CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF A.T. v. AUSTRIA

(Application no. 32636/96)

JUDGMENT

STRASBOURG

21 March 2002

FINAL

21/06/2002

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 A.T. v. Austria,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mrs E. STEINER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 28 Februar 2002,

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

PROCEDURE

1. The case originated in an application (no. 32636/96) 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 an Austrian national, A.T. ("the applicant"), on 28 May 1996.

2. The applicant was represented before the Court by Mr. T. Kapsch, a lawyer practising in Graz. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that in compensation proceedings under the Media Act he did not have a public oral hearing.

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 16 January 2001, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant complains about two sets of proceedings, in which he sought compensation for statements published in the weekly *News*, in articles relating to a spectacular series of letter bombs which had been sent to politicians and other persons in the public eye in Austria. In both sets of proceedings the applicant was represented by counsel.

A. The first set of proceedings

10. On 3 May 1995 the applicant brought an action against the publisher of *News*. He complained that an article published on 16 February 1995 alleged that there was incriminating evidence against him, describing him as a right wing extremist being technically, organisationally and intellectually capable of organising the letter bomb terrorism. Moreover, his picture had been published. He requested compensation under the following sections of the Media Act (*Mediengesetz*): under section 6 for defamation, under section 7 for violation of his strictly private sphere, under section 7a for disclosure of his identity to the public, and under section 7b for breach of the presumption of innocence. He further requested supplementary measures under the Media Act, such as the publication of the judgment.

11. On 20 June 1995 the St. Pölten Regional Court (*Landesgericht*) discontinued the proceedings on the ground that the applicant had no right of action and dismissed his claim accordingly. The court did not hold a hearing prior to this decision.

The court noted that the impugned article mentioned the applicant by his first name and the initial of his family name without giving further information relating to his person. The following page showed his and a second person's picture, on which their faces had been obliterated. The image was subtitled "A. [first name in full] T. and Adolf S. hoarded Peter Binders' secret documents ...". The court observed that only a person whose identity had been disclosed to the public could invoke the Media Act. However, the applicant had not been mentioned by his full name. As to the picture, which showed two persons, it was impossible for the reader to identify which one was the applicant, as their faces had been obliterated. Thus, there was no disclosure of the applicant's identity and his request had to be rejected in accordance with section 8a § 2 of the Media Act, taken together with sections 486 § 3 and 485 § 1 (7) of the Code of Criminal Procedure (*Strafprozessordnung*).

12. On 25 July 1995 the applicant filed an appeal. He submitted that the court had wrongly dismissed his compensation claims. In particular, as to

the question whether his identity had been disclosed to the public, it had failed to take the article in its entirety into account. He maintained that he was entitled to compensation and requested the court to quash the Regional Court's decision and to remit the case to it for the continuation of the proceedings.

13. On 8 January 1996 the Vienna Court of Appeal (*Oberlandesgericht*), sitting in private, dismissed the applicant's appeal.

The court found that the Regional Court's reasoning only had force as regards the compensation claim based on section 7a of the Media Act, as this provision dealt with disclosure of a person's identity to the public, whereas the right of action under the other provisions relied on by the applicant depended on different conditions. The Court of Appeal went on to examine whether these conditions were met. As to section 6 of the Media Act, it found that the applicant had not denied that criminal proceedings on suspicion of intentionally causing danger by explosives were pending against him. Given this uncontested factual basis, the description of the suspicion against the applicant in specific terms did not constitute defamation. A right of action under section 7 of the Media Act was excluded in any case, as this provision protected only the strictly personal sphere. Section 7b provided for a compensation claim if someone was depicted as the perpetrator of an offence and not merely as a suspect. However, the article did not claim that the applicant had committed the letter bomb attacks; it only described him as being a suspect while drawing the reader's attention to the criminal proceedings which were pending against him. In conclusion, the Court of Appeal found that the Regional Court had, albeit with insufficient reasoning, rightly discontinued the proceedings. The decision was served on 25 January 1996.

B. The second set of proceedings

14. On 26 July 1995 the applicant brought another action against the publisher of *News*. He complained that in an article published on 22 June 1995 he had been described as a neo-nazi, and as being responsible for the letter bomb terrorism. His picture had also been published. He claimed that the article aimed at showing that he was the perpetrator of the letter bomb attacks. Again, he requested compensation under sections 6, 7, 7a and 7b of the Media Act, as well as supplementary measures such as the publication of the judgment.

15. On 21 August 1995 the St. Pölten Regional Court discontinued the proceedings on the ground that the applicant had no right of action and dismissed his claim accordingly. The court did not hold a hearing prior to this decision.

It noted that the impugned article mainly dealt with defects in the police investigation of the letter bomb attacks. The applicant was only mentioned

once by his first name and the initial of his family name. The accompanying text stated that the right-wing extremists from Carinthia, A. [first name in full] T. and Ewald F. had either not been put under surveillance at all or only occasionally. The following page showed the applicant's picture with a black bar over the eyes. It was subtitled "Under surveillance. Neo-nazi A. [first name in full] T. belongs to the circle of Ewald F".

The court found that the Media Act protected a person's name and picture, as well as other information which was likely to disclose the person's identity to the public. In order to disclose the applicant's identity, at least the mention of his full name, or other precise information concerning his person, would have been required. As the applicant's identity had not been disclosed, the relevant provisions of the Media Act did not apply. Thus, the applicant's request had to be rejected in accordance with section 8a § 2 of the Media Act, taken together with sections 486 § 3 and 485 § 1 (7) of the Code of Criminal Procedure.

16. On 4 September 1995 the applicant lodged an appeal. He submitted that the court had wrongly dismissed his compensation claim. He requested the Vienna Court of Appeal to quash the Regional Court's decision and to remit the case to it for the continuation of the proceedings. Alternatively, he requested the Court of Appeal to decide on his claims.

17. On 19 October 1995 the Vienna Court of Appeal, sitting in private, dismissed the applicant's appeal.

The court found that the Regional Court's reasoning only had force as regards the compensation claim based on section 7a of the Media Act. However, the decision to discontinue the proceedings was nevertheless correct for the following reasons: As regards his compensation claim for defamation based on section 6 of the Media Act, the court, having regard to the contents of the article as a whole, found that the applicant was only described as a suspect on account of his membership of a group of right wing extremists. It was a fact that this group of persons was under suspicion and the applicant had not contested that he belonged to that group. Thus, the reference to him as a suspect, being based on uncontested facts, did not constitute defamation. Further, the description of a suspicion of a criminal offence could not be considered as a violation of the applicant's strictly personal sphere under section 7 of the Media Act, nor did it violate the presumption of innocence giving rise to a claim under section 7b of the said Act. The decision was served on 28 November 1995.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Compensation claims under the Media Act

18. The Media Act contains a number of provisions under which a person who has been affected by a publication in a medium may claim compensation. As far as they are relevant in the context of the present case, they read as follows:

Section 6

"(1) Where a medium publishes statements which constitute the actus reus of disparagement, insult, derision or defamation the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered ...."

Section 7

"(1) Where a person's strictly private life is discussed or portrayed in a medium in such a way as to expose him publicly the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered ..."

Section 7a

"(1) Where publication is made, through any medium, of a name, image or other particulars which are likely to lead to the disclosure to a larger not directly informed circle of people of the identity of a person who

1. has been the victim of an offence punishable by the courts or

2. is suspected of having committed, or has been convicted of, a punishable offence,

and where legitimate interests of that person are thereby injured and there is no predominant public interest in the publication of such details on account of the person's position in society, of some other connection with public life, or of other reasons, the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered. ...."

Section 7b

"(1) Where a person who is suspected of having committed a punishable offence but has not been finally convicted is portrayed in a medium as guilty, or as the offender and not merely a suspect, the victim shall have a claim in damages against the owner of the medium (publisher) for the injury suffered. ...."

B. Compensation proceedings under the Media Act

19. According to the Media Act, compensation claims under sections 6, 7, 7a and 7b may either be raised in criminal proceedings against the publisher or, failing such criminal proceedings, in separate proceedings.

20. Section 8a § 1 of the Media Act states that, in separate compensation proceedings, the rules for criminal proceedings by way of a private prosecution apply, unless the Media Act provides otherwise.

21. Section 8a § 2 of the Media Act provides *inter alia* that a single judge has to conduct the hearing and to give judgment. The public nature of a hearing may be excluded at the claimant's request when issues relating to his strictly personal sphere are discussed. The single judge also takes the decisions envisaged by sections 485 and 486 of the Code of Criminal Procedure (*Strafprozessordnung*), which are otherwise taken by the Review Chamber (*Ratskammer*). An appeal lies to the superior court against a decision to discontinue the proceedings.

22. According to section 486 § 3 in conjunction with section 485 § 1 (7) of the Code of Criminal Procedure, the Review Chamber will discontinue the proceedings if it considers that the request for prosecution has not been brought by a person entitled to do so.

23. The Media Act does not contain any explicit provision on whether or not the single judge has to hold a hearing when the proceedings are to be discontinued. The courts' practice is not to hold a hearing in such cases. The Review Chamber, in whose stead the single judge decides under the Media Act (see above), sits in private pursuant to section 113 § 3 of the Code of Criminal Procedure.

24. Again the superior court, when dealing with appeals against decisions of the Review Chamber, which under the Media Act are taken by the single judge, takes its decisions sitting in private pursuant to section 114 of the Code of Criminal Procedure.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

25. The Government contended that the applicant failed to exhaust domestic remedies. Firstly, he should have complained in his appeal about the lack of a public oral hearing at first instance. Secondly, he should have requested a hearing in his initial submissions to the first instance court. In the alternative the Government argued that, by failing to do so, the applicant has waived his right to a hearing.

26. The applicant contested this view.

27. In its decision of 16 January 2001 on the admissibility of the application, the Court has already found that the Government's arguments on both issues are closely linked to the merits of the applicant's complaint. It sees no reasons to depart from this approach. Consequently, the Court decides to join the Government's preliminary objection to the merits of the case.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

28. The applicant complained about the lack of a public oral hearing in the two sets of proceedings under the Media Act. He relied on Article 6 § 1 of the Convention which, so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal..."

29. In the applicant's view the courts wrongly discontinued the proceedings as they did not limit themselves to an examination of the formal requirements of his action but went into an assessment of the substantive law, albeit without holding a hearing.

30. The applicant maintained that, in both sets of proceedings, the action lodged with the first-instance court as well as the appeal implied a request for a public oral hearing, as he was seeking compensation which can only be granted after a hearing has been held. He could, thus, not be required to ask for a hearing in case the court intended to discontinue the proceedings. In any case, the law does not provide for a possibility to request a hearing. Therefore, failure to request one cannot be considered as a waiver.

31. The Government accepted that Article 6 § 1 applied to the proceedings at issue as the compensation claims asserted by the applicant are of a civil law nature.

32. They pointed out that, in the present case, the relevant proceedings were discontinued. In case of a discontinuation of the proceedings the courts' review is limited to an examination of formal requirements. Where the proceedings are discontinued the law rules out a hearing before the appellate court. As to the proceedings before the first instance court, the law does not exclude the holding of a hearing but it is not common practice of the courts to hold one.

33. In the Government's view, this does not mean that hearings may not be held. Should a hearing be required under Article 6 of the Convention, for example, as the decision to discontinue the proceedings - though being potentially of a procedural nature - may have a bearing on substantive rights, the first instance court would be obliged to hold one. The applicant should therefore have complained in his appeal about the lack of a public hearing at first instance. The Government claimed that, upon such a

complaint, the appellate court would have ordered the first-instance court to continue the proceedings and to hold a hearing. Although there was no example for such a practice in compensation proceedings under the Media Act, this followed from the Supreme Court's judgment of 30 June 1999 and the Constitutional Court's judgment of 10 December 1999 which were both given in the light of the Court's Werner v. Austria case (judgment of 24 November 1997, *Reports of Judgments and Decisions* 1997-VII) relating to compensation proceedings for detention on remand. It follows from these judgments that a hearing required by Article 6 § 1 of the Convention may be held whenever it is not expressly excluded by domestic law. However, the applicant failed to make an appropriate complaint in his appeal.

34. The Court notes at the outset that the Government did not contest the applicability of Article 6 of the Convention. In both sets of proceedings the Regional Court discontinued the proceedings finding that the applicant had no right of action and dismissed his compensation claim accordingly. The Court of Appeal confirmed this view. In reaching the conclusion that the applicant had no right of action, the courts did not limit themselves to a review of purely formal requirements of the action, but proceeded to an examination of whether or not the applicant fulfilled the requirements for receiving compensation. Their decisions, thus, involved a determination of his civil rights and obligations.

35. Further, the Court finds that there are no special circumstances which would have justified dispensing with a hearing. It will, therefore examine the Government's argument that the applicant waived his right to a public oral hearing. In this context, the Court reiterates that the public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6. Admittedly, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, but any such waiver must be made in an unequivocal manner and must not run counter to any important public interest (see, among other authorities, the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 19, § 58, and the Pauger v. Austria judgment of 28 May 1997, *Reports* 1997-III, p. 895, § 58).

36. The Court further reiterates that the failure to request a hearing has been considered an unequivocal waiver where the courts' practice is not to hold one of their own motion but where the law explicitly provides for the possibility to request one (see the Zumtobel v. Austria judgment of 21 September 1993, Series A no. 268-A, p. 14, § 34, and the Schuler-Zgraggen judgment, cited above, *ibid.*) or were there is at least a practice to hold one upon a party's request (see the Pauger judgment, cited above, § 60). On the other hand such failure is irrelevant, where the law explicitly excludes a hearing (see the Diennet v. France judgment of 26 September 1995, Series A no. 325-A, p. 15, § 34) or where, though the

law does not contain a specific rule, the court's practice is never to hold one (see the Werner judgment, cited above, p. 2510, § 48, and the H. v. Belgium judgment of 30 November 1987, Series A no. 127, p. 36, § 54).

37. In the present case, the law explicitly excludes a hearing before the appellate court if the proceedings are to be discontinued. As to the proceedings before the court of first instance the law does not contain an explicit rule but the court's practice was not to hold one. In these circumstances, the applicant's failure to request a hearing either at first or second instance cannot be considered as a waiver. Nor is the Court convinced by the Government's argument that the appeal court would, upon a complaint by the applicant, have ordered the court of first instance to continue the proceedings and to hold a hearing. The Court notes in particular that the proceedings at issue came before the appeal court in late 1995 and early 1996, respectively, while the case-law relied upon by the Government, namely judgments of the Supreme Court and the Constitutional Court were only given in 1999 in the light of the Court's Werner case (*loc. cit.*). The Government have not pointed to any court practice or adduced any case-law existing at the time of the present proceedings. This being so, the applicant cannot be blamed for not having made a complaint which offered no prospects of success.

38. Consequently, the Court dismisses the Government's preliminary objection and holds on the merits that there has been a breach of Article 6 § 1 on account of the lack of a hearing in both sets of proceedings complained of.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicant claimed 150,000 Austrian schillings (ATS) as compensation for pecuniary damage with regard to each set of proceedings, i.e. a total amount of ATS 300,000 or 21,801.85 euros (EUR). He asserts that this is the amount he would have received, had the courts granted his claims under the Media Act.

The applicant further asked the Court to award him ATS 300,000 as compensation for non-pecuniary damage in respect of each set of proceedings, i.e. a total amount of ATS 600,000 or EUR 43,603.70. He

submitted in particular that he suffered from and was put into danger by being described as a letter bomb terrorist.

41. The Government contested the applicant's claim arguing that there was no causal link between the violation of the Convention at issue and the pecuniary and non-pecuniary damage allegedly sustained by the applicant.

42. The Court reiterates that it cannot speculate as to what would have been the outcome of the proceedings if they had satisfied the requirements of Article 6 § 1 (see the Werner judgment, cited above, p. 2514, § 72). It agrees with the Government that there is no causal link between the violation found and the alleged pecuniary damage.

43. However, the Court considers that the applicant sustained non-pecuniary damage on account of the breach of the Convention found in the present judgment (see, *mutatis mutandis*, *Kahlfaoui v. France*, no. 34791/97, 14.12.99, § 58). Making an assessment on an equitable basis, the Court awards the applicant EUR 1,500 under this head.

B. Costs and expenses

44. As regards the costs of the domestic proceedings, the applicant claimed ATS 19,250 in respect of each set of proceedings, i.e. a total amount of ATS 38,500 or EUR 2,797.88.

As regards the Strasbourg proceedings he claimed a total amount of ATS 145,920 or EUR 10,604.40 for costs plus ATS 8,208 or EUR 596,49 for cash expenses.

45. In the Government's submission, the costs incurred in the domestic proceedings did not serve to prevent the alleged violation of the Convention.

Further, the Government asserted that the costs claimed in respect of the Strasbourg proceedings are excessive. They pointed out in particular that the applicant filed a separate application in respect of each set of proceedings. For both applications, he now charges separate costs in respect of the preparation and the presentation of the written version of the application. They consider that an amount of ATS 55,000 (EUR 3,997.10) would be appropriate. Further, the Government accept the amount claimed in respect of cash expenses.

46. As to the costs of the domestic proceedings, the Court finds that they were not incurred in an attempt to prevent or redress the violation found. Thus, it makes no award under this head.

As to the costs of the Strasbourg proceedings, the Court having regard to the Government's comments as well as to comparable cases (see as recent authorities, *Eisenstecken v. Austria*, no. 29477/95, § 41, ECHR 2000-X, and *Entleitner v. Austria*, no. 29544/95, 01.08.2000, § 28, both concerning the lack of a public hearing in land consolidation proceedings) and making an

assessment on an equitable basis, awards the applicant a total amount of EUR 4,600 for costs and expenses incurred in the Strasbourg proceedings.

C. Default interest

47. 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. *Joins* to the merits the Government's preliminary objection and *dismisses* it after considering the merits;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention the following amounts:
      (i) EUR 1,500 (one-thousand five hundred euros) for non-pecuniary damage;
      (ii) EUR 4,600 (four-thousand six hundred euros) 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 21 March 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President