



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

FIRST SECTION

CASE OF ÖSTERREICHISCHER RUNDFUNK v. AUSTRIA

(Application no. 35841/02)

JUDGMENT

STRASBOURG

7 December 2006

FINAL

07/03/2007

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 Österreichischer Rundfunk v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 16 November 2006,

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

PROCEDURE

1. The case originated in an application (no. 35841/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the Österreichischer Rundfunk (“the applicant”), on 12 September 2002.

2. The applicant was represented by Mr G. Korn, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. On 25 May 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant is the Austrian Broadcasting Corporation (*ORF*), a public law foundation (*Stiftung öffentlichen Rechts*) with its seat in Vienna.

5. On 13 July 1999 the applicant broadcast information on the evening news of its regional television channel about the release on parole of K., head of a neo-Nazi organisation called Extra-Parliamentary Opposition True to the People (*Volkstreue Ausserparlamentarische Opposition* – “VAPO”)

who had been sentenced under the National Socialist Prohibition Act (*Verbotsgesetz*, “the Prohibition Act”). This news item also mentioned his deputy S., who had been convicted under the Prohibition Act in 1995 and had been released on parole five weeks earlier. Its text ran as follows:

“For years G. K. [full name] was known as the head of the Austrian neo-Nazi scene. But it was only after the strengthening of the Prohibition Act in 1992 that he was charged and sentenced to eleven years' imprisonment. Many other members of the VAPO were put behind bars along with him, among them H.-J. S. [full name] – who has also recently been released. K. [family name], now aged 41, made the headlines even while in prison in Krems, for instance at the first letter bomb trial. His release today, however, took place without much ado. Waiting journalists saw nothing but his belongings packed in boxes.”

6. While the third sentence of this text was broadcast, a picture showing S. at his trial in 1995 was broadcast for a couple of seconds.

7. The news item was followed by a brief statement of the commentator. He stated that K. had served seven and a half years of his sentence. The Public Prosecutor had opposed his release on parole, but the Vienna Court of Appeal had granted K.'s request, having refused his first request for early release in 1997.

8. On 23 September 1999 S. brought proceedings under Section 78 of the Copyright Act (*Urheberrechtsgesetz*), requesting that the applicant be prohibited from publishing his picture without his consent accompanied by any text stating that he had been convicted under the Prohibition Act once the sentence had been executed or once he had been released on parole. In addition he requested a preliminary injunction to that effect.

9. In its submissions in reply (*Klagebeantwortung*) the applicant asserted that it had reported on true facts. As regards the publication of the applicant's picture the applicant referred to the Supreme Court's established case-law that Section 78 of the Copyright Act had to be interpreted in the light of Section 7a of the Media Act (see below). Given that S. was an adult who had been convicted of a crime, it followed from Section 7a (2) of the Media Act that the publication of his picture only violated his legitimate interests if it substantially prejudiced his economic advancement. Even if the claimant's legitimate interests were affected, they had to be weighed against the public interest in the publication. In the present case, the public interest was predominant, given that VAPO was an organisation which aimed at destroying the Austrian constitutional order and that two of its leading members, namely K. and the claimant, had been released from prison within a short period. Other media including two leading daily newspapers had also mentioned S.'s release in the context of reports on K.'s release. Finally, the applicant emphasised that under the relevant broadcasting laws it even had an obligation to impart information on political issues.

10. On 11 November 1999 the Vienna Commercial Court (*Handelsgericht*) granted the preliminary injunction.

11. The Commercial Court noted that the following facts were undisputed: The claimant, who had been convicted under the Prohibition Act in 1995 and had been sentenced to eight years' imprisonment, had been one of the leading members of VAPO which aimed at fighting against democratic order in Austria. He had participated in training camps organised by VAPO which were destined to train to kill. He had been released on 7 June and K. five weeks later on 13 July 1999. On the latter date the applicant had broadcast the report at issue.

12. As to the interpretation of Section 78 of the Copyright Act in conjunction with Section 7a of the Media Act, the Commercial Court agreed that the legitimate interests of an adult who had been convicted of a crime were only violated if the publication of his name or picture disproportionately prejudiced his economic advancement.

13. Applying this case-law to the facts of the present case, the Commercial Court noted that the report in the present case dealt mainly with K.'s release on parole. In its view there was an evident interest of S. not to have broadcast his picture taken in the course of criminal proceedings dating years back, even if the fact that he had meanwhile been released on parole was mentioned. S.'s picture had been widely broadcast at the time of the criminal proceedings against him. However, its broadcasting at the present stage did not add any relevant information to the report at issue, even if the criminal proceedings against him had been among the most important ones conducted under the Prohibition Act.

14. On 21 June 2000 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal.

The Court of Appeal confirmed the Commercial Court's assessment that the publication of S.'s picture had violated his legitimate interests within the meaning of Section 78 of the Copyright Act read in conjunction with Section 7a of the Media Act. Like the Commercial Court it stressed in particular that S.'s picture had been broadcast in the context of a report on the release of another person, K., and found that S. had an evident interest not to have his picture published in that context even if his own release dating some weeks back had also been mentioned. Even taking into account that S. had a certain degree of notoriety, his advancement within the meaning of Section 7a of the Media Act had been hampered disproportionately by the new publication of a picture taken at his trial.

15. The Supreme Court (*Oberster Gerichtshof*) rejected the applicant's extraordinary appeal on points of law on 13 September 2000.

In the subsequent main proceedings, the Vienna Commercial Court gave judgment on 31 December 2000. It ordered the applicant to refrain from publishing S.'s picture without his consent if it was accompanied by any text stating that he had been convicted under the Prohibition Act once the

sentence had been executed or he had been released on parole. In its reasoning it repeated the arguments which had been developed in the preliminary injunction proceedings.

16. On 29 November 2001 the Vienna Court of Appeal dismissed the applicant's appeal. It repeated the arguments set out in its judgment of 21 June 2000. Moreover, it referred to the Supreme Court's judgment of 13 September 2000.

17. On 12 February 2002 the Supreme Court rejected the applicant's extraordinary appeal on points of law.

18. The decision was served on the applicant's counsel on 8 April 2002.

II. RELEVANT DOMESTIC LAW

A. Regulations concerning the ORF and broadcasting

19. The general framework for broadcasting is set out in the Constitutional Act concerning the Safeguarding of the Independence of Broadcasting of 10 July 1974 ("the Constitutional Broadcasting Act", *BVG über die Sicherung der Unabhängigkeit des Rundfunks*, Federal Law Gazette no. 396/1974). Article 1 of the Constitutional Broadcasting Act, as far as material, reads as follows:

"2. Broadcasting shall be governed by more detailed rules to be set out in a federal law. Such a law must inter alia contain provisions guaranteeing the objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for carrying out the duties defined in paragraph 1."

20. With effect of 31 December 2001 the *ORF*, which had been a public law corporation before, was transformed into a public law foundation, a legal entity without an owner by the Act on the Austrian Broadcasting ("the 2001 Act", *Bundesgesetz über den Österreichischen Rundfunk*, Federal Law Gazette no. 83/2001). Those provisions of the law relating to the setting up of the *ORF*'s organs entered into force on 1 August 2001, the law in its entirety came into force on 1 January 2002.

21. The foundation has to fulfil a public law mandate which comprises operating at least two national television programmes plus three national and nine regional radio programmes (Section 3 § 1).

22. In accordance with Section 4 § 1 the *ORF* has to provide comprehensive news coverage of major political, social, economic, cultural and sporting events. In its broadcasts it has to observe the requirements of objectivity and diversity of views and has to preserve its independence from the State, parties, other media or lobbying groups (Section 4 §§ 5 and 6).

23. Pursuant to Section 19 § 1 the *ORF*'s bodies are the Foundation Council (*Stiftungsrat*), the Director General (*Generaldirektor*), the Audience

Council (*Publikumsrat*) and the Auditing Commission (*Prüfungskommission*). In the exercise of their functions, all members of these bodies are only subject to the law and are not bound by any instructions (Section 19 § 2).

24. Section 20 regulates the appointment of the Foundation Council. It consists of 35 members who are appointed as follows: six by the Federal Government upon proposals of the political parties represented in the National Assembly (*Nationalrat*), nine by the *Länder*, nine by the Federal Government, six by the Audience Council and five by the Central Works Council (*Zentralbetriebsrat*). Pursuant to Section 21 § 1, the Foundation Council is in charge of monitoring the management and of appointing the Director General.

25. The Director General is appointed for five years. The Foundation Council can only remove him from office with a two thirds majority (Section 22 §§ 1 and 5). The Director General runs the *ORF*'s activities. He is not bound by any instructions (Section 22 § 3).

26. The Audience Council is composed of 35 members representing different sectors of society. Its task is to represent the interests of the audience (Section 28).

27. The programme fees are fixed by the Foundation Council and are subject to approval by the Audience Council (Section 31 §§ 1 and 2).

28. Pursuant to Section 32 § 1 the *ORF* has to guarantee the independence of all editorial and journalistic members of its staff. To safeguard the latter's independence the *ORF* has to conclude an Editor's Statute (*Redakteursstatut*) with the staff representatives elected by secret ballot.

29. Section 35 provides that the Federal Communication Panel (*Bundeskommunikationssenat*) decides on alleged violations of the 2001 Act, unless the issue falls within the competence of the courts or administrative authorities.

30. The *ORF* does not have a broadcasting monopoly. Private broadcasters may obtain licences under the Private Radio Act (*Regionalradiogesetz*) and the Private Television Act (*Privatfernsehgesetz*).

31. The Federal Communication Panel, established by the Act on the Communication Authority Austria (Federal Law Gazette no. 32/2001) consists of five members, who are appointed for a term of six years. Three members have to be judges one of whom is elected by the Panel as its Chairperson. All members of the Panel are independent in the exercise of their functions and are not bound by any instructions. The Federal Communication Panel is competent to monitor the *ORF*'s compliance with the 2001 Act (see paragraph 29 above) and to supervise the KommAustria, the authority competent for all matters of broadcasting regulation, including the granting of licences to private broadcasters and the supervision of private broadcasters' compliance with the provisions of the Private Radio

Act and the Private Television Act. The decisions of the Federal Communication Panel are subject to an appeal to the Administrative Court.

B. The Copyright Act

32. Section 78 of the Copyright Act reads as follows:

“(1) Images of persons shall neither be exhibited publicly, nor disseminated in any other way in which they are made accessible to the public, where the legitimate interests of the person in question or, in the event that they have died without having authorised or ordered publication, of a close relative would be injured...”

33. Starting with its judgment of 23 September 1997 (4 Ob 184/97, MR 1997, 302) the Supreme Court has consistently held that Section 78 of the Copyright Act has to be interpreted in the light of Section 7a of the Media Act.

C. The Media Act

34. Section 7a of the Media Act reads as follows:

“(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 the legitimate interests of that person are thereby harmed 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. The award of damages shall not exceed 14,535 euros; additionally, Section 6(1), second sentence, shall apply.

(2) The legitimate interests of the victim shall in any event be harmed if the publication

1. in the case of subsection (1)1, is such as to give rise to an interference with the victim's strictly private life or to his or her exposure,
2. in the case of subsection (1)2, relates to a juvenile or merely to a lesser indictable offence or may disproportionately prejudice the victim's advancement.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant complained that the courts' decisions violated its right to freedom of expression as provided in 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.”

A. Admissibility

1. *The parties' submissions*

36. The Government contested the applicant's *locus standi* within the meaning of Article 34 of the Convention.

37. Referring to the Convention case-law concerning territorial authorities and to the case of *The Holy Monasteries v. Greece* (judgment of 9 December 1994, Series A no. 301-A), they argued that the applicant did not qualify as a “non-governmental organisation”.

38. The Government asserted that the applicant was, since 2001, a public law foundation without an owner. Nevertheless, it was under State control: the majority of the members of the Foundation Council, namely 18 out of 35, were appointed by the Federal Government and the Länder. Consequently, the public authorities were in a position to exercise a direct or indirect dominant influence on the applicant company, which therefore qualified as a public undertaking under EU-law (Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings directive).

39. Furthermore the applicant had a public service mandate defined by law obliging it to provide regularly and permanently one region-wide and

two nation-wide radio programmes and two nation-wide television programmes.

40. It financed its activities from programme fees fixed unilaterally by its organs, namely the Foundation Council and the Audience Council. A company of which the applicant was the sole owner was empowered by law, namely the Collection of Broadcasting Fees Act (*Rundfunkgebührengesetz*), to collect these fees. Private broadcasters did not have such a system of financing at their disposal.

41. Finally, the applicant's activities were subject to State supervision in two respects. Firstly, the Federal Communication Panel supervised the applicant company's compliance with its obligations under the 2001 Broadcasting Act. Secondly, the Audit Office (*Rechnungshof*) controlled its financial management.

42. The applicant contested the Government's view. Although it was a legal person established by public law and provided a public service, it did not exercise any sovereign powers comparable to that of an administrative authority. Relying on a decision of the Constitutional Court (of 27 June 1975, G 24, 27/74) the applicant company argued that its bodies were neither state organs nor did they exercise governmental powers.

43. Moreover, the applicant asserted that it was not acting under Government control. It argued that the 2001 Act, apart from transforming it from a public law corporation into a public law foundation, did not affect other aspects of its legal status, in particular its institutional independence. Its organs were established as independent bodies which did not receive any instructions in the exercise of their functions.

44. The applicant's public service mandate consisted of the duties defined in the Constitutional Broadcasting Act, and was designed to secure the enjoyment of the right to freedom of information by all citizens. Moreover, the Constitutional Broadcasting Act was also applicable to private broadcasting companies with which the applicant company competed on the media market, just like public broadcasting companies in other European countries did.

45. Finally, if one followed the Government's argument, public law broadcasting companies would not be able to rely on the provisions of the Convention, whereas their private competitors could, which would not be in conformity with the concept of the Convention.

2. The Court's assessment

46. The Court observes that a legal entity "claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto" may submit an application to it provided that it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The Government's line of argument was that the *ORF* was a governmental rather than a non-governmental organisation.

47. In its *Radio France and Others v. France* decision (no. 53984/00, ECHR 2003-X (extracts)), the Court summarised the Convention case-law relating to the question whether territorial authorities and other public law entities qualified as “governmental organisations”:

“It follows from the above-mentioned decisions and judgment that the category of 'governmental organisation' includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.”

48. The Court notes at the outset that the parties' submissions refer to the legal situation as described in the 2001 Act on the Austrian Broadcasting, which had entered into force on 1 January 2002 before the final decision in the present case was given and the application lodged. It follows that the question of the *ORF's locus standi* is to be assessed in the light of the provisions contained in the 2001 Act.

49. Applying the criteria set out in the *Radio France* decision (cited above) to the present case, the Court observes that the applicant undisputedly does not exercise governmental powers. It provides a public service and it therefore remains to be examined whether it does so under government control.

50. The Court observes that the basic rules for broadcasting in Austria are laid down by the 1974 Constitutional Law concerning the Safeguarding of the Independence of Broadcasting, which stipulates that any law governing broadcasting has to contain provisions to ensure the objectivity and independence of reporting. The applicant which, since 1974, was a public law corporation was transformed into a public law foundation without an owner by the 2001 Act. Its capital, though stemming from public means, is therefore no longer held by the State. The applicant finances its activities from programme fees which it can fix itself. Its mandate is set out in the 2001 Act as are the rules relating to the establishment of its organs, namely the Foundation Council, the Director General, the Audience Council and the Auditing Commission.

51. The Foundation Council monitors the applicant's management and appoints the Director General for a period of five years. The latter is responsible for running of the applicant's activities and can only be removed by the Foundation Council acting with a two-thirds majority. The Government argued in particular that the public authorities exercise control since the Federal Government and the Länder appoint a majority of the members of the Foundation Council, namely 18 out of 35. However, the Court notes a number of features which are designed to guarantee the *ORF's* independence. Firstly, its mandate laid down in Section 4 § 1 of the 2001

Act oblige it to observe the requirements of objectivity and diversity of reporting and to preserve its independence *inter alia* from the State and the parties. Secondly, Section 19 § 2 provides that the members of the Foundation Council are only bound by law in the exercise of their functions and do not receive any instructions. Section 22 § 3 contains the same provision for the Director General. Thirdly, a number of provisions of the said Act guarantee the editorial and journalistic independence of the applicant's staff members. Finally, the Federal Communication Panel which monitors the *ORF*'s compliance with the 2001 Act is an independent body consisting of a majority of judges. Having regard to all these elements, the Court is not convinced that the applicant is placed under “government control.”

52. Moreover, the Austrian Broadcasting does not hold a broadcasting monopoly, but operates in a sector open to competition. Private broadcasters can obtain licences under the Private Radio Act and the Private Television Act. As to the Government's argument that the applicant could rely on a method of financing which was not at the disposal of private broadcasters and was subject to the financial control of the Audit Office, the Court recalls that, even where a public broadcaster is largely dependent on public resources for the financing of its activities this is not considered to be a decisive criterion, while the fact that a public broadcaster is placed in a competitive environment is an important factor (see *Radio France and Others*, cited above).

53. In conclusion, the Court finds that the Austrian legislator has devised a framework which ensures the Austrian Broadcasting's editorial independence and its institutional autonomy. Consequently, the Austrian Broadcasting qualifies as a “non-governmental organisation” within the meaning of Article 34 of the Convention and is therefore entitled to lodge an application.

54. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

55. The applicant, while conceding that the interference at issue had a legal basis and served a legitimate aim, contested its necessity. It argued in particular that the prohibition to publish Mr S.'s picture in the context of any reports about his conviction under the Prohibition Act limited its choice of the form and means of imparting information, while other media remained free to publish Mr S.'s picture in the said context.

56. In the applicant's assertion the Austrian courts had failed to duly weigh the competing interests, since they prohibited the publication of Mr S.'s picture although the accompanying text reported true facts, namely S.'s conviction under the Prohibition Act and his release from prison. Moreover, the news item at issue reported on a subject of great public interest which the applicant, given its broadcasting mandate, was obliged to cover, namely the release on parole of Mr K., a well-known neo-Nazi and leader of VAPO, an organisation which aimed at destroying the democratic order in Austria. There was an equally important public interest in reporting that only a few weeks earlier Mr K.'s deputy, Mr S., had also been released on parole.

57. The Government's observations also concentrated on the necessity of the interference. They conceded that the news item broadcast by the applicant concerned an issue of public interest, namely the release on parole of Mr K., a leading neo-Nazi. Mr S. was only mentioned as an example of another convict in proceedings against VAPO members. Furthermore, his own release on parole a few weeks earlier was mentioned. The publication of a picture showing him at his trial years back did not add any information of public interest to the report.

58. Even if Mr S. enjoyed certain notoriety, the courts had rightly found that his interest not to have his picture broadcast many years after his trial prevailed over the applicant's interest to use that picture for purely illustrative purposes. This was all the more so, since Mr S. had been released a few weeks earlier and was thus just beginning to re-integrate into society. He therefore had an important interest not to have his picture shown again in the context of criminal acts the penalty of which he had already served. In any case, the applicant remained free to report about the events at issue without showing Mr S.'s picture. In sum, the interference with the applicant's right to freedom of expression was proportionate.

2. The Court's assessment

59. The present case concerns proceedings under the Copyright Act brought by Mr S. against the applicant in respect of a news item in which his picture was shown. The courts prohibited the applicant from showing Mr S.'s picture in connection with any report stating that he had been convicted under the Prohibition Act once the sentence had been executed or once he had been released on parole. It is undisputed that the courts' judgments in these proceedings constituted an interference with the applicant's right to freedom of expression.

60. It is not in dispute either that the interference was "prescribed by law" and served a legitimate aim, namely the protection of rights and reputation of others.

61. The parties' argument concentrated on the necessity of the interference. As regards the general principles relating to freedom of

expression of the media in the context of reporting on issues of public interest and the question of assessing the necessity of an interference with that freedom, the Court refers to its established case-law in the cases of *Feldek v. Slovakia* (no. 29032/95, §§ 72-76, ECHR 2001-VIII) and *Scharsach and News Verlagsgesellschaft v. Austria* (no. 39394/98, § 30, ECHR 2003-XI).

62. In accordance with its case-law, the Court will examine whether the reasons adduced by the domestic courts were “relevant and sufficient” and whether the interference was proportionate to the legitimate aim pursued. In so doing the Court will have regard to the domestic courts' margin of appreciation.

63. As it did in comparable cases, the Court will take the following elements into account: the position of the applicant, the position of Mr S. who brought the proceedings and the nature and subject matter of the report at issue (see, for instance, *Scharsach and News Verlagsgesellschaft*, cited above, § 31, and *Jerusalem v. Austria*, no. 26958/95, § 35, ECHR 2001-II).

64. The applicant is the Austrian public broadcaster. The Court notes that Section 4 § 1 of the 2001 Act obliges it to cover any major new item in the field of politics. In this connection the Court's reiterates its view that the press and more generally the media have a duty to impart – in a manner consistent with their obligations and responsibilities – information and ideas on all matters of public interest (see, among many other authorities, *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37).

65. Mr S. who brought the proceedings at issue, is a well-known member of the neo-Nazi scene in Austria. The Court has already held in a similar case that a person expressing extremist views lays himself open to public scrutiny (see, *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 56, ECHR 2000-I). Moreover, Mr. S. was convicted of crimes under the Prohibition Act in 1995 and was sentenced to a lengthy prison term for being a leading member of VAPO, an organisation aimed at destroying the Austrian constitutional order. In the domestic courts' assessment the proceedings against Mr S. were among the most important ones under the Prohibition Act. At the time of his trial his picture was widely published.

66. Turning to the nature and subject matter of the news item broadcast by the applicant, the Court notes that it was a brief report dealing mainly with the release on parole of Mr. K. the leader of VAPO and the neo-Nazi scene in Austria. Mr S. was mentioned as another convicted member of VAPO who had also been released on parole a few weeks earlier. It is not contested by the Government that the news item concerned an issue of public interest. Consequently, it related to a sphere in which restrictions on freedom of expression are to be strictly construed. Accordingly, the Court must exercise caution when the measures taken by the national authorities

are such as to dissuade the media from taking part in the discussion of matters of public interest (see for instance *Thoma v. Luxembourg*, no. 38432/97, § 58, ECHR 2001-III, and *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 25-26, § 35).

67. The Court notes that the injunction granted by the domestic courts was phrased in broad terms. It prohibited the applicant from showing Mr S.'s picture in connection with any text mentioning his conviction under the Prohibition Act once the sentence has been executed or once he had been released on parole.

68. While the court agrees that there may be good reasons to prohibit the publication of a picture of a convicted person after his release on parole a number of elements are to be taken into account when weighing the individual's interest not to have his physical appearance disclosed against the public's interest in the publication of his picture. Elements that will be relevant are the degree of notoriety of the person concerned, the lapse of time since the conviction and the release, the nature of the crime, the connection between the contents of the report and the picture shown and the completeness and correctness of the accompanying text.

69. The domestic courts attached great weight to the time-element, in particular to the long lapse of time since Mr S.'s conviction, but did not pay any particular attention to the fact that only a few weeks had elapsed since his release. They did not take into account his notoriety and the political nature of the crime of which he had been convicted. Nor did they have regard to other important elements, namely that the facts mentioned in the news items were correct and complete and that the picture shown was related to the content of the report.

70. The latter elements distinguish the present case from a comparable case (*Österreichischer Rundfunk v. Austria* (dec.), no. 57597/00, 25 May 2004) which was declared inadmissible. In that case, the Court found no indication of a violation of Article 10 as regards the prohibition to publish a convict's picture after his release on parole. It had regard to the fact that the picture of B. who had been convicted under the Prohibition Act had been shown in a different context, namely in connection with the investigations in respect of a spectacular series of letter bomb attacks without mentioning that B. had been acquitted of any involvement in these attacks and without mentioning that he had served his sentence under the Prohibition Act and had been released on parole.

71. Another element which is of relevance is that the other media remained free to publish Mr S.'s picture in the said context. This has not been contested by the Government.

72. In sum the Court finds that the reasons adduced by the domestic courts were not "relevant and sufficient" to justify the interference. It follows that the interference was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

73. There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10

74. The applicant complained of a violation of Article 14 taken in conjunction with Article 10, in that the contested injunction prohibited it from publishing Mr S.'s picture while other media remained free to do so.

75. The Government contested that argument.

76. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

77. Having regard to the finding relating to Article 10 (see paragraph 71 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 14 taken in conjunction with Article 10 (see, among other authorities, *News Verlags GmbH & Co.KG*, cited above, §§ 61-62).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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

79. The applicant claimed 6,711.63 euros (EUR) as compensation for pecuniary damage, namely the costs the courts had ordered it to reimburse to Mr. S. This sum includes value-added tax (VAT) which the applicant asserts it cannot recover.

80. The Government commented in general terms that there must be a causal link between the damage claimed and the violation found.

81. The Court finds that there is a causal link between the violation found and the pecuniary damage claimed; it awards the sum in full, that is EUR 6,711.63.

B. Costs and expenses

82. The applicant also claimed EUR 13,190.67 for the costs and expenses incurred before the domestic courts. It accepted that the amount of VAT included in this sum, namely EUR 1,892.74, have to be deducted.

Moreover, the applicant claimed EUR 7,019.28 for costs and expenses incurred before the Court.

83. The Government accepted the amounts claimed, but submitted that 20% VAT, i.e. EUR 1,169.88, had to be deducted from the costs incurred before the Court.

84. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

85. In the present case, regard being had to the information in its possession and the above criteria, the Court awards EUR 11,297.93 in respect of costs and expenses incurred before the domestic court and EUR 5,849.40 for the proceedings before the Court. The total amount, which does not include VAT, is EUR 17,147.33.

C. Default interest

86. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 14 of the Convention taken in conjunction with Article 10;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,711.63 (six thousand seven hundred eleven euros and sixty-three cents) in respect of pecuniary damage and EUR 17,147.33 (seventeen thousand one hundred forty-seven euros and thirty-three cents) in respect of costs and expenses;
 - (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;

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

Done in English, and notified in writing on 7 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President