

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

FOURTH SECTION

CASE OF ZÖCHLING v. AUSTRIA

(Application no. 4222/18)

JUDGMENT

STRASBOURG

5 September 2023

This judgment is final but it may be subject to editorial revision.



In the case of Zöchling v. Austria,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Faris Vehabović*, President*,
Iulia Antoanella Motoc,
Branko Lubarda*, judges*,

and Veronika Kotek, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 4222/18) 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") on 18 January 2018 by an Austrian national, Ms Christa Zöchling ("the applicant"), who was born in 1959 and lives in Vienna and who was represented by Mr H. Simon, a lawyer practising in Vienna;

the decision to give notice of the application to the Austrian Government ("the Government"), represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs;

the parties' observations;

Having deliberated in private on 27 June 2023,

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

SUBJECT MATTER OF THE CASE

1. The case concerns a complaint under Article 8 § 1 of the Convention about the refusal to hold the publisher of an Internet news portal liable for hate speech in users' comments.

2. The applicant is a journalist working for a well-known weekly news magazine.

3. Medienvielfalt Verlags GmbH ("the company") is the publisher of an Internet news portal ("the portal") where on average six to ten articles a day are published by journalists who work on a voluntary basis. The portal allows users registered with an email address to post comments relating to articles published by the company without the content of the comments being checked before or after their publication. Users are given notice that unlawful comments are undesirable (*nicht erwünscht*). The comments are technically cleared for publication by an employee and are visible on the portal under the relevant article.

4. On 11 September 2016 the company published an article about the applicant on the portal along with an image of her. On 12 September 2016 a user posted that he had printed out the applicant's image and had successfully shot her in the face and encouraged others to do the same. Another user posted a comment calling the applicant a "plague", a "dumb person" and a "larva" and stated that he regretted that gas chambers no longer existed.

5. On 23 September 2016 the applicant asked the company to delete the comments and to disclose the users' data. The company deleted the comments within a few hours after receipt of the request and informed the applicant of the users' email addresses on 29 September 2016. The comments had been visible on the portal for 12 days. The users in question were blocked. The applicant subsequently failed to obtain the names and postal addresses of the users because their email providers refused to share those data with her.

6. The applicant lodged an application with the Vienna Regional Criminal Court against the company pursuant to section 6 § 1 of the Media Act (see *Armellini and Others v. Austria*, no. 14134/07, § 24, 16 April 2015) claiming damages for the publication of insulting statements. The court granted the applicant's request. It noted that section 6 § 2.3a of the Media Act exempted media owners (*Medieninhaber*) from liability for content available on their websites provided that the media owners or one of their employees or agents had not disregarded due diligence. Section 16 of the E-Commerce Act provided that a host provider was not liable for the information stored at the request of a user on condition that the provider did not have actual knowledge of any illegal activity or [illegal] information and, as regards claims for damages, was not aware of facts or circumstances from which any illegal activity or information was apparent, or the provider, upon obtaining such knowledge or awareness, acted expeditiously to remove or to disable access to [such] information (see *Standard Verlagsgesellschaft mbH v. Austria (no. 3)*, no. 39378/15, § 36, 7 December 2021). The company had deleted the comments immediately after notification by the applicant. Nevertheless, due diligence in the sense of section 6 § 2.3a of the Media Act entailed wider obligations than section 16 of the E-Commerce Act. Otherwise, the legislature would have drafted section 6 § 2.3a of the Media Act in the same way as section 16 of the E-Commerce Act. Taking into account among other things the role of the company, the content of the article (see paragraph 4 above), which intentionally stirred up antipathies against the applicant, the content of the comments, which contained incitements to violence against the applicant, and the fact that offensive comments about the applicant had repeatedly been posted under articles published on the portal since September 2015, the court concluded that the company had not fulfilled the requirements for exemption from liability set out in section 6 § 2.3a of the Media Act.

7. On 20 July 2017 the Court of Appeal quashed the decision of the Regional Criminal Court on an appeal by the company. It found that – in accordance with section 16 of the E-Commerce Act – section 6 § 2.3a of the Media Act required media owners to delete statements without delay if they became aware that such statements fulfilled the offences referred to in section 6 § 1 of the Media Act. Media owners did not have the obligation to monitor all comments posted on their website. Such an obligation would violate section 18 of the E-Commerce Act. The Court of Appeal referred to

Article 10 of the Convention and to the case of *Delfi AS v. Estonia* (no. 64569/09, 10 October 2013). It concluded that the company had acted with the due diligence required under section 6 § 2.3a of the Media Act by deleting the impugned comments immediately on the applicant's request. It was therefore not liable for the damages claimed by the applicant under section 6 § 1 of the Media Act. No further remedies were available.

8. The applicant complained under Article 8 of the Convention that the respondent State had not fulfilled its positive obligation to protect her private life and reputation when rejecting her claims.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

9. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

10. The general principles concerning competing interests under Article 8 and Article 10 of the Convention have been summarised in the case of *Delfi AS*, cited above, § 139). The Court has identified the following criteria for the assessment of liability for third-party comments on the Internet: the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the company (see, in the context of criminal liability for anonymously posted comments on the applicant's Facebook "wall", *Sanchez v. France* [GC], no. 45581/15, §§ 163-66, 15 May 2023 with reference to *Delfi A.S.*, cited above, §§ 142-43, and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 69, 2 February 2016). In striking a fair balance between an individual's right to respect for his or her private life under Article 8 and the right to freedom of expression under Article 10, the nature of the comment will have to be taken into consideration, in order to ascertain whether it amounted to hate speech or incitement to violence (*Sanchez,* cited above, § 166).

11. The Government explicitly listed the criteria established in the cases of *Delfi AS* and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt* (see paragraph 10 above) and concluded that the Court of Appeal had balanced the interests at issue fairly, finding those protected by Article 10 to be of overriding importance. For the reasons set out below the Court cannot agree with that conclusion.

12. As to the context of the comments in issue, the Court agrees with the Government that the company's portal was not one of the largest news portals in Austria, unlike the portal in Estonia in the case of *Delfi AS* (cited above,

§ 129). However, although the Court of Appeal noted in its decision that when assessing the obligations of the media owner, his or her conduct, the organisation of the news portal and the degree of violation of law (*Schwere der Rechtsverletzung)* had to be taken into consideration, it subsequently did not examine the size of the portal or the extent of the company's commercial interest in the posting of the comments (see *Sanchez*, cited above, § 166), nor did it consider the Regional Criminal Court's finding that the article the comments were based on intentionally stirred up antipathies against the applicant (see paragraph 6 above). The Court of Appeal did not refer to the content of the comments either although they clearly amounted to hate speech and contained incitements to violence (see *Sanchez*, cited above, § 166; contrast, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*, cited above, § 77; *Pihl v. Sweden* (dec.), no. 74742/14, § 37, 7 February 2017; *Høiness v. Norway*, no. 43624/14, § 69, 19 March 2019, in all of which cases the content of the impugned comments was found not to amount to hate speech).

13. As to the measures applied by the company to prevent or remove defamatory content, the comments in issue were deleted after having been notified to the company by the applicant (see paragraph 5 above). The Court of Appeal did not examine the possibility for the company to operate a notice-and-take-down system which could have been a useful tool for balancing the rights and interests of all those involved (*Delfi AS,* cited above, § 159). In cases where third-party user comments were in the form of hate speech and direct threats to the physical integrity of individuals, as in the instant case (see paragraph 4 above), the rights and interests of others and of society as a whole may entitle States to impose liability on Internet news portals without contravening Article 10 if they failed to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties (ibid.) In its recent judgment in the case of *Sanchez* (cited above, § 190), the Court reiterated that a minimum degree of subsequent moderation or automatic filtering would be desirable in order to identify clearly unlawful comments as quickly as possible and to ensure their deletion within a reasonable time, even where there has been no notification by an injured party. In the instant case, the Court of Appeal did not consider possible measures to be applied by the company to prevent defamatory content on its portal or to remove such content. It did not have regard to the Regional Criminal Court's finding that offensive comments about the applicant had repeatedly been posted under articles published on the company's portal since September 2015 (see paragraph 6 above) so that the company could have anticipated further offences. It did not assess whether informing users that unlawful comments were merely "undesirable" rather than prohibited (see paragraph 2 above) could be regarded an effective measure to prevent hate speech.

14. Turning to the possibilities for the applicant to pursue claims against the anonymous authors of the comments, it remained undisputed that she was refused access to the author's data by their email providers (see paragraph 5 above).

15. The Court does not overlook the fact that section 16 (1) of the E-Commerce Act exempts host providers from responsibility for information stored on behalf of third parties and that section 18 (1) of the E-Commerce Act excludes an obligation to generally monitor stored information. However, section 6 § 2.3a of the Media Act does – when referring to a media owner's due diligence – require a certain balancing between the interests of an applicant claiming damages under section 6 § 1 of the Media Act and thus relying on Article 8, and those of a media owner in protecting his or her rights under Article 10 of the Convention. The Government conceded that such a balancing exercise was necessary (see paragraph 11 above). The Court of Appel explicitly referred to the case of *Delfi AS* (see paragraph 7 above) but subsequently did not apply the relevant criteria.

16. The Court finds that in the absence of any balancing of the competing interests at issue the Court of Appeal did not satisfy its procedural obligations to safeguard the applicant's rights to respect for her private life and reputation.

17. There has accordingly been a violation of Article 8 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

18. The applicant claimed 7,782.70 euros (EUR) in respect of pecuniary and non-pecuniary damage. She claimed EUR 3,871.95 in respect of costs and expenses incurred before the domestic courts and EUR 2,707.68 for those incurred before the Court.

19. The Government argued that those claims were excessive.

20. The Court reiterates that it cannot speculate as to what the outcome of proceedings would have been if they had been in conformity with the requirements of Article 6 § 1 of the Convention (see *Osinger v. Austria*, no. 54645/00, § 57, 24 March 2005). The same applies in the present case, in which a procedural violation of Article 8 has been found (see paragraph 16 above). Accordingly, it does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

21. 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 were actually and necessarily incurred and are reasonable as to quantum (see *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 58, 27 February 2007). Regard being had to the documents in its possession and the above criteria, the Court

considers it reasonable to award EUR 3,800 for costs and expenses incurred in the domestic proceedings and EUR 2,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 5,800 (five thousand eight hundred euros), plus any tax that may be chargeable to the applicant, 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 5 September 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Veronika Kotek	Faris Vehabović
Acting Deputy Registrar	President