



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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 42409/98
by Wolfgang SCHÜSSEL
against Austria

The European Court of Human Rights (Third Section), sitting on 21 February 2002 as a Chamber composed of

Mr I. CABRAL BARRETO, *President*,

Mr L. CAFLISCH,

Mr P. KÜRIS,

Mr R. TÜRMEŒ,

Mr J. HEDIGAN,

Mrs H.S. GREVE

Mrs E. STEINER, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 2 June 1998 and registered on 24 July 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicant, Wolfgang Schüssel, is an Austrian national, who was born in 1945 and lives in Vienna. He is represented before the Court by Mr W. Suppan, a lawyer practising in Vienna.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

At the material time the applicant was Deputy Prime Minister of Austria in a coalition Government formed by the Austrian Social-democratic Party (*Sozialdemokratische Partei Österreichs*) and the applicant's party, namely the Austrian Peoples' Party (*Österreichische Volkspartei*). In the 1995 election campaign the applicant had been nominated by his party as candidate for the office of Prime Minister.

In November 1995 the Austrian Social-democratic Party and the Group of Social-democratic Trade Unionists distributed stickers showing a picture of the applicant's face half overlapped by the face of Mr Haider, the leader of the Austrian Freedom Party (*Freiheitliche Partei Österreichs*), headed by the following text: "The social security slashers and the education snatchers share a common face" ("*Sozialabbau und Bildungsklau haben ein Gesicht*").

On 21 November 1995 the applicant brought proceedings under section 78 of the Copyright Act (*Urheberrechtsgesetz*).

On 28 November 1995 the Vienna Commercial Court (*Handelsgericht*) granted the applicant's request for a preliminary injunction prohibiting the defendants from publishing and disseminating the applicant's picture, in the event that his legitimate interests were thereby injured, firstly, in that the accompanying text alleged that he was a "social security slasher" and an "education snatcher" or, secondly, in that his face was distorted by being overlapped with the face of a politician of an opposing party, that of Jörg Haider.

In its reasoning, the Commercial Court noted that section 78 of the Copyright Act protected anyone against abuse of his or her picture in public. A person in the public eye, in particular one who had entered the public arena of his or her own motion, was not protected in this public capacity. The applicant had put himself at the centre of his party's election campaign. As his party's top candidate, he could be regarded as endorsing its positive statements and had to accept being the target of its opponents' criticism. Thus, the use of his picture by political opponents was not in itself contrary to section 78 of the Copyright Act. However, while the applicant had to

accept admissible criticism directed against the party represented by him, an infringement of his legitimate interests was conceivable regarding attacks on his privacy or personal disparagement which went beyond the limits of acceptable criticism. This consideration applied in particular where his picture was used in a distorted manner. In the present case, the applicant did not have to accept the distorted use of his picture “melted” with the picture of a political opponent.

Further, the Commercial Court examined whether the publication of the applicant’s picture in the context of the impugned statement “The social security slashers and the education snatchers share a common face” was unlawful. It found that the combination of the applicant’s picture with disparaging expressions suggesting that he was insensitive to social needs and was stealing educational opportunities violated his legitimate interests.

On 15 December 1995 the Vienna Commercial Court dismissed the objection (*Widerspruch*) of the defendants.

On 18 October 1996 the Vienna Court of Appeal (*Oberlandesgericht*), upon the defendants’ appeal, confirmed the preliminary injunction order as to the prohibition to publish a distorted picture of the applicant, but lifted it as regards the prohibition to publish it accompanied by the incriminated text.

The Court of Appeal confirmed that the applicant did not have to accept the publication of his distorted picture overlapped with the picture of a political opponent. However, as to the accompanying text, it found that the expressions “social security slashers” and “education snatchers”, though being blunt, were no more than the usual graphic wording applied in an election campaign. The average citizen would conclude that the applicant advocated reducing social assistance and making budgetary cuts in the education system. The statement could not be understood as to contain an allegation of theft within the meaning of the Criminal Code, nor did it suggest that the applicant was generally insensitive to social needs.

On 28 January 1997 the Supreme Court, upon the defendants’ appeal on points of law, quashed the Appeal Court’s decision and dismissed the applicant’s request for a preliminary injunction.

The Supreme Court observed that, when examining whether the publication of a picture violated legitimate interests within the meaning of section 78 of the Copyright Act, it had to be taken into account whether the person concerned was well-known. However, even where a well-known politician was concerned, there were limits to the admissible publication of his picture. Such limits applied where the publication intruded on a politician’s privacy, where his picture was distorted or where it was accompanied by a text which connected him with events with which he had nothing to do or attributed political convictions to him which he did not hold.

The Supreme Court confirmed the appellate court's view that section 78 of the Copyright Act did not prohibit the publication of the applicant's picture in the context of the allegation that he was a social security slasher and an education snatcher. The impugned statement was - contrary to the applicant's view - not a statement of fact but a value judgment. The dividing line between statements of fact and value judgments depended on the context in which the statement was made and the impression it conveyed. In general, the public would understand attributions of negative intentions to one politician by his political opponents as value judgments. Whether measures proposed in the interest of consolidating the budget were perceived as slashing social security or, on the contrary, as preserving a sound economic basis for the social security system, was indeed a value judgment.

The Supreme Court went on to say that political debate and the shaping of public opinion was sometimes impossible without having recourse to graphic wording. It recalled that political debate was protected by the right to freedom of expression as guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Referring to the case-law of the European Court of Human Rights, the Supreme Court recalled that the limits of acceptable criticism were wider for a politician than for a private individual. A politician inevitably and knowingly laid himself open to close scrutiny of his every word and deed by journalists, the public at large and his political opponents. Thus, as his party's top candidate, the applicant had to accept that his political opponents used disparaging words to describe his political aims.

As to the question of whether the publication of the applicant's picture overlapping with Mr Haider's was contrary to section 78 of the Copyright Act, the Supreme Court contested the appellate court's view. It was clear to every onlooker that the faces of two leading politicians had been combined by way of photomontage. The picture showed the applicant as he had presented himself in the election campaign without making his features ugly or repulsive. The sticker simply conveyed the political message that the applicant advocated the same policy as Mr Haider on social security and education issues. This was the "common face" of the defendant's two most important opponents. On the whole, this was an admissible political statement rather than a personal disparagement of the applicant.

In the subsequent main proceedings, the Vienna Commercial Court held a hearing on 29 April 1997. The applicant's counsel submitted that the sticker at issue suggested to the general public not only that the applicant's future political intention was to reduce social security or educational opportunities but that he had already taken such measures. He requested that a member of the applicant's party be heard as a witness. The court dismissed the request, finding that the matter was ready for decision.

The Commercial Court, referring to the Supreme Court's reasoning, dismissed the applicant's request that the defendants be prohibited from publishing his picture in the event that his legitimate interests were thereby injured, firstly, in that the accompanying text alleged that he was a "social security slasher" and an "education snatcher" or, secondly, in that his face was distorted by being overlapped by the face of a politician of an opponent party, in particular Jörg Haider's.

On 18 September 1997 the Vienna Court of Appeal dismissed the applicant's appeal. As to the applicant's complaint that the witness requested by him had not been heard, the court found that the question of what impression was conveyed by the sticker at issue was a matter of legal assessment to be carried out by the court.

On 24 February 1998 the Supreme Court dismissed the applicant's appeal on points of law. It found that the applicant's submissions in the main proceedings did not raise any relevant new facts as compared to the preliminary injunction proceedings.

B. Relevant domestic law

Section 78 of the Copyright Act, insofar as relevant, 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 they have died without having authorised or ordered publication, of a close relative would be injured."

COMPLAINTS

1. The applicant complains under Article 6 § 1 of the Convention that the Austrian courts' assessment that the incriminated statement "The social security slashers and the education snatchers share a common face" constituted a value judgment was arbitrary in particular in that the Supreme Court, in its judgment of 28 January 1997, failed to give reasons in this respect. Moreover, this deprived him of the possibility to adduce evidence to prove that the statement was untrue and thereby also violated the principle of equality of arms.

2. The applicant further complains under Article 8 of the Convention that the Austrian courts failed to protect him against the publication of his distorted picture accompanied by a disparaging text and therefore violated his right to respect for his private life.

3. Finally, the applicant invoking Article 14, alleges that he, being a politician, was treated less favourably than the average citizen as regards protection against the publication of his picture.

THE LAW

1. The applicant raises a number of issues relating to the alleged unfairness of the proceedings concerning his request to prohibit the publication of his picture. He relies on Article 6 § 1 of the Convention, which so far as material, provides as follows:

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

The Court notes that, in the present case, two sets of proceedings, namely preliminary injunction proceedings followed by the main proceedings were conducted. As regards compliance with Article 35 § 1 of the Convention, the Court recalls that in a previous similar case it found that the preliminary injunction proceedings and the main proceeding under section 78 of the Copyright Act had to be considered as a whole and that, thus, the six-month time-limit started running from the date of service of the Supreme Court’s decision in the main proceedings (see, *News Verlags GmbH & CoKG v. Austria*, (dec.) no. 31457/96, 1.6.99, unreported). Thus, the Court considers that the requirements of Article 35 §1 of the Convention are fulfilled in the present case, as the application was introduced on 2 June 1998, that is less than six months after the final domestic decision was given, i.e. the Supreme Court’s judgment of 24 February 1998 in the main proceedings.

As to the applicant’s complaint that the Supreme Court wrongly regarded the impugned statement as a value judgment and failed to give reasons in this respect, the Court recalls that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain*, [GC] no. 30544/96 § 28, ECHR 1999-I). The Court further recalls that according to its established case-law, Article 6 requires that judgments of courts and tribunals should adequately state the reasons on which they are based. The extent of this duty to give reasons may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (*ibid.*, § 26).

The Court finds that the Supreme Court, in its judgment of 28 January 1997, gave sufficient reasons for its finding that the statement at issue constituted a value judgment. Insofar as the applicant complains that this assessment deprived him of the possibility to adduce evidence that the statement was untrue, he overlooks that even where a statement amounts to a value judgment, it may depend on a factual basis which is itself

susceptible to proof (see, *mutatis mutandis*, the De Haes and Gijssels v. Belgium judgment of 24 February 1997, Reports of Judgments and Decisions 1997-I, p. 236, § 47). However, neither in the preliminary proceedings nor in the main proceedings did the applicant attempt to adduce any evidence in order to show that there was no factual basis for stating that he advocated budgetary cuts in the area of social and educational policy.

In these circumstances, the Court finds that there is no indication of a violation of Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant complains that the Austrian Courts failed to protect him against the publication of his distorted picture accompanied by a disparaging text and therefore violated his right to respect for his private life. He relies on Article 8 of the Convention which provides as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The Court considers that the notion of private life includes elements relating to a person's identity, such as a person's name (see the *Burghartz v. Switzerland* judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), or, as in the present case, a person's picture.

The Court recalls that Article 8 taken in conjunction with the obligation to secure the effective exercise of Convention rights imposed by Article 1 of the Convention, may involve a positive obligation on the State to provide a measure of protection for an individual's private life in relation to the exercise by third parties of the right to freedom of expression bearing in mind the duties and responsibilities referred to in Article 10. The absence of a remedy in relation to the publication of information relating to private affairs may constitute a lack of respect for private life (cf. nos. 28851/95 and 28852/95, *Earl and Countess Spencer v. the United Kingdom*, Dec. 16.1.1998, D.R. 92, p. 56).

In the present case the Court notes at the outset that section 78 of the Copyright Act provides a remedy against publication of a person's picture. Persons in the public eye are not - as a matter of principle - excluded from the protection afforded. The decisions given in the present case clearly show

that even a leading politician such as the applicant may be protected against the publication of his picture where it constitutes an intrusion upon his privacy, where his picture is distorted or where it is accompanied by disparaging statements.

Applying these principles to the particular circumstances of the present case, the Supreme Court correctly weighed the general interest in an open political debate as protected by Article 10 of the Convention against the applicant's interest in protection against the publication of his picture. Giving detailed reasons, it found that neither the accompanying text nor the fact that the applicant's picture was half overlapped by the picture of another leading politician went beyond the limits of what is acceptable in the context of political battle in general and against the background of an electoral campaign in particular. In arriving at this conclusion, the Supreme Court had guidance from the present Court's established case-law under Article 10 of the Convention, according to which the limits of acceptable criticism are wider with regard to a politician than as regards a private individual (see, among others, the *Lingens v. Austria* judgment of 22 November 1990, Series A no. 204, p. 27, § 42).

In conclusion, the Court finds that the facts of the case do not disclose any indication of lack of respect for the applicant's private life.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. Having regard to its considerations under Article 8, the Court finds that the applicant's complaint under Article 14 of the Convention that he, as a politician, was treated less favourably than the average citizen as regards protection against the publication of his picture, does not raise a separate issue.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President