



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

FIRST SECTION

CASE OF ARBEITER v. AUSTRIA

(Application no. 3138/04)

JUDGMENT

STRASBOURG

25 January 2007

FINAL

25/04/2007

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 Arbeiter 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 N. VAJIĆ,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 4 January 2007,

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

PROCEDURE

1. The case originated in an application (no. 3138/04) 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 an Austrian national, Mr Gebhard Arbeiter (“the applicant”), on 14 January 2004.

2. The applicant was represented by Mr Ulrich Polley, a lawyer practising in Klagenfurt. The Austrian Government (“the Government”) were represented by their Agent, Mr Ferdinand Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that his right to freedom of expression under Article 10 of the Convention had been violated.

4. On 29 November 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**

5. The applicant was born in 1944 and lives in Klagenfurt.

6. At the time of the events he was the chairman of the Workers' Committee (*Zentralbetriebsobmann*) of the Carinthian regional hospitals

(*Landeskrankenanstalten*). He was also a member of the Carinthian Regional Parliament (*Landtag*) and speaker on health matters (*Gesundheitssprecher*) of the Carinthian regional branch of the Social Democratic Party (*SPÖ*).

7. In the context of a political debate concerning the reform of the regional health system, the Carinthian Regional Government (*Landesregierung*), in March 2001, commissioned Köck, Ebner and Partners and thereby their managerial director Mr Köck, to draft an expert opinion on the future development of the Carinthian regional hospitals. They were asked in particular to submit proposals as to the possible reduction of costs in this field. While the regional branch of the Austrian People's Party (ÖVP) and the Austrian Freedom Party (FPÖ) voted in favour of this decision, the SPÖ contested the appointment of Mr Köck.

8. Before and after this event, the debate on a regional health reform received extensive media coverage in the regional newspapers. In interviews Mr Köck stated that in various medical fields many unnecessary surgical operations were carried out. Furthermore, the probability of dying in hospital as a result of medical negligence was comparatively high. He advocated cutting down superfluous services and closing smaller hospitals and hospital departments. These proposals were heavily criticised by the federal health speaker of the SPÖ.

9. At the end of May 2001 Mr Köck co-founded the “hospital investment joint-stock company” (*Krankenanstalten Beteiligungs-aktiengesellschaft* - “KABAG”) whose purpose was to take over and run hospitals. In interviews with regional newspapers Mr Köck contended that his company would focus on hospitals run by municipalities, private establishments and hospitals of religious orders. He wished to show through this company that hospitals could be administrated from a patient-orientated perspective, run efficiently and be of top quality. Above all the potential of employees could be better used in a private company. He had worked for public hospitals long enough to know how much potential was not being used. He was not yet speculating about the takeover of a hospital in Carinthia as the subject of takeovers had not yet come up there.

10. The federal speaker of the SPÖ objected that the founding of this company was incompatible with Mr Köck's function as expert for the Region of Carinthia because the latter function enabled Mr Köck to have access to all relevant data on regional hospitals. This was contested by Mr Köck and the chairman of the FPÖ parliamentary party.

11. In its issue of 8 June 2001 the *Kärntner Tageszeitung*, a regional newspaper, published an article in which it cited the applicant saying:

“It is outrageous how the alleged hospital guru Köck wishes, on the one hand, to erase whole departments and hospitals from Carinthia, and, on the other hand, to use his newly founded hospital investment company to take over these hospitals in our Region”...

...“the Regional Governor Jörg Haider has already once erred enormously by [employing] an alleged technical 'wonder-wizard' who then ended up before the Public Prosecutor's Office”... Arbeiter warns of the “incomprehensible enthusiasm of the Freedom Party for an alleged health guru and 'closing-down preacher’ “

”... “K smashes our good health system in order to take over hospitals with his company”.

12. On an application by Mr Köck and Köck, Ebner and Partners, the Klagenfurt Regional Court (*Landesgericht*) issued an injunction on 30 September 2002 prohibiting the applicant from repeating and ordering him to retract the statements that Mr Köck would smash the Carinthian health system and intended to close whole departments and hospitals in order to take them over with his company. Furthermore, he was ordered to abstain from any allegations comparing or associating Mr Köck to an “alleged wonder-wizard” who had ended up before the Public Prosecutor's Office. It noted that the impugned statements were statements of fact which gave the impression that Mr Köck was totally unqualified and, furthermore, referred to his alleged criminal activity. In particular, the reproach that Mr Köck wished to take over hospitals after having smashed the health system in Carinthia suggested that he would enrich himself. However, Mr Köck had not taken any steps which would have justified the applicant's reproaches. In particular, Mr Köck had not taken any concrete measures to close hospitals, smash the health system or to take over hospitals with his company. The applicant's statements were therefore untrue and defamatory statements of facts in respect of which a civil offence under Article 1330 § 2 of the Civil Code was made out. Mr Köck's situation was not comparable to the situation of a politician or a private person who had entered the public scene and therefore had to display a greater degree of tolerance.

13. On 2 April 2003 the Graz Court of Appeal (*Oberlandesgericht*) dismissed an appeal by the applicant. It noted that the fact that Mr Köck had proposed to close some hospitals and had founded a private investment company for hospitals did not constitute a sufficient basis for establishing that he would misuse his mandate to push private business dealings. The applicant had, furthermore, stressed the reproach of criminal conduct by drawing a comparison with a “wonder-wizard who had ended up before the Public Prosecutor's Office”. The court did not agree with the applicant's argument that the impugned statements had to be understood as permissible value judgments.

14. On 10 July 2003 the Supreme Court (*Oberster Gerichtshof*) rejected an extraordinary appeal by the applicant. This decision was served on the applicant's counsel on 12 August 2003.

II. RELEVANT DOMESTIC LAW

15. Article 1330 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides:

"(1) Anybody who, due to defamation, has suffered real damage or loss of profit may claim compensation.

(2) The same shall apply if anyone disseminates facts which jeopardise another's reputation, gains or livelihood, the untruth of which was known or should have been known to him. In this case there is also a right to claim a retraction and the publication thereof. ...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

16. The applicant complained that the Austrian courts' decisions had violated his right to freedom of expression as provided for in Article 10 of the Convention, 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."

17. The Government contested that argument.

A. Admissibility

18. 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

19. The applicant contested the submission that there had been relevant and sufficient grounds to justify the impugned interference with his rights under Article 10 of the Convention. Mr Köck had entered the public arena as he had been commissioned as an expert by the regional government and had, furthermore, repeatedly expressed his views on this subject in public. He had done so in an exceptionally provocative manner and the applicant had merely responded to those views. Given the nature of his commission, Mr Köck should have been required to exercise particular restraint until the study was completed in order to avoid anticipating and forestalling its conclusions. Any expert who stated the direction his findings would take before he had concluded his report left himself open to a high degree of legitimate criticism. The applicant's statements had been value judgments with a sufficient factual basis, namely Mr Köck's provocative public comments and his general conduct. The matter at issue was of the greatest public interest and the applicant had relied upon information which was already within the public domain. The applicant had also explained his principal reasons for concern, namely Mr Köck's involvement in the creation of a private hospital management company with an abbreviated name (*KABAG*) confusingly similar to that of the holding company which operated Carinthia's regional hospitals (*Landeskrankenanstalten-Betriebsgesellschaft, KABEG*). The statement that Mr Köck intended to smash the Carinthian health system had to be seen in the whole context of all the statements. Obviously every reader would understand that Mr Köck was not accused of smashing the system himself but of recommending measures to that effect. The mere reference to another expert who had failed and had been pursued by the criminal justice could not be understood as an implied accusation of Mr Köck. The applicant contended finally that the courts' decisions ordering him not only to refrain from further similar statements, but also to retract his comments had not been proportionate either.

20. The Government argued that the courts' decisions had been justified under Article 10 § 2 of the Convention. By qualifying the applicant's statements as statements of fact, the Austrian courts had not transgressed their margin of appreciation. An essential element for this qualification was the fact that the impugned statements had been given without any further explanation and without giving the reasons for the applicant's conclusions. The Austrian courts had legitimately interpreted the statements in the sense normally attributable to similar reproaches. Even assuming that Mr Köck was to be considered as a person of public life, the impugned statements had transgressed the limit of acceptable criticism. The Austrian courts' orders had also been proportionate. In that regard the Government argued that the applicant had neither been convicted nor made to pay compensation. He had

merely been ordered to refrain from making clearly defined incorrect statements of fact and by no means impeded from voicing his opinion in other less derogatory and defamatory words. Even if the Court, contrary to the Government's view, considered the statements to be value judgments, the interference appeared proportionate, in particular in view of the implied accusation that Mr Köck had acted in a manner similar to another expert who had committed criminal acts.

21. The Court notes that it is undisputed that the contested judgments prohibiting the applicant from repeating and ordering him to retract and to abstain from certain statements regarding Mr Köck constituted an interference with the applicant's right to freedom of expression. It is not in dispute either that the interference was "prescribed by law" and served a legitimate aim, namely the protection of the rights and reputation of others. The parties' argument concentrated on the necessity of the interference. As regards the general principles relating to the freedom of the expression and the question of assessing the necessity of an interference with that freedom, the Court refers to the summary of its established case-law in the case of *Nilsen and Johnsen v. Norway* ([GC], no. 23118/93, § 43, ECHR 1999-VIII).

22. In accordance with its case-law, the Court will examine whether the reasons adduced by the domestic courts in the present case 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.

23. The applicant had stated that Mr Köck, a government-appointed expert on the reform of regional hospitals, "*wishes to erase whole departments and hospitals from Carinthia*" and "*smashes our good health system*" in order to "*take over these hospitals using his newly founded hospital investment company*". The applicant had further mentioned the previous employment, by Mr Haider, of another "*alleged technical wonder-wizard*" who had ended up before the Public Prosecutor's Office. The Austrian courts granted the requested injunction as they found that these were incorrect statements of fact which gave the impression that Mr Köck was totally unqualified and, furthermore, referred to his alleged criminal activity.

24. The Court cannot agree with these findings. It notes that the applicant stated his indignation at Mr Köck's alleged intentions and thereby expressed his own opinion rather than an actual statement of fact. The Court further notes that there existed at the material time certain objective factors supporting the applicant's allegations concerning Mr Köck's wishes "*to erase*" health institutions from the public landscape and "*to take them over*" himself. Mr Köck had in fact advocated cutting down superfluous services and closing smaller hospitals and hospital departments. He had also recently founded a company whose purpose was to take over and run hospitals.

While asserting that he was not focusing on Carinthian hospitals yet, he had not excluded this possibility in future. The applicant's assertion that this amounted to the “*smash[ing of] our public health system*” has to be considered as his - certainly exaggerated and polemical - value judgment on the above events. The subsequent reference made by the applicant to a previous expert employed by Mr Haider who had been the subject of criminal investigations undoubtedly constituted a statement of fact. However, unlike the domestic courts, the Court does not find that this statement actually implied any reproach of criminal conduct against Mr Köck. From the context in which this statement was made, it appears that this incident was rather cited as an example of the FPÖ party's ways of choosing and supporting experts.

25. In this connection the Court further points out that the applicant's statements have to be seen in the broader context of an ongoing political and general debate on public health matters, concerning the future development of regional hospitals. Mr Köck had been appointed by the Regional Government, against the will of the SPÖ party, as an expert in this matter. He had repeatedly discussed this issue before the press and had thus entered the public arena. As a consequence, he had to bear a higher degree of tolerance (see, *mutatis mutandis*, *Nilsen and Johnsen v. Norway*, cited above, §52). The Court further notes that, apart from calling for cut backs, Mr Köck had also expressed harsh criticism of the actual functioning of the regional hospitals, stating that many unnecessary surgical operations were carried out and that the mortality rate due to medical negligence was relatively high. By doing so, Mr Köck certainly had to expect indignation and protest by the applicant, who spoke in his capacity as chairman of the Workers' Committee of the Carinthian regional hospitals.

26. It is true that the applicant, on a slim factual basis, published harsh criticism in strong, polemical language. However, having regard, on the one hand, to Mr Köck's active involvement in a public discussion and the critical proposals made by him, and, on the other hand, the applicant's position as spokesman of the part of the population primarily concerned by these statements, the Court considers that a certain degree of exaggeration had to be tolerated in the applicant's response and reaction. In this regard the Court further reiterates that Article 10 also protects information or ideas that offend, shock or disturb (see *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 23, § 49). It follows that the applicant's statements have to be considered as permissible contributions to a debate of general and political interest.

27. In sum, the Court finds that the Austrian courts overstepped the margin of appreciation afforded to Member States and, in this respect, the measures at issue were disproportionate to the aim pursued. The Court cannot find that the limited nature of the interference, namely the order to refrain from repeating and to retract the impugned statements, is decisive;

what is of greater importance is that the domestic courts restricted the applicant's freedom of expression while relying on reasons which cannot be regarded as sufficient and relevant. They therefore went beyond what would have amounted to a "necessary" restriction on the applicant's freedom of expression.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicant claimed 20,000 euros (EUR). He did not specify whether this claim was made in respect of pecuniary or non-pecuniary damage. He further claimed EUR 7,084.11 including value added tax (VAT) for pecuniary damage in respect of reimbursement of the plaintiffs' costs incurred in the domestic proceedings. He also sought interest at a rate of 4% per annum to be added to the above amounts and backdated to 12 August 2003, when the Supreme Court's final judgment was served on him.

31. The Government contested the applicant's unspecified claim of EUR 20,000. They did not comment on the applicant's further claims.

32. The Court notes that, in so far as the applicant claims EUR 20,000, no award can be made as the applicant has not specified his claim. On the other hand, having regard to the direct link between the applicant's claim concerning reimbursement of the costs of the domestic proceedings which were to be paid to the plaintiffs and the violation of Article 10 found by the Court, the applicant is entitled to recover the full amount of EUR 7,084.11. The Court further agrees with the applicant that some pecuniary loss must have been occasioned by reason of the period that elapsed from the time when these costs were incurred until this Court's award. Deciding on an equitable basis and having regard to the statutory 4% interest rate in Austria, it awards the applicant EUR 850 in respect of this claim (see, *mutatis mutandis*, *Albert-Engelmann-Gesellschaft mbH v. Austria*, no. 46389/99, § 39, 19 January 2006, with further references). Therefore, a total of EUR 7,934.11 is awarded in respect of pecuniary damage. This amount includes VAT.

B. Costs and expenses

33. The applicant claimed EUR 7,952.58 including VAT for the costs and expenses incurred before the domestic courts and EUR 7,411.61 including VAT for those incurred before the Court. He also sought interest backdated to 12 August 2003, when the Supreme Court's final judgment was served on him, at a rate of 4% per annum to be added to the claim concerning his costs in the domestic proceedings.

34. The Government contested the claim concerning the costs of the Convention proceedings, which they considered excessive.

35. As regards the costs of the domestic proceedings, the Court finds that they were necessarily incurred and reasonable as to quantum. It therefore awards them in full, namely EUR 7,952.58. The Court further agrees with the applicant that some pecuniary loss must have been occasioned by reason of the period that elapsed from the time when these costs were incurred until this Court's award. Deciding on an equitable basis and having regard to the statutory interest rate in Austria, it awards the applicant EUR 950 with respect to this claim. The costs of the Convention proceedings were also necessarily incurred. Having regard to the sums awarded in comparable cases and making an assessment on an equitable basis, the Court awards EUR 3,500.

36. In sum, a total of EUR 12,402.58 is awarded under the head of costs and expenses. This amount includes VAT.

C. Default interest

37. 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*
 - (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 7,934.11 (seven thousand nine hundred thirty four euros and eleven cents) in respect of pecuniary

damage and EUR 12,402.58 (twelve thousand four hundred two euros and fifty eight 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;

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

Done in English, and notified in writing on 25 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President