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

FIRST SECTION

CASE OF KRONE VERLAG GmbH & Co.KG (no. 2) v. AUSTRIA

(Application no. 40284/98)

JUDGMENT

STRASBOURG

6 November 2003

FINAL

06/02/2004

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 (First Section), sitting as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
and Mr S. NIELSEN, *Deputy Registrar*,

Having deliberated in private on 14 November 2002 and 16 October 2003,

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

PROCEDURE

1. The case originated in an application (no. 40284/98) 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 company"), on 24 February 1998.

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, in particular, that the imposition of a coercive indemnity for breach of an injunction for the period of the appeal proceedings concerning that injunction amounted to a violation of its right to freedom of expression under 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).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. By a decision of 14 November 2002, the Court declared the application admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

10. In July 1996 the *Neue Kronenzeitung* published several articles on a case of parents, Ms and Mr K. who had abused their daughter. In the articles it was alleged that they had homo-bisexual inclinations. Subsequently Ms K. filed a compensation claim under the Media Act (*Mediengesetz*) with the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) against the applicant company.

11. On 30 July 1996 the court ordered the applicant company under Section 8a § 5 of the Media Act to publish a notice concerning the institution of the proceedings. On 4 September 1996 this notice was published in the *Neue Kronenzeitung*.

12. On 5 and 10 September 1996 Ms K. filed enforcement requests (*Durchsetzungsanträge*) under Section 20 of the Media Act against the applicant company. Referring to Section 13 § 3 of the Media Act, requiring a notice of the same "publishing value" (*Veröffentlichungswert*) as the original message, she argued that the notice of 4 September 1996 was smaller than the articles of July 1996 and was, thus, not published in due form.

13. On 17 December 1996 the Regional Court dismissed Ms K.'s request. The court found that the notice of 4 September 1996, though somewhat smaller, had the same "attention value" (*Auffälligkeitswert*) and, thus, the same "publishing value" as the articles.

14. With the Vienna Court of Appeal's (*Oberlandesgericht*) decision of 14 July 1997 the compensation proceedings were finally determined. The court ordered the applicant company to pay ATS 115,000 in compensation to Ms K. for breach of the presumption of innocence in its reporting about Ms K. and to publish the sentence. The applicant company complied with these orders.

15. On 30 July 1997 the Court of Appeal, upon Ms K.'s appeal, quashed the Regional Court's decision of 17 December 1996 and ordered the applicant company to pay a coercive indemnity (*Geldbuße*) of ATS 24,000 to Ms K., namely ATS 4,000 for each issue of the newspaper between 5 and 10 September 1996. The court considered that, in one of the disputed articles, Ms K. had been defamed even in a subtitle, whereas the notice had no subtitle. Therefore the "publishing value" was diminished.

16. Following this decision, Ms K. filed further enforcement requests for the period of 11 September 1996 until 4 August 1997.

17. On 23 September 1997 the applicant company requested that Section 20 § 4 of the Media Act be applied by analogy. This provision allowed for an exemption from the imposition of coercive indemnity for the duration of appeal proceedings in case a first-instance court had imposed a coercive indemnity for an inappropriate publication of the notice - which, however, had been published in a manner close to the due form - and the respondent had appealed against this decision. The applicant company argued that after the first-instance court's decision in its favour, finding that the notice had the same publishing value, it had not been required to publish another notice. Therefore the above rule of exemption from imposition of coercive indemnity during the appeal proceedings applied even more in its case. The applicant company further requested that Section 20 § 3 of the Media Act - which, in cases of special circumstances, allows the authority to stop or remit the imposition of coercive indemnity, once the notice has been published in due form - be applied for the period of 5 to 10 September 1996.

18. On 27 October 1997 the Regional Court ordered the applicant company to pay ATS 508,000 to Ms K., namely ATS 4,000 for each issue of the *Neue Kronenzeitung* between 20 September 1996 and 16 January 1997, the date of the introduction of Ms K.'s appeal against the decision of 17 December 1996. It dismissed the remainder of Ms K.'s request and the applicant company's request under Section 20 § 3 of the Media Act. The court found that Section 20 § 4 of the Media Act applied by analogy for the period of the appeal proceedings, therefore no coercive indemnity had to be paid from 17 January to 4 August 1997.

19. On 30 January 1998 the Vienna Court of Appeal, on both parties' appeal, quashed the Regional Court's decision in part. It decided that the applicant company had to pay a coercive indemnity of ATS 1,304,000 to Ms K., i.e. ATS 4,000 for each issue of the newspaper between 11 September 1996 and 4 August 1997. The court considered that the applicant company could not be exempted from paying the coercive indemnity for the period of the appeal proceedings, as the notice of 4 September 1996 had not come close to a notice in due form as required by Section 20 § 4 of the Media Act.

20. On 30 June 1998 the Procurator General's Office (*Generalprokuratur*) lodged a plea of nullity for the preservation of the law

(*Nichtigkeitsbeschwerde zur Wahrung des Gesetzes*) with the Supreme Court. It argued that the coercive indemnity under Section 20 of the Media Act was a coercive measure (*Beugemittel*). According to the Office, it was unreasonable to impose a coercive indemnity for the period after the first instance court's decision of 17 December 1996, since after that decision the applicant company was to be considered as having acted in good faith when it did not publish another notice. The coercive indemnity should therefore only be imposed for the period before 17 December 1996.

21. On 15 September 1998 the Supreme Court dismissed the plea of nullity. It argued that the question of good faith could not be resolved under Section 20 § 4 of the Media Act. Rather, the applicant company would have to commence indulgence proceedings (*Nachsichtsverfahren*) under Section 20 § 3 of the Media Act. In such proceedings, its particular situation after the first instance decision of 17 December 1996 could be taken into account.

II. RELEVANT DOMESTIC LAW

22. In compensation proceedings under the Media Act, the court shall order the media company concerned to publish a short notice about the institution of the case, if it may be assumed that the compensation claim is well founded (Section 8a § 5).

23. This notice has to have the same "publishing value" (*Veröffentlichungswert*) as the publication to which it refers (Section 13 § 3).

24. If the notice was not published in due form, the plaintiff may request the court to impose a coercive indemnity on the respondent for each issue in which the notice could have been duly published, with sums of up to ATS 10,000 per issue (Section 20 § 1).

25. Once the notice has been duly published, the coercive indemnity may be stopped or remitted on request by the respondent in cases of special circumstances *(in berücksichtigungswürdigen Fällen*) (Section 20 § 3).

26. The parties have a right to appeal to the Court of Appeal against decisions imposing or remitting a coercive indemnity. In the event a coercive indemnity has been imposed for inappropriate publication of the notice and the respondent has appealed against this decision, no further coercive indemnity shall be imposed for the duration of the appeal proceedings, if the notice - whose proper publication is litigious - was published in a manner coming close to the due form (Section 20 § 4).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

27. The applicant company complained that the imposition of the coercive indemnity violated its rights under Article 10, which, as far as relevant, 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....
>
> 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."

A. Whether there was an interference

28. The applicant company submitted that the imposition of the coercive indemnity was an interference with its rights to freedom of expression, as it aimed at enforcing another publication of the notice in the applicant company's newspaper.

29. In the Government's view, the decision of the Austrian courts to impose a coercive indemnity did not constitute an interference with the applicant company's rights under Article 10. The only interference conceivable was the previous order of the Austrian courts to publish a notice. The imposition of coercive indemnity only aimed at the enforcement of earlier decisions following the applicant company's failure to comply with a final decision.

30. The Court considers that the coercive indemnity interfered with the applicant company's rights under Article 10 and refers in this respect to the case of *Tolstoy Miloslavsky v. the United Kingdom* (judgment of 13 July 1995, Series A no. 316-B, § 35), where the Court found that the award of damage of a particularly high amount constituted an interference with Article 10.

B. Whether the interference was justified

31. 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"

32. The applicant contended that the imposition of the coercive indemnity under Section 20 § 1 of the Media Act was not prescribed by law. In particular, the order to pay coercive indemnity for the duration of the appeal proceedings after the first-instance court's decision in its favour was not foreseeable.

33. The Government submitted that the measure was prescribed by law, namely by Section 20 § 1 of the Media Act. It was foreseeable for the applicant company. This was implicitly conceded by the applicant company as otherwise it would not have requested, on 23 September 1997, that Section 20 § 4 of the Media Act be applied by analogy. Thereby the applicant company acknowledged that this provision was not applicable as such and that only by applying Section 20 § 4 by analogy, Section 20 § 1 – which was in principle applicable – would no longer apply.

34. The Court considers that the imposition of coercive indemnity was prescribed by law, namely by Section 20 § 1 of the Media Act.

2. Legitimate aim

35. The applicant company also disputed that there was a legitimate aim.

36. In the Government's view, the coercive indemnity served the aim of protecting the reputation of third persons who had been defamed in the media and of ensuring the enforcement of decisions on the publication of a counter-statement.

37. The Court agrees with the Government and finds that the measure at issue pursued a legitimate aim, namely "the protection of the reputation (and) the rights of others" within the meaning of Article10 § 2 of the Convention.

3. "Necessary in a democratic society"

38. The applicant company argued that it was incompatible with this requirement that a media company would be forced to publish another notice after a first-instance court's decision in its favour, merely to be on the safe side in case the Court of Appeal would quash the lower court's decision. Had the Court of Appeal then confirmed the lower court's decision, the second publication of the notice would turn out to have been unnecessary. Any such publication would constitute a considerable financial

burden for a media company and, thus, a disproportionate interference with its rights to freedom of expression. The applicant company further pointed out that, on 30 July 1997, when the Court of Appeal decided on the imposition of the coercive indemnity for the applicant company's failure to publish in due form a notice on the institution of the compensation proceedings, it had already given the final decision in those proceedings, namely on 14 July 1997. Finally, the amount of more than ATS 1,3 million was grossly disproportionate and therefore not necessary within the meaning of Article 10 § 2 of the Convention.

39. The Government argued that the coercive indemnity was not a fine but compensation for damage, as the money - its amount depending on the number of issues in which the judicial decision was not properly implemented - was to be paid to the injured party and not to the State. Consequently, as the damage for a plaintiff would not stop with the first-instance judgment but continued throughout the appeal proceedings, also this period had to be taken into account when awarding payment of coercive indemnity. The potential inconvenience to pay coercive indemnity also for the duration of the appeal proceedings was inherent in the rule of law, implying the risk that, upon review, a court of appeal quashed a lower court's decision. The Government pointed out finally that the coercive indemnity in the amount of ATS 4,000 per issue was not disproportionate.

40. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. As set forth in Article 10 § 2, this freedom is subject to the exceptions, which must, however, be construed strictly and the need for any restrictions must be established convincingly (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

41. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-234, § 37). Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 28, § 63; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III; *Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, § 46, 26 February 2002).

42. According to its 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 *Lingens v. Austria,* judgment of 8 June 1986, Series A no. 103, pp. 25-26, § 40; and *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, p. 21, § 43). 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. Thus, the Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, Reports 1999-I).

43. In the present case, the Court can accept the Government's view that it is inherent in the rule of law that a superior court may quash a lower court's decision, as legal certainty only exists in respect of a binding final decision. However, in the present case the main issue is not the aspect of legal certainty, but rather the duties and responsibilities linked to the exercise of freedom of expression through the mass media. In this respect, the Court notes that the Procurator General's Office, of its own motion, lodged a plea of nullity for the preservation of law on 30 June 1998, considering unreasonable that a coercive indemnity be imposed for the period after the first instance court's decision of 17 December 1996, since after that decision the applicant company had to be considered as having acted in good faith when it did not publish another notice. In the Procurator's Office view, the coercive indemnity could only be imposed for the period before 17 December 1996.

44. The Court agrees with the reasons given by the Procurator's Office. The applicant company could not have been expected to publish another notice, when it had a court decision in its favour, merely to take precaution for the eventuality that the decision could be quashed by the superior court, or for fear of further enforcement requests by the plaintiff and subsequent further imposition of a coercive indemnity.

45. Therefore, the Court considers that the imposition of a coercive indemnity for the period of the appeal proceedings was disproportionate and unnecessary for the purposes of Article 10 of the Convention. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant company requested ATS 566,204.68 (41,147.70 euros [EUR]) in respect of pecuniary damage, i.e., reimbursement of payments made on the basis of a friendly settlement reached between the applicant company and the plaintiff on 16 November 1998, by which various claims from different sets of proceedings were set off.

48. The Government disputed that there was a causal link between the amount claimed and the violation found.

49. The Court considers that it cannot be established with sufficient precision which payments by the applicant company of the sums in question were a direct consequence of its conviction, which the Court has found to be in breach of Article 10 of the Convention. Therefore the Court awards on an equitable basis EUR 20,000 in respect of pecuniary damage.

50. As regards non-pecuniary damage, the Court notes that in the absence of any claim in this respect, no award can be made under this head.

B. Costs and expenses

51. For costs and expenses incurred by its legal representation in the domestic enforcement proceedings, the applicant company claimed ATS 112,962.60 (EUR 8,209.31), consisting of ATS 60,000 for legal representation before the courts of first and second instance, and ATS 52,962.60 for legal presentation before the Supreme Court. Further, the applicant company, which has not been represented by counsel in the Convention proceedings, claimed EUR 1,000 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.

52. As regards the claim for costs and expenses incurred in the domestic proceedings, the Government argued that it could not be inferred from the lump sums submitted which amounts were incurred in an attempt to prevent the violation found. The Government made no comments as regards the claim for costs and expenses incurred in the Convention proceedings.

53. The Court finds that the sums claimed by the applicant company appear reasonable and awards the full amount, namely EUR 9,209.31.

C. Default interest

54. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant company, 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 20,000 (twenty thousand euros) in respect of pecuniary damage;
      (ii) EUR 9,209.31 (nine thousand two hundred and nine euros and thirty-one cents) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 6 November 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Peer LORENZEN
President