliament is suffering from the immune deficiency syndrome, but, as the Inspector told the 'Steirerkrone': 'The member of Parliament had been in contact with the other demonstrators and they were not particularly clean.' Criminal proceedings against Wabl on a charge of causing bodily injury have been discontinued on the ground of the triviality of the injury. Fellner nevertheless requests that the member of Parliament be handed over.

'Mr. Wabl has to undergo an AIDS-test, as he might have infected me', states Fellner and thereby asks the Green 'scratcher' to have a blood sample taken for the purposes of an immune deficiency syndrome test. Wabl's victim also intends to claim compensation for moral damages. As regards his claims for compensation, Fellner is represented by the Graz lawyer Candidus Cortolezis, who is known to be close to the opponents of the [planes] and not to the authorities who guard the [planes]."

8. This article, reproduced on pages 8 and 9 of the newspaper, was accompanied by a photograph showing the applicant and two police officers with the sub-title "AIDS-test for the privileged member of Parliament? Wabl (centre) in an altercation with the police."

9. The article was announced on the front page as follows:

"Green politician Wabl should have an AIDS test.

The Police Officer Walter Fellner from Aflenz asks Green member of Parliament Andreas Wabl to undergo an AIDS-test. Wabl scratched Fellner and drew blood in the course of an altercation (pages 8/9)."

10. The applicant requested the author of the article in question, who had not contacted him prior to its publication, to publish a rectification as well as a statement drafted by the applicant.

11. The text of this statement, published in the "Steirerkrone" on 17 August 1988, read as follows:

"In the context of the report on Fellner's request for an AIDS-test, the 'Steirerkrone' wishes to clarify that, when mentioning the disease AIDS, it never intended to defame, for personal or political reasons, the member of Parliament Andreas Wabl. We wish to apologise for any gross claims which were not appropriate to our standards of fairness and our reputation as journalists."

12. This statement was printed as an annex to an article with the headline "Defamation of Green politician not intended/hygiene expert Möse reassures: 'No AIDS-infection from scratches!'", with the following text:

"On Tuesday, the Graz 'hygiene-king', university professor Josef Möse, reassured the Police Officer Walter Fellner from Aflenz, who feared an infection with AIDS from scratches which were allegedly inflicted on him by Green member of Parliament Andreas Wabl. Möse: 'AIDS cannot be caught from scratches.'

Möse, President of the Austrian AIDS Committee, informed the 'Steirerkrone': 'Nobody has anything to fear from a simple scratch. Infection is impossible.' The Head of the Graz Institute for Hygiene declared his immediate willingness to 'hold at any time an explanatory talk' with the senior Police Inspector and his family.

As reported Fellner feared that he had been infected with the AIDS virus by two scratches to his right lower arm, which were inflicted on him in the course of an altercation with the Green member of Parliament Andreas Wabl. Criminal proceedings on a charges of causing bodily harm (superficial reddening) have been discontinued by the Graz Public Prosecutor's Office on the ground that the factual elements of the offence were not present."

13. The article further referred to the applicant's claims that the matter was a political campaign intending to bring him into disrepute.

14. Also on 17 August 1988 the applicant, on the occasion of a press conference, commented on the events of 10 June 1988 and in particular the above articles of 14 and 17 August 1988. He informed the press of his opinion regarding the background to the events which he considered to be a "political character assassination" ("politischer Rufmord"). When asked by a journalist how he felt about the above events, the applicant replied as follows:

"This is Nazi-journalism."

15. This statement was quoted in the Austrian media.

16. On 29 August 1988 the company publishing the newspaper "Kronen-Zeitung" brought injunction proceedings under section 1330 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) against the applicant with the Graz Regional Civil Court (*Landesgericht für Zivilrechtssachen*). It requested that the applicant be prohibited from repeating the statement according to which the contents of the "Kronen-Zeitung" were "Nazi-journalism" and to arrange for a rectification.

17. In the context of private prosecution proceedings instituted by the applicant in respect of the article of 14 August 1988, the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*), as confirmed by the Vienna Court of Appeal (*Oberlandesgericht*) on 5 February 1990, convicted the company publishing the "Kronen-Zeitung" of defamation, pursuant to the Media Act (*Mediengesetz*), and ordered it to pay compensation to the applicant.

18. On 5 February 1993 the Graz Regional Civil Court dismissed the injunction claim. The Court observed that section 1330 of the Civil Code envisaged an injunction in respect of any statement of facts which jeopardised someone's reputation, income or livelihood, the untruth of which was known or must have been known. Considering all circumstances, and in particular the background of the press conference and the impugned statement, the Court found that the applicant had used the expression "Nazi-journalism" as a value-judgment. The Court based its decision on the statements made by the applicant and various witnesses, as well as on an expert opinion regarding the interpretation of the expression "Nazi-journalism".

19. On 30 June 1993 the Graz Court of Appeal dismissed the plaintiff's appeal (*Berufung*). The Court of Appeal confirmed the findings of the first

instance court that the impugned statement was a value-judgment. Furthermore, even assuming that the impugned statement was an untrue statement of fact, the plaintiff had failed to show that the applicant had known or should have known that this statement was untrue. In this respect, the Court of Appeal referred to the expert opinion according to which the defamation of political opponents with an alleged illness was an essential element of the journalism under the Nazi regime. Furthermore, even assuming that the impugned statement amounted to an insult, it was justified as a reaction to the plaintiff's previous publication on the applicant.

20. On 14 December 1993 the Austrian Supreme Court (*Oberster Gerichtshof*), upon the plaintiff's further appeal (*außerordentliche Revision*), reversed the Appeal Court's decision and issued an injunction against the applicant prohibiting him from repeating the statement that the article of 14 August 1988 amounted to "Nazi-journalism", and similar statements.

21. According to the Supreme Court, section 1330 § 2 of the Civil Code presupposed facts, i.e. circumstances, the existence of which could be demonstrated. If a value-judgment was based on particular facts it comprised a statement of facts. The question whether or not "facts" had been disseminated had to be examined against the general context of the impugned statement, as understood by the man in the street. In this respect the interpretation least favourable to the offender had to be placed on the statement. Objective criticism presupposed that the value-judgment corresponded to unchallenged or proven facts. The Supreme Court further observed that, under section 1330 § 2 of the Civil Code, the plaintiff had to prove that the discrediting statement was untrue, unless the statement also amounted to an insult; in the latter case, the offender had to prove the truth of the statement concerned. The question whether or not a statement constituted an unlawful interference with a person's reputation could only be assessed by balancing all relevant circumstances.

22. The Supreme Court found that the applicant's reproach of "Nazi-journalism" had concerned an article published by the plaintiff, and had arisen on the occasion of a press conference concerning the plaintiff's defamatory report about the applicant. The impugned statement had been an answer to a question put by one of the journalists, and, in the circumstances, the Court had no doubt that this statement only related to the particular article of 14 August 1988. In this context, the applicant's statement was a value-judgment. In any event, there was no indication as to how the journalist had understood the applicant's reproach "Nazi-journalism".

23. The Supreme Court considered further whether this value-judgment fell within the scope of section 1330 § 1 of the Civil Code. The plaintiff could claim an injunction under this provision if, considering all circumstances, the plaintiff's interests were not less important than the applicant's. The Supreme Court found that the plaintiff had an interest not to

be associated with National Socialism. The reproach “Nazi-journalism” was close to a charge of criminal behaviour under the National Socialism Prohibition Act (*Verbotsgesetz*). The Supreme Court also noted that the applicant's statement was a reaction to an article published by the plaintiff which contained the assumption that the applicant was suffering from the immune deficiency syndrome, i.e. a contagious disease, which provokes fear and antipathy amongst the majority of the population. His indignation about the defamatory reporting might appear understandable but could not justify the reproach that the plaintiff's way of reporting came close to criminal behaviour, in particular as he himself could have brought proceedings under section 1330 of the Civil Code against the plaintiff. Balancing all circumstances, the Supreme Court concluded that the applicant's interests did not outweigh the plaintiff's. The right to freedom of expression could not justify such a serious attack on the plaintiff's reputation. For the same reasons, the impugned statement could not be regarded as permissible political criticism, which is supposed to provoke or shock. The Supreme Court also noted that, having regard to the applicant's submissions in the course of the proceedings, there was a risk that he would repeat the statement in question.

24. This decision was served on the applicant's counsel on 8 February 1994.

II. RELEVANT DOMESTIC LAW

25. Section 1330 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides as follows:

“(1) Anybody who, due to defamation, suffers real damage or loss of profit, may claim compensation.

(2) The same applies if anyone is disseminating facts which jeopardise someone's reputation, income or livelihood, the untruth of which was known or must have been known to him. In this case there is also a right to claim a revocation and the publication thereof...”

26. After the Second World War, Austria introduced legislation penalising activities inspired by National Socialist ideas, i.e. the National Socialism Prohibition Act (*Verbotsgesetz*). In the State Treaty (*Staatsvertrag*) of 1955, Austria confirmed its undertaking to prohibit any such activities.

PROCEEDINGS BEFORE THE COMMISSION

27. The applicant applied to the Commission on 7 July 1994. He alleged that the Supreme Court's judgment of 14 December 1993 prohibiting him from repeating the reproach with "Nazi-journalism" constituted a violation of Article 10 of the Convention.

28. The Commission declared the application (no. 24773/94) admissible on 10 April 1997. In its report of 4 March 1998 (former Article 31 of the Convention), it expressed by a majority the opinion that there had been no violation of Article 10 of the Convention.

FINAL SUBMISSIONS TO THE COURT

29. The Government requested the Court to find that there has been no violation of Article 10 of the Convention.

30. The applicant asked the Court to find that the Supreme Court's judgment of 14 December 1993 constituted a violation of Article 10 of the Convention

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

31. The applicant alleged a breach of Article 10 of the Convention which reads as follows:

"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."

32. The applicant contended that the Supreme Court, in its judgment of 14 December 1993, did not duly weigh the interest of the publisher of the "Kronen-Zeitung", a legal person, in the protection of its reputation against

his interest in defending himself against a libellous and defamatory attack. He emphasised, on the one hand, his role as a member of Parliament of an opposition party and, on the other hand, the power of the “Kronen-Zeitung” which is the Austrian daily newspaper with the largest circulation reaching over 40% of the population. He claimed that the “Kronen-Zeitung” was, therefore, a “public figure” in Austria. As it used an aggressive and provocative style of journalism, it had to accept harsher criticism than would be permissible with regard to a private individual. The applicant also pointed out that the article with the rectification had only been published on the day on which he gave the press conference and made the impugned statement. Moreover, the rectification repeated the accusation that he was suffering from the immune deficiency syndrome. Finally, the applicant submitted that the Austrian authorities obviously did not consider that his statement contained a reproach of criminal behaviour as there was no prosecution against him in this respect.

33. The Government accepted that the injunction interfered with the applicant’s right to freedom of expression and was based on section 1330 of the Austrian Civil Code. They maintained that the injunction was necessary in a democratic society for the protection of the reputation and the rights of others. Against the particular political background, it was imperative to afford effective legal protection against unjustified accusations of expressing Nazi attitudes. The statement at issue was a value-judgment which contained the reproach of almost criminal behaviour. The Government further argued that the applicant’s statement did not contribute to a debate on the quality of Austrian journalism, but was an insulting reaction to an article defaming him. It was excessive, in particular as the applicant could have sought an injunction himself, and as a rectification had already been published. The Government also contended that the interference, consisting not in a conviction but only in an injunction, was of a minor nature.

34. The Court notes that it was common ground between the parties that the Supreme Court’s injunction constituted an interference with the applicant’s right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. Furthermore, there was no dispute that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others, within the meaning of Article 10 § 2. The Court endorses this assessment.

35. The dispute in the case related to the question whether the interference was “necessary in a democratic society.”

The Court recalls its well established case-law that the notion of necessity implies a pressing social need. The Contracting States enjoy a margin of appreciation in this respect, but this goes hand in hand with a European supervision which is more or less extensive depending on the circumstances. In reviewing under Article 10 the decisions taken by the

national authorities pursuant to their margin of appreciation, the Convention organs must determine, in the light of the case as a whole, whether the interference at issue was “proportionate” to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are “relevant and sufficient” (see for instance the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 25, §§ 39-40; *Sunday Times (no. 2) v. the United Kingdom* judgment of 26 November 1991, Series A no. 217, p. 28-29, §§ 50).

36. The Court notes that the Graz Regional Civil Court, in its decision of 5 February 1993, and the Graz Court of Appeal, in its decision of 30 June 1993, had dismissed the action brought by the publisher of the “Kronen-Zeitung”. They held in essence that the impugned statement was a value-judgment which was not excessive in the circumstances of the case.

37. These decisions were overturned by the Supreme Court which, in its decision of 14 December 1993, issued an injunction against the applicant prohibiting him from repeating the statement, “This is Nazi-journalism”, and similar statements in relation to the article published about him in the “Kronen-Zeitung” on 14 August 1988. The Supreme Court shared the lower courts’ view that the applicant had meant the impugned statement as a value-judgment. It weighed the applicant’s interest in expressing his opinion against the necessity in a democratic society to protect the reputation and rights of others, in this case the publisher of the “Kronen-Zeitung”, against an accusation of Nazi working methods. In conclusion it found that the applicant had exceeded the limits of acceptable criticism.

38. The Court considers that the reasons given by the Supreme Court were “relevant” with regard to the aim pursued. It remains to be ascertained whether they were also “sufficient” for that same purpose.

39. In assessing this question, the Court recalls that, subject to paragraph 2 of Article 10 of the Convention, freedom of expression is applicable not only to “information” and “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb. The Court further recalls that it must consider the decision challenged before it, in the light of the case as a whole, including the circumstances in which the applicant made his statement (see the *Oberschlick (no. 2) v. Austria* judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1274-75, §§ 29 and 31).

40. The applicant’s remark, reproaching the “Kronen-Zeitung” with Nazi-journalism, was certainly not only polemical but particularly offensive. On the other hand it was made in response to an article published in the “Kronen-Zeitung” which supposed that he was suffering from the immune deficiency syndrome. The Supreme Court considered that the applicant’s indignation about defamatory reporting, associating him with a disease provoking fear and antipathy amongst the majority of the population could not justify the reproach of Nazi working methods, which came close to a

charge of criminal behaviour. In addition the Supreme Court referred to the legal remedies available to the applicant.

41. The Court finds that the Supreme Court duly balanced the interests involved and that the detailed reasons given by it were also “sufficient” for the purposes of Article 10 § 2. In coming to this conclusion, the Court had particular regard to the special stigma which attaches to activities inspired by National Socialist ideas. In this context it notes that, pursuant to constitutional provisions and legislation introduced in Austria after the Second World War, it is a criminal offence to perform such activities (see paragraph 26 above).

42. However, the Court considers that the article published in the “Kronen-Zeitung” was defamatory. It would also appear open to doubt whether it contributed to a debate of general concern as it contained hardly any information about the protest campaign against the stationing of interceptor fighter planes in which the applicant had participated. Thus, even bearing in mind that the applicant is a politician, who “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large and must display a greater degree of tolerance” (see the Oberschlick (no. 2) judgment, cited above, § 29), the Court finds that the article at issue was indeed an understandable ground for indignation. Nevertheless, the Court notes that the applicant did not use this expression “Nazi-journalism” as an immediate reaction but only a few days later when the “Kronen-Zeitung” published a rectification which included a statement drafted by the applicant himself.

43. Furthermore, the applicant, as stated by the Supreme Court, could himself have brought injunction proceedings under section 1330 of the Civil Code. In this context, the Court notes that the applicant did avail himself of the possibility of a private prosecution against the company publishing the “Kronen-Zeitung”, which resulted in the latter’s conviction for defamation, pursuant to the Media Act.

44. Finally, the Court observes that the contested injunction was confined to prohibiting the applicant from repeating the statement that the article of 14 August 1988 amounted to “Nazi-journalism”, or the making of similar statements. The applicant, thus, retained the right to voice his opinion regarding the reporting by the “Kronen-Zeitung” in other terms.

45. Having regard to these considerations, the Court finds that the Supreme Court was entitled to consider that the injunction was “necessary in a democratic society” for the protection of the reputation and rights of others.

Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS THE COURT

Holds by six votes to one that there has been no violation of Article 10 of the Convention;

Done in English, and notified in writing on 21 March 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. Dollé
Registrar

J.-P. Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mrs Greve is annexed to this judgment.

S.D.
J.-P.C.

DISSENTING OPINION OF JUDGE GREVE

In the present case I have found a violation of Article 10. Unlike the majority, I do not find the interference with Mr Wabl's freedom of expression necessary in a democratic society.

The newspaper "Neue Kronen-Zeitung - Steirerkrone" also referred to as the "Kronen Zeitung" - by far the most read newspaper in Austria - headlined an article printed on 14 August 1988 "Police Officer claims: AIDS test for Wabl". On the front page the article was announced as follows:

"Green politician Wabl should have an AIDS test.

The Police Officer Walter Fellner from Aflenz asks Green member of Parliament Andreas Wabl to undergo an AIDS-test. Wabl scratched Fellner and drew blood in the course of an altercation (pages 8/9)."

Three days later a rectification was published in the newspaper and a statement by Mr Wabl himself. The rectification was headlined "Defamation of Green politician not intended/hygiene expert Möse reassures: 'No AIDS-infection from scratches'". On this same day, at a press conference where Mr Wabl commented on the articles, he was asked by a journalist *how he felt* about it and replied "This is Nazi-journalism." The company publishing the "Kronen Zeitung" was convicted for defaming Mr Wabl and ordered to pay him compensation.

Following separate proceedings - contrary to the findings of the Graz Regional Civil Court and the Graz Court of Appeal - the Austrian Supreme Court issued an injunction against Mr Wabl prohibiting him from repeating the statement that the article of 14 August 1988 amounted to "Nazi-journalism", and similar statements. According to the Supreme Court the statement was an answer to a question put by a journalist, related only to the particular article of 14 August 1988, and was a value-judgement. In the course of the proceedings, the Graz Court of Appeal had relied on expert opinion according to which the defamation of political opponents with an alleged illness was an essential element of the journalism of the Nazi regime. The Supreme Court noted that Mr Wabl's statement was a reaction to an article published by the plaintiff which contained the assumption that Mr Wabl was suffering from the immune deficiency syndrome, a contagious disease, which provokes fear and antipathy amongst the majority of the population. However, the Supreme Court argued that Mr Wabl's reproach came close to a charge against the publisher of criminal behaviour under the National Socialism Prohibition Act. The publisher, according to the Supreme Court, had a clear interest not to be associated with National

Socialism. On balance, the Supreme Court concluded that Mr Wabl's interests did not outweigh the publisher's.

The main issue to be resolved by this Court is whether the interference with Mr Wabl's right to freedom of expression under Article 10 § 1 of the Convention was justified under the second paragraph of this Article as "being necessary in a democratic society".

According to the Court's well-established case-law, the test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Sunday Times* (no. 1) v. the United Kingdom judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.

Generally speaking, a democratic society presupposes a measure of tolerance and broadmindedness. For this reason, and as a matter of fairness, I agree with the findings of the six dissenting members of the Commission, that a democratically elected politician such as Mr Wabl, with a mandate to fulfil, who became the target of a public defamatory attack, should not be prohibited from defending himself in the way he did. A democratic political debate requires that where a politician is attacked, not for his political views but on a purely personal level, he should not be in a more disadvantageous position than the press, and that he should be allowed sufficient latitude to reply to press attacks.

Furthermore, Nazism is known and identified with the ideology and practices of the German "Third Reich" and its associates. Nazism is in essence political although criminalised for its extreme victimisation. The combat against Nazism can never be only legal, primarily it is a political "battle". The recourse that individuals have to courts - here in Austria - cannot but be a fallback position, especially when the political fight against Nazism and its different methods and manifestations fail or the individuals affected are at a disadvantage in terms of political clout for political confrontation. I find it necessary in and for a democratic society to permit and encourage a political discourse to prevent the recurrence of Nazism, even if certain statements may be emotional value-judgements. This is the

context in which I consider Mr Wabl's declaration. He had participated in a demonstration against the stationing of interceptor fighter planes near the Graz airport when in the course of a police action a police officer charged him with having scratched his right arm. Where there is blood and infectious diseases can be spread by blood, someone afraid of catching a particular disease may always want a blood-test. This, however, is a general issue with no special relevance when politician A sees his dentist, politician B is giving birth, etc. There was absolutely *no* particular reason in the present case to associate the politician Mr Wabl with the need for an AIDS-test. This could only be defamatory, and the publisher was convicted for defamation. There was furthermore expert advice in Austria to the effect that the defamation of political opponents with an alleged illness was an essential element of the journalism of the Nazi regime.

Under these circumstances I do not find the restriction imposed on the applicant reconcilable with freedom of expression as protected by Article 10 of the Convention.