



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

FORMER THIRD SECTION

CASE OF KRONE VERLAG GMBH & CO. KG v. AUSTRIA

(Application no. 34315/96)

JUDGMENT

STRASBOURG

26 February 2002

FINAL

26/05/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Krone Verlag GmbH & Co. Kg v. Austria,

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

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr P. KÜRIS,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Sir Nicolas BRATZA,

Mr K. TRAJA, *judges*,

and Mrs S. DOLLÉ, *Registrar*

Having deliberated in private on 15 May 2001 and 30 January 2002,

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

PROCEDURE

1. The case originated in an application (no. 34315/96) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a limited partnership registered under Austrian law, Krone Verlag GmbH & Co. KG (“the applicant”), on 29 November 1996.

2. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant company alleged that an injunction ordering it to refrain in the future from publishing the picture of a politician, together with allegations about his sources of revenue, like that which it had already published in its newspaper, violated its right to freedom of expression, contrary to Article 10 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 15 May 2001 the Chamber declared the application admissible.

7. On 1 November 2001 the Court effected a change in the composition of its Sections, but the present case remained with the former Chamber of Section III which had declared the application admissible.

8. Neither the applicant company nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant company is the publisher of a newspaper (*Kronenzeitung*) with its registered office in Vienna.

10. On 3, 4, 7, 8 and 15 March, as well as on 3 and 16 May and 29 June 1995, the applicant company published, in its Carinthian regional edition (*Lokalausgabe*), articles on the financial situation of a certain Mr Posch who, at that time, was employed as a teacher and, at the same time, was a member of the Austrian National Assembly (*Nationalrat*) and the European Parliament. The articles commented on these professional tasks and, in harsh terms, alleged that he received three salaries unlawfully as, according to Austrian law, he was not entitled to a teacher's salary during his membership of the European Parliament. He was, *inter alia*, referred to as someone unjustly enriching himself. These articles were accompanied by photographs of Mr Posch.

11. On 18 August 1995 Mr Posch applied for an injunction under Section 78 of the Copyright Act (*Urheberrechtsgesetz*) to the Klagenfurt Regional Court against the applicant company. He requested that the applicant company be ordered to refrain from publishing his picture in connection with statements describing him as somebody who received his salaries unlawfully and who benefited from unlawful privileges. Furthermore, he requested an order for the publication of the judgment in the applicant company's newspaper, indicating the grant of damages and the injunction (*einstweilige Verfügung*).

12. On 21 September 1995 the applicant company filed a statement of defence (*Klagebeantwortung*) in which it argued, *inter alia*, that the publication of the impugned articles had been justified under Article 10 of the Convention.

13. On 10 October 1995 the Klagenfurt Regional Court granted an interim injunction. It found the measure justified because the plaintiff's interest in prohibiting the publication of his photograph outweighed the applicant company's interest in the publication of the illustrated articles, in

particular as the publication of the pictures *per se* had no special information value (*Nachrichtenwert*).

14. On 4 January 1996 the Klagenfurt Regional Court granted the permanent injunction prohibiting the applicant company from publishing the plaintiff's picture in connection with the above mentioned or similar articles. It dismissed the remainder of the action. The court found that Section 78 of the Copyright Act prohibited publishing a person's picture if the publication violated that person's legitimate interests. When considering such interests, account had to be taken of whether the person concerned was known to the public, because the publication of the photographs of unknown persons made it possible to identify them later. The court found that Mr Posch's face was not generally known, despite his membership of the National Assembly. Therefore, his legitimate interests had been infringed by creating the possibility of identifying him. The applicant company was of course entitled to report on the plaintiff's activities and financial situation, but there was no legitimate interest in publishing his picture as it had, *per se*, no information value. Furthermore, it was irrelevant for this specific question whether the content of the articles was true or false.

15. On 8 February 1996 the applicant company appealed. It argued that the court had erred when it found that the plaintiff's interests outweighed the applicant company's interests, as the public in Carinthia, who had elected Mr Posch, were interested in his sources of revenue. Therefore the court should have also taken evidence – as had been offered by the applicant company – in order to prove the truth of the articles. Furthermore, the plaintiff was known to the public as he was Carinthian and had participated in several events during the election campaign there. Thus it was incorrect that Mr Posch's face was unknown.

16. On 9 July 1996 the Graz Court of Appeal dismissed the appeal. It found that the publication of the pictures together with the articles had been unnecessary. In any case, the information value of the pictures could not outweigh Mr Posch's interests. It also confirmed the legal opinion of the Regional Court that, for the purposes of Section 78 of the Copyright Act, it was irrelevant whether or not the publication contained true information.

17. On 15 October 1996 the Supreme Court declared inadmissible the applicant company's extraordinary appeal on points of law (*außerordentlicher Revisionsrekurs*). It confirmed the findings of the Court of Appeal, observed that the publication of the plaintiff's pictures had no additional information value, and therefore concluded that it had been unnecessary. On 4 November 1996 this decision was served upon counsel for the applicant company.

II. RELEVANT DOMESTIC LAW

18. Section 78 of the Copyright Act, in so far as relevant, reads as follows:

“(1) Images of persons shall neither be exhibited publicly, nor in any way made accessible to the public, where injury would be caused to the legitimate interests of the persons concerned or, in the event that they have died without having authorised or ordered publication, those of a close relative.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

19. The applicant company complains under Article 10 of the Convention that the injunction prohibiting it from publishing photos of Mr Posch, in connection with certain statements about his sources of revenue, violated its right to freedom of expression.

20. The relevant part of Article 10 of the Convention 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....

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 ... for the protection of the reputation or rights of others....”

A. Whether there was an interference

21. The Court notes that it was common ground between the parties that the injunction issued by the Austrian courts constituted an interference with the applicant company’s freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

B. Whether the interference was justified

22. An interference contravenes Article 10 of the Convention unless it is “prescribed by law”, pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is “necessary in a democratic society” for achieving such an aim or aims.

1. *"Prescribed by law"*

23. The applicant company submitted that the interference was not prescribed by law because Section 78 of the Copyright Act left a very wide margin of interpretation to the domestic courts, in particular as regards the term "justified interests" of the person in the picture.

24. The Government for their part asserted that section 78 of the Copyright Act formed the legal basis for the injunctions.

25. The Court finds that the impugned measure had a legal basis in Austrian law, namely Section 78 of the Copyright Act. The Court is not persuaded by the applicant company's argument that this provision is too vague to make the interference unforeseeable. A similar argument has been rejected by the Court in the case of *News Verlags GmbH & Co. KG v. Austria*, (no. 31457/96, ECHR 2000-I, § 43) and the Court sees no reason to reach a different conclusion in the present case. Accordingly, the Court is satisfied that the interference was "prescribed by law".

2. *Legitimate aim*

26. The applicant company submits that the interference at issue did not pursue a legitimate aim as required by paragraph 2 of Article 10.

27. In the Government's view, there existed a legitimate aim, namely the protection of the reputation and rights of others.

28. The Court agrees with the Government and finds that the measure at issue pursued a legitimate aim, namely the protection of the rights and the reputation of others, i.e. of Mr Posch. The applicant company does not submit any arguments in support of its allegation that this was not the case. The interference complained of, thus, had an aim that was legitimate under paragraph 2 of Article 10.

3. *"Necessary in a democratic society"*

29. The applicant company submits that the injunction was not necessary in a democratic society. The public has an interest in being informed about politicians and their conduct and, in particular, about politicians like Mr Posch who was not just a local politician of limited importance but a member of the Austrian Parliament, as well as a member of the European Parliament. The report did not concern issues relating to that politician's private sphere but a matter which was directly connected to his public functions, as the article criticised the fact that he received at the same time salaries from different functions and sources. Informing the public of such issues is an essential task of the media and, in this context, a politician should accept that his picture be published.

30. In the applicant company's view, there is no material difference between the present application and the aforementioned case of *News Verlags GmbH & Co. KG v. Austria* as the essential argument of the

domestic courts for issuing the injunctions was the same, namely that in their view there was no additional informative or news value in publishing the picture of the person concerned. This was not the test which should be applied under Article 10 when deciding on an injunction. The domestic courts should rather examine whether or not the arguments raised in the accompanying text were true or not.

31. The Government submit that the Austrian courts which granted the impugned injunction have struck a fair balance between the public's right to be informed about its elected representatives and their emoluments and the protection of the reputation of a politician. They argue further that pictorial reporting should essentially be judged by other standards than verbal reporting in view of the dangerous effects a picture may have on a person's security. There was no urgent need to publish a picture of Mr Posch while the tendency of the applicant company's style of reporting was to disparage Mr Posch in the eyes of the public. The bold print of the head lines and the placing of the article on the front page were sufficient to attract the readers' attention. The picture had no additional informative or news value. Moreover, the injunction was a proportionate measure as the applicant company was not generally prevented from publishing photographs of Mr Posch, but only prohibited from doing so in a closely circumscribed context.

32. In the Government's view the present case had to be distinguished from the *News Verlags GmbH & Co. KG v. Austria* judgment (no. 31457/96, ECHR 2000-I) on important factual differences. In the latter case, the Court attached particular importance to the fact that the person whose picture had been published was suspected of criminal offences directed against the foundations of a democratic society and the picture in that case had been published in the context of reporting on court proceedings. Both elements were absent in the present application.

33. The Court recalls its well-established case-law that the adjective "necessary", within the meaning of Article 10 § 2 implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protection by Article 10.

34. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the materials for which reproach is made against the applicant company and the context in which they were published. The Court must determine whether the interference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the courts to justify it are "relevant and sufficient" (see,

for instance, *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59 and, recently, *Arslan v. Turkey*, no. 23462/94, § 44, 8.7.99).

35. The Court recalls further that there is little scope for restrictions on political speech or questions of public interest (see e.g. *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 46, ECHR 1999-VIII). The limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues (e.g. *Oberschlick v. Austria* judgment of 23 May 1991, Series A no. 204, p. 26, § 59).

36. In the present case, the applicant company criticised Mr Posch, a politician. The subject matter of the published articles concerned his financial situation and the accusation that not all of his income had been earned lawfully. This is without doubt a matter of public concern which does not fall wholly within his private sphere. The reasons relied on by the Austrian courts for issuing an injunction prohibiting the applicant company from publishing the picture of Mr Posch were essentially that they did not consider Mr Posch a person known to the public and that the publication of his picture in connection with the reporting of his financial situation would make it possible to identify him, which infringed his interests. The applicant company had no legitimate interest in publishing the picture as it had no information value *per se* and it was irrelevant whether the facts alleged in the accompanying article were true or not.

37. Even accepting that the reasons adduced by the Austrian courts were “relevant”, the Court finds that they were not “sufficient”. The Austrian courts failed to take into account the essential function the press fulfils in a democratic society and its duty to impart information and ideas on all matters of public interest (*Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Moreover, it is of little importance whether a certain person (or his or her picture) is actually known to the public. What counts is whether this person has entered the public arena. This is the case of a politician on account of his public functions (*Oberschlick v. Austria* judgment (No. 2) of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, § 29), a person participating in a public debate (*Nilsen and Johnsen v. Norway* [GC], no. 23118/93, ECHR 1999-VIII, § 52), an association which is active in a field of public concern, on which it enters into public discussions (*Jerusalem v. Austria*, no. 26958/95, §39, 27.2.2001), or a person who is suspected of having committed offences of a political nature which attract the attention of the public (*News Verlags*

GmbH & Co. KG v. Austria, loc. cit., § 54). In view of Mr Posch's position as a politician there is no doubt that he had entered the public arena and had to bear the consequences thereof. Thus, there is no valid reason why the applicant company should be prevented from publishing his picture. In this respect the Court attaches particular importance to the fact that the published photographs did not disclose any details of his private life (see *Tammer v. Estonia*, no. 41205/98, § 68, 6.2.2001). Moreover, the Court has noted itself that on the Austrian Parliament's internet site the curriculum vitae and picture of Mr Posch, who is still a member of the Austrian Parliament (national council), can be seen.

38. The Government also argue that the injunction was a proportionate measure as the applicant company was not generally prevented from publishing photographs of Mr Posch, but was only prohibited from doing so in a closely circumscribed context. However, even within the scope delimited by the terms of the injunction the measure must correspond to a pressing social need. For the above reasons, the Court finds that this is not the case.

39. It follows from these considerations that the interference with the applicant company's right to freedom of expression was not "necessary in a democratic society". Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant company sought 59,419.02 Austrian schillings [ATS] (4,318.16 euros [EUR]) in respect of pecuniary damage, that is to say reimbursement of the opposing parties' costs for court fees and legal representation, which the applicant company was ordered to pay by the Austrian courts.

42. In addition the applicant company claimed 100.000 EUR in non-pecuniary damages. It submitted that, as a consequence of the injunction, it would be prevented in the future from publishing a picture of Mr Posch when reporting on his financial situation which would result in a loss for the newspaper's circulation. If, however, the applicant company would

disregard the injunction and publish a picture of Mr Posch, heavy fines might be imposed in enforcement proceedings.

43. The Government did not comment on the applicant company's claim for pecuniary damage but objected to an award for non-pecuniary damage. In their view, the applicant company failed to show a sufficiently strong link of causality between the violation found and the claim raised, and merely speculated about possible developments in the future.

44. As to pecuniary damages, the Court observes that payment by the applicant of the sums in question was a direct consequence of its conviction, which the Court has found to be in breach of Article 10 of the Convention. The Court considers the claim justified and, consequently, awards the full amount, namely 4,318.16 EUR.

45. As to non-pecuniary damages, the Court will leave open whether a corporate applicant may claim non-pecuniary damages of this kind (see *mutatis mutandis* the Immobiliare Saffi v. Italy judgment of 28 July 1999, § 79, ECHR 1999-V) as, in the circumstances of the case, the finding of a violation in itself provides sufficient satisfaction as regards any non-pecuniary damages the applicant company might have sustained.

B. Costs and expenses

46. For costs and expenses incurred by its legal representation in the domestic proceedings, the applicant company claimed 78,224.54 ATS (5,684.80 EUR). Further, the applicant company, which has not been represented by counsel in the Convention proceedings, claimed 10,000 ATS (726.73 EUR) for expenses incurred in the Convention proceedings. It submitted that the case had been prepared and pursued by its employees, which caused internal costs of at least the amount claimed.

47. The Government did not comment on these claims.

48. The Court finds that the sums claimed by the applicant company appear reasonable and awards the full amount, namely 6,411.53 EUR.

C. Default interest

49. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;
2. *Holds* that the finding of a violation in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) 4,318.16 EUR (four thousand three hundred and eighteen euros and sixteen cents) in respect of pecuniary damage;
 - (ii) 6,411.53 EUR (six thousand four hundred and eleven euros and fifty three cents) in respect of costs and expenses;
 - (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President