



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

FIRST SECTION

CASE OF EUROPEAN UNIVERSITY PRESS GMBH v. AUSTRIA

(Application no. 36942/05)

JUDGMENT

STRASBOURG

24 June 2010

FINAL

24/09/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of European University Press GmbH v. Austria,
The European Court of Human Rights (First Section), sitting as a
Chamber composed of:
Christos Rozakis, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges*,
and André Wampach, *Deputy Section Registrar*,
Having deliberated in private on 3 June 2010,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 36942/05) 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 European University Press GmbH (“the applicant”), on 29 September 2005.

2. The applicant was represented by Mr E. Morent, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant company complained that the non-communication of a request for a correction of a cost order violated the principle of equality of arms.

4. On 28 September 2007 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a limited liability company with its seat in Vienna.

6. In 2002 the applicant company published a book about K., Federal President of Austria at that time, and his family. The book included a

passage suggesting that K. had forced his wife to undergo an abortion in the Netherlands. It was distributed to bookshops on 9 April 2002.

7. On 22 April 2002 the Vienna Commercial Court (*Handelsgericht*) issued a preliminary injunction (*einstweilige Verfügung*) against the applicant company prohibiting it from disseminating statements concerning the alleged abortion. The preliminary injunction became enforceable on 24 April 2002.

8. Since the applicant company allegedly did not comply, K. and his wife requested the enforcement of the injunction (*Unterlassungsexekution*). This request was granted by the Innere Stadt Vienna District Court (*Bezirksgericht*) on 2 May 2002.

9. On 3 May 2002 the District Court, upon request of the opposing party, imposed for the first time a fine of EUR 10,000 on the applicant company for failure to comply with the injunction.

10. On the basis of the enforcement order of 2 May 2002 the District Court subsequently, upon request of the opposing party, imposed fines between EUR 10,000 and EUR 75,000 on the applicant company 36 times, since the applicant company was found still not to have complied with injunction of 22 April 2002. All 37 decisions included costs orders, which amounted to EUR 741.76 in each case.

11. The applicant company appealed against the enforcement order of 2 May 2002 to the Vienna Regional Court (*Landesgericht*). It also opposed the 37 fines which had subsequently been imposed on it. On 12 June 2002 the Vienna Regional Court quashed the decision of 2 May 2002, by which enforcement of the injunction had been granted, because, on the basis of the preliminary injunction, the applicant company could not be ordered to dispose of the books which had already been disseminated before the entry into force of that injunction. Subsequently, on 26 July 2002, the Regional Court also quashed all 37 decisions imposing fines and cost orders on the applicant company.

12. On an unspecified date K. and his wife lodged extraordinary appeals against the decisions of the Regional Court.

13. On 18 December 2002 the Supreme Court (*Oberster Gerichtshof*) gave a lengthy judgment on the appeals against the Regional Court's decisions of 12 June 2002 and 26 July 2002. Whereas the Supreme Court agreed with the Regional Court that the injunction ordering the applicant company not to distribute the book in question could not relate to copies of the book which had already been distributed to book shops, it found it established that the applicant company had also offered the book for mail order on its internet site. In this respect the applicant company had not complied with the injunction and enforcement through imposition of fines was in those instances justified.

14. In the operative part of its judgment the Supreme Court accordingly granted the appeal in so far as it related to the imposition of fines in 11 cases, namely as regards decisions no. 4, 6, 8-11, 13, 14 and 18-20.

15. As regards decision no. 4 the Supreme Court reformulated it to cover only a breach of the injunction for offering the book on the internet site, reduced the fine to EUR 1,000 but upheld the cost order of EUR 741.76.

16. As regards the remaining 10 decisions the Supreme Court likewise held the applicant company responsible for a breach of the injunction, limited to offering the book on the internet site and reduced the fines to amounts between EUR 1,000 and EUR 2,000. The Supreme Court, however, was silent on the question of costs in respect of these 10 decisions.

17. On 26 January 2005 the estate of K. and K.'s former wife requested the correction of the Supreme Court's judgment of 18 December 2002 maintaining that the court had by mistake omitted to restore the remaining 10 cost orders. The request was not communicated to the applicant company.

18. On 16 February 2005 the Supreme Court corrected its judgment of 18 December 2002, by inserting in the operative part the following phrase:

“The cost orders, namely para 3 of the first instance decisions, are restored”

As a result, the applicant company had to pay an additional EUR 7.467,51 to the opposing parties.

19. The applicant company was informed of the opposing parties' request on 27 June 2005, when the decision of the Supreme Court concerning the correction of its judgment was served on it.

II. RELEVANT DOMESTIC LAW

20. Article 419 of the Code of Civil Procedure reads as follows:

“(1) The court giving judgment may at any time correct writing and calculation errors or other apparent errors in the judgment or in its written version or deviations of the written version from the issued decision and may add statements omitted contrary to the requirements of Article 417 § 3.

(2) The court may decide on the correction without conducting a previous oral hearing. There is no separate remedy against the decision rejecting the request for a correction. A correction shall be added to the original version of the judgement and, if possible, shall be made visible in the required pertinent copies.

(3) The correction may also be ordered at a higher instance.”

21. Article 521a § 4 of the Code of Civil Procedure, as applicable at the time of the events, read as follows:

“Where an appeal is lodged in time against a cost order, the notice of appeal or a copy of the record drawn up in its place shall be served on the opposing party by the first-instance court. The opposing party may lodge a counter-appeal with the

first-instance court within a fixed time-limit of four weeks from the date of notification of the appeal as regards points 1-3 and within a fixed time-limit of fourteen days from notification as regards point 4. Article 464 § 3 and the final sentence of Article 520 § 1 shall apply *mutatis mutandis*.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant company complained that the non-communication of a correction request violated the principle of equality of arms. It relied on Article 6 of the Convention which, insofar as relevant, reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

23. 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*

24. The applicant company submitted that the decisions in the present case did not concern obvious mistakes. The addition of costs which had not been included in the original decisions cannot be regarded as evident. The applicant company relied on the case of *Beer v. Austria* in which the Court had found that the failure to serve a cost appeal in summary appeal proceedings against a cost order constituted a breach of Article 6 of the Convention (*Beer v. Austria*, no. 30428/96, § 20, 6 February 2001). Subsequently the Austrian legislature changed the relevant provisions of the Code of Civil Procedure introducing a new Article 521a § 4, according to which also in cost proceedings the opposing party had to be heard. Even though the instant proceedings differed in their subject matter from appeal proceedings against a cost order, the applicant company should have been given the opportunity to comment on the opposing parties' request for correction.

25. The Government submitted that, in accordance with Article 419 of the Code of Civil Procedure, obvious errors may be corrected if the decision to be corrected appears not to comply with the court's true intention. Under that provision the court may act, without involving the parties, *ex-officio*. Nevertheless the court may be notified about any mistake by a third person. Therefore the proceedings in the instant case cannot be compared to appeal proceedings on a cost order in domestic law pursuant to Article 521a § 4 of the Austrian Code of Civil Procedure. In the present case the Supreme Court in its decision merely clarified that not only the decisions themselves but also the cost orders of the first-instance decisions were reinstated and gave no decision on the amount of the costs. Since the decision did not affect the actual content of the judgment and alter its legal effect, but merely added part of a phrase which had inadvertently been omitted, there was no need to hear the parties. Therefore the equality of arms principle had not been violated.

2. The Court's assessment

26. In the present case the Court reiterates that the opposing parties to the applicant company lodged a request for correction of the Supreme Court's judgment on 26 January 2005 and the Supreme Court, by decision of 16 February 2005, corrected its judgment of 18 December 2002 by introducing a phrase (see § 16 above) which had not been in the operative part of its judgment before. It is not in dispute between the parties that the opposing parties' request had not been served on the applicant company and it only learned about the request when the final decision by the Supreme Court was served on it.

27. The Government argued that in the present case it had not been necessary to give the applicant an opportunity to comment on the opposing party's request because the matter concerned merely the correction of a manifest clerical mistake. In such proceedings it was not necessary to hear also the applicant company before the Supreme Court could proceed to a decision because the Supreme Court could have also acted *ex-officio* without involving the parties.

28. However, the Court is not persuaded that this was the case. In the Court's view the modification of its judgment by Supreme Court went beyond the correction of a manifest and minor clerical mistake, as the modification at issue did not concern a mere error of typing or calculation or related to an apparent contradiction in the text of the judgment. Rather, a complete phrase was introduced which significantly changed the text of the judgment and had serious repercussions on the financial position of the applicant company.

29. In this respect the Court reiterates that the principle of equality of arms requires that each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial

disadvantage vis-à-vis his opponent. Each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (see *Beer*, cited above, § 17 with further references).

30. The Court attaches great importance to the demands of efficiency and economy of proceedings as its case-law bears out, but that objective does not, however, justify disregarding the fundamental principle of adversarial proceedings. In fact, Article 6 § 1 is intended above all to secure the interests of the parties and those of the proper administration of justice (see *Beer*, cited above, § 18 with further references).

31. In the Court's view it would be in accordance with the principle of equality of arms that a domestic court, which had been made aware of a manifest and minor clerical mistake by one of the parties, proceed to its correction without a further exchange of submissions by the parties. However, such an approach, based on demands of efficiency and economy of proceedings is not appropriate to the proceedings in the present case because, as has been pointed out above, the correction at issue clearly went beyond the correction of a manifest and minor mistake (see § 28).

32. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed 7,467.51 euros (EUR) in respect of pecuniary damage, as, following the modification of the judgment of the Supreme Court of 18 December 2002 on 16 February 2005, it had to reimburse procedural costs increased by that amount to the opposing party.

35. The Government dispute this claim.

36. The Court reiterates that it cannot speculate what the outcome of the proceedings would have been if they had been in conformity with Article 6 of the Convention (see *Hofbauer v. Austria*, no. 7401/04, § 35, 10 May 2007). Accordingly, the Court dismisses the claim for damages for pecuniary loss, as it cannot discern any causal link between the violation found and the pecuniary damage alleged.

B. Costs and expenses

37. The applicant also claimed EUR 5,400 for the costs and expenses incurred before the Court plus turnover tax chargeable on this amount.

38. The Government considers that the costs and expenses claimed by the applicant company are excessive.

39. According to the Court's case-law, an applicant is entitled to the reimbursement of 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. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant company.

C. Default interest

40. 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 6 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 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant company, 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 amount 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 24 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President