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OF HUMAN RIGHTS

Application No. 9815/82

Peter Michael LINGENS
against
AUSTRIA

Report of the Commission

(Adopted on 11 October 1984)

STRASBOURG
1984

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

The substance of the application

2. The application concerns criminal proceedings taken by the former Austrian Chancellor, Mr. Kreisky, in which the applicant, who is a journalist, was convicted for public defamation. The court found that certain terms which the applicant had used in press articles to describe specific behaviour and statements made by Mr. Kreisky in a political context were objectively defamatory of the latter and had not been proven to be true. The applicant complains that this conviction constituted an unjustifiable interference with his freedom of expression as guaranteed by Art. 10 of the Convention.

Proceedings before the Commission

3. The application was introduced on behalf of the applicant on 19 April 1982. It was registered on 3 May 1982.

4. On 6 October 1982, the Commission began with its examination of the admissibility of the application. It decided to give notice of the application to the respondent Government and to invite that Government to submit written observations on the admissibility and merits.

5. The Government submitted their observations on 17 December 1982 and the applicant submitted observations in reply on 28 February 1983.

6. On 13 May 1983, the Commission decided to fix a hearing on the admissibility and merits.

The hearing took place on 5 October 1983. The parties were represented as follows:

the applicant by Mr. W. Masser, a lawyer practising in Vienna;

the Government by their Agent, Mr. H. Türk, Head of the International Law Department of the Federal Ministry of Foreign Affairs who was assisted by Mr. W. Okressek of the Constitutional Law Department of the Federal Chancellery and Mr. G. Felsenstein, of the Federal Ministry of Justice.

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7. Following the hearing, the Commission declared the application admissible.

8. The Government submitted supplementary observations on the merits on 5 March 1984, and the applicant replied thereto on 3 April 1984.

9. After declaring the case admissible, the Commission, acting in accordance with Art. 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

The present Report

10. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
F. ERMACORA
G. JORUNDSSON
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
M. MELCHIOR
A.S. GOZUBUYUK
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
G. BATLINER

11. The text of the Report was adopted by the Commission on 11 October 1984 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

12. A friendly settlement of the case not having been reached, the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

1. to establish the facts; and
2. to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

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13. A schedule setting out the history of proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II. The press articles concerned are reproduced at Appendix III.

14. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

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II. ESTABLISHMENT OF THE FACTS

15. The facts are not in dispute between the parties.

16. The applicant, who is represented by Messrs W. Masser, E. Grossmann and E. Klingsbigl, lawyers practising in Vienna, is an Austrian citizen born in 1931 and resident in Vienna. He has already previously filed an application (No 8803/79, Lingens and Leitgeb v Austria) which the Commission, however, rejected as inadmissible on 11 December 1981 (DR 26, 171).

17. In the present case, the applicant complains of a conviction for defamation in the press (Uble Nachrede, section 111 (2) of the Penal Code) following a private prosecution brought against him by Dr Bruno Kreisky (the former Austrian Federal Chancellor). Mr Kreisky had felt attacked by two articles published by the applicant in the magazine "Profil" (of which he is the editor-in-chief) in October 1975.

The background of the applicant's articles

18. On 9 October 1975, i.e. shortly after the general elections of 5 October 1975, Mr. Simon Wiesenthal, Chairman of the Jewish Documentation Centre, in a television interview accused Mr. Friedrich Peter, Chairman of the Austrian Liberal Party (Freiheitliche Partei Osterreichs, FPÖ) of having belonged to the first SS infantry-brigade in World War II, i.e. a unit which had repeatedly dealt with the liquidation of people behind the Russian front. Mr. Peter subsequently did not deny having belonged to this brigade, but affirmed that he had not participated in any atrocities. Mr. Wiesenthal clarified that that had not been his allegation.

19. On the day following Mr. Wiesenthal's revelation, i.e. on 10 October 1975, Mr. Kreisky was questioned on television about these accusations. This interview took place in the Federal Chancellery immediately after a meeting between MM. Kreisky and Peter as party Chairmen, held in the framework of the usual party consultations before the forming of a new Government. This meeting attracted considerable publicity because many people had thought before the elections that they might lead to a coalition Government Kreisky-Peter. During the electoral campaign, Mr. Kreisky had always opposed such speculations and at the interview in question he stated that a coalition was excluded in view of the absolute majority of his party. He did, however, vehemently stand up for Mr. Peter concerning the allegations made against the latter, and in this context called Wiesenthal's activities "political mafia" or "mafiosi-methods" not only directed against Mr. Peter but also against himself. Similar statements of Mr. Kreisky, in which he also used the word "mafia" in relation to Mr. Wiesenthal, were reported the following day in a Vienna newspaper to which he had given an interview.

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The contents of the applicant's articles

20. Following these declarations, the applicant published the two articles under discussion.

21. The first of these articles was published on 14 October 1975 under the title "The Peter case" ("Der Fall Peter"). It accompanied a report on the above events including a detailed survey of the activities of the first SS infantry brigade, and of what was known about Mr Peter's involvement with that unit. Mr Peter had admitted to have belonged to the unit, but denied that he had known anything about the killings. It was stated that there was no ground to assume that Mr Peter had taken part in any killings himself, but it was submitted that his involvement with the unit nevertheless made him unbearable as an Austrian politician. In the applicant's article Mr Kreisky was accused of protecting Mr Peter for political reasons. The applicant then wrote: "Had someone else behaved in this way, one would probably have spoken of the ugliest opportunism" ("Bei einem anderen würde man es wahrscheinlich Übelsten Opportunismus nennen").

22. The second article was published on 21 October 1975 under the title "Reconciliation with the Nazis - but how?" ("Versöhnung mit den Nazis - aber wie?"). Its gist was that it would be in the interest of the Austrian society not to protect those who committed serious crimes during the Nazi period. Austria had produced much more war criminals than could follow from its share in the population of the Third Reich, but it had done very little about them. Austria had not mastered its past, but had neglected it. It was submitted that this tolerance could promote the development of standards which could help a future fascist party in taking over power. The applicant then continued: "But how far away and how speculative are such thoughts. And how near and concrete is a long sequence of Bruno Kreisky cabinets. In truth, one cannot refute in a rational way what Kreisky is doing. Only in an irrational way: it is immoral, undignified" ("In Wahrheit kann man das, was Kreisky tut, auf rationale Weise nicht widerlegen. Nur irrational: es ist unmoralisch. Würdelos.")

23. It follows from the further contents of the article that the applicant was especially angry about Mr Kreisky's refusal to consider Mr Peter unbearable as a politician and partner of the Austrian Government. This, it was submitted, was a "minimum requirement of political ethics" ("ein Mindestanforderung des politischen Anstands"). The "monstrosity" ("Ungeheuerlichkeit") was not Simon Wiesenthal having made this a point of discussion, but Bruno Kreisky's wish to remove it from discussion. Mr Kreisky was very strongly criticised for his attacks on Mr Wiesenthal in this context.

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The legal basis for the private prosecution

24. Mr Kreisky subsequently brought a private prosecution against the applicant because he considered certain passages of the articles (including the words underlined above) as defamatory and contrary to section 111 of the Penal Code.

25. Subsection (1) of this section makes it a criminal offence to state before others that a person has contemptible features or attitudes, or to accuse him of dishonest behaviour or of behaviour contrary to good morals which is liable to scorn, or to degrade him in the public opinion. By virtue of subsection (2) the offence is aggravated if it is committed in print or broadcast or otherwise in such a manner that the defamation becomes accessible to a broad public. A person will not be punished if it is shown that the allegation made is true, but in the cases coming only under subsection (1) it is sufficient to prove that the circumstances were such as to give the person making the allegation sufficient grounds to believe that the statement was true (subsection (3)). According to section 112 the burden of proof is on the defendant party.

Under section 117 (1), defamation is generally punishable only upon a private prosecution brought by the person concerned. However, in the case of civil servants it is punishable only upon a public prosecution for which the consent of the person concerned is required. Only if the public prosecution is refused is there room for a private prosecution in such cases (section 117 (2) of the Penal Code).

The first judgment of the Regional Court

26. On 26 March 1979, the Regional Court of Vienna convicted the applicant of the offence of defamation under s. 111 (2) of the Penal Code in respect of the use of the expressions "ugliest opportunism", "immoral" and "undignified". The court found that he had not offered proof of the truth of the designation "ugliest opportunism" and it considered that he had failed to prove the truth of the terms "immoral" and "undignified".

27. In this context the court first dealt with the objectively defamatory character of the words used. As regards the word "opportunism" it was admitted that a certain amount of opportunism is not foreign to politicians in general, but in this case the word was used with the adjective "ugliest" and therefore had a derogatory connotation. Despite the fact that in terms the expression was used in relation to other people than Mr. Kreisky, it was clear from the context that the applicant in reality wished to address this reproach to him.

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As regards the terms "immoral" and "undignified" the court considered that no further explanations were necessary to show that they involved per se an accusation of dishonourable, despicable behaviour.

28. In reply to the applicant's argument that these terms were value judgments which as such should not be punishable, the court observed that the offence set out in s. 111 of the Penal Code itself contained evaluations such as "despicable", "dishonourable" etc. as an essential element of this offence. The unfavourable conclusion drawn by the applicant on the specific behaviour of Mr. Kreisky displayed a dishonourable attitude and behaviour and therefore constituted the offence. The applicant could not invoke his constitutional right to freedom of expression in this context, because the constitutional provisions, including Art. 10 of the Convention, were subject to restrictions. Freedom of expression was not an unlimited basic right and reached its limits where the provisions of the Penal Code were overstepped. These provisions had struck the balance between freedom of expression on the one hand, and the basic right to the integrity of the person on the other.

29. As regards Mr. Kreisky's entitlement to bring the private prosecution, the court observed that he had not been criticised in his capacity of Federal Chancellor (and thus a civil servant within the meaning of s. 117 (2) of the Penal Code in which case only a public prosecution with the consent of the interested person would have been possible), but as a top politician of his party and an Austrian politician like any other.

30. The court then went on to deal with the question of the evidence of truth. As regards the first statement ("ugliest opportunism") it noted that such evidence had not been offered at all, and this would as such be sufficient for a conviction. It added, however, that the evidence offered on the other statements also did not provide the court an indication that this statement was true, and its truth also was not notorious.

31. As regards the other two statements the applicant had offered proof of truth, and he therefore would have had to prove that Mr. Kreisky's actual behaviour, as described in the article in question, was "immoral" or "undignified". The court noted that the applicant had used these words mainly to describe behaviour and an attitude of Mr. Kreisky which consisted in minimising the atrocities of the national socialist régime while calling the endeavours of Mr. Wiesenthal "Mafia" operations. The applicant had argued that Mr. Kreisky had also insinuated a collaboration of Mr. Wiesenthal with the national socialists, and in this respect he had offered proof that there had been no such collaboration, by a court judgment in which a

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journalist had been convicted of defamation of Mr. Wiesenthal because he had not been able to prove the truth of similar allegations. The court accepted this proof. It added in a later context that Mr. Kreisky had not upheld his allegations concerning a collaboration of Mr. Wiesenthal with the Gestapo when examined as a witness in the instant proceedings.

32. The court then dealt with the other elements of the allegation of "immoral" and "undignified" behaviour. Insofar as these terms were meant to criticise Mr. Kreisky for the use of the words "Mafia" or "Mafia methods" in relation to Mr. Wiesenthal, the court noted that Mr. Kreisky had not denied having made these remarks. As such, these words imply criminal behaviour in organised form, but sometimes they are also used in a different meaning. Even if Mr. Kreisky's statement did not supply any convincing grounds for the court to find that Mr. Wiesenthal had acted in a criminal manner, it did not follow that these statements were "immoral" or "undignified". It was clear that one could disagree about the correctness of Mr. Kreisky's argument, but his concept of "Mafia" was at least possible and worth discussing. The court stated in this context that it knew of admissions by Mr. Wiesenthal himself that he used a set-up with many ramifications in order to achieve his various political aims. The court concluded from this that Mr. Kreisky's description of Mr. Wiesenthal's activities was by no means "immoral" or "undignified".

33. Regarding Mr. Wiesenthal's revelations concerning Mr. Peter's past, the court stated that Mr. Wiesenthal was Mr. Kreisky's political adversary and therefore it was not unreasonable to suspect that these revelations had been made in order to influence the internal politics by throwing a shadow on a possible coalition partner. The applicant's statements concerning this issue therefore had to be judged in the light of the consideration that they concerned a political fight between political adversaries each of whom attacked or defended himself with the means at his disposal. If it had indeed been Mr. Wiesenthal's intention to describe Mr. Kreisky as a man who collaborated with persons who had participated in Nazi crimes, it was a logical defence for Mr. Kreisky to describe also Mr. Wiesenthal as a collaborator. If this possibility to interpret the facts existed, it was not lack of morals or dignity which had prompted Mr. Kreisky's action, but a defence which was possible and not unusual in hard fights of the political life. As the possibility existed to see the matter in this way, one could not draw the inevitable conclusion as to the existence of an "immoral" or "undignified" behaviour.

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34. Regarding the further allegation that Mr. Kreisky's general attitude towards Nazi victims or Nazi collaborators was "immoral" or "undignified", the court admitted that this attitude, as expressed to the public, was by no means clear and unequivocal, but that it rather manifested itself in a form which allowed various conclusions to be drawn. However, the applicant was required to prove the truth and to convince the court of the correctness of the allegation that Mr. Kreisky's behaviour was "immoral" or "undignified". This proof failed because there were various possibilities to interpret the behaviour and attitudes of Mr. Kreisky. This logically made it impossible to prove that there was only one possible interpretation.

35. The applicant was acquitted in respect of the use of some other words ("minimum requirement of political ethics", "monstrosity") which in the court's opinion were not defamatory of Mr. Kreisky in the context in which they had been used. If read together with the article as a whole, they were not objectively defamatory.

36. The first expression ("minimum requirement of political ethics") was primarily aimed at Mr. Peter and only in the second line at Mr. Kreisky who had defended the former. The court was aware of the distinction which must be drawn between political criticism on the one hand, which was not punishable, and defamation on the other, which was punishable under s. 111 of the Penal Code. An essential criterion in this respect was a restrictive interpretation of s. 111, if the reader could recognise a political criticism short of defamation. "Political ethics" was difficult to define and it could not be said that its disregard necessarily implied a reproachable inner attitude.

37. The second expression ("monstrosity") had been skilfully used to turn around an argument and thus provided the reader with serious food for thought. It did not overstep the limits between political criticism and criminal behaviour.

38. The applicant was sentenced to a fine of AS 20,000.-. The facts that he had intended political criticism in relation to political issues and persons and that the tolerance for defamation concerning top politicians should be greater than that of other people were considered as grounds for mitigation. The court refrained from awarding a compensation to Mr Kreisky in view of the applicant's good faith. The forfeiture of the press publications in question and the publication of the judgment were additional sanctions which had to be imposed in view of Mr Kreisky's applications to this effect.

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The first appeal proceedings

39. Both the private prosecutor and the applicant appealed from this judgment. However, the Vienna Court of Appeal did not consider it necessary to deal with the substance of those appeals. By a decision of 30 November 1979 it quashed the above judgment on the ground that the court had failed to investigate Mr Kreisky's legitimation to bring a private prosecution in the present case. If he had been attacked in his capacity of Federal Chancellor, he would have lacked this legitimation unless a public prosecution under s. 117 of the Penal Code had been refused by the competent authority.

The Regional Court's second judgment

40. The Regional Court therefore held a new trial on 1 April 1981 in which it investigated in particular the circumstances under which Mr Kreisky had made the statements criticised by the applicant in his articles. It found that Mr Kreisky had been attacked in his capacity as a party leader and as a loyal person, and not in his official function of Federal Chancellor. His legitimation to bring a private prosecution was therefore confirmed.

41. As to the qualification of the applicant's acts under s. 111 (2) of the Penal Code, the court confirmed its earlier judgment of 26 March 1979 to which it simply referred. It emphasised again that evidence of truth had not been offered at all as regards the expression "ugliest opportunism", and as regards the terms "immoral", "undignified" it had only been offered insofar as these terms related to Mr. Kreisky's allegations that Mr. Wiesenthal had collaborated with the national socialists. These allegations, however, had only been made after the publication of the applicant's articles in which they had not been mentioned, and they were therefore irrelevant for the proof of truth. The court accordingly did not maintain the findings made in relation to this issue in the first judgment.

42. It did fully maintain its findings insofar as these terms "immoral", "undignified" were related to further behaviour and attitudes of Mr. Kreisky, i.e. his allegation that Mr. Wiesenthal used "Mafia methods", his defence of Mr. Peter, and the minimising of national socialist atrocities. It observed that in view of the latter two elements the applicant's criticism went far beyond the scope of an issue of defamation as between Mr. Wiesenthal and Mr. Kreisky, an issue which could not as such be investigated in the present

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proceedings. It added that in any event Mr. Kreisky had made his remarks about "Mafia methods" in good faith, having regard to the bad experiences which he had made with Mr. Wiesenthal. That Mr. Kreisky could not be sued by Mr. Wiesenthal for defamation due to his parliamentary immunity, while the applicant could in fact be sued by Mr. Kreisky was not the court's fault because it was only the result of the existing legislation which provided for parliamentary immunity. Equally it was not the fault of the court that in this context the applicant was required to prove the truth of his statements because this, too, was provided for in the legislation and it was not for the court, but for the legislator, to reduce the requirements of the proof of truth. Finally the court could not be made responsible for the low level of tolerance of certain politicians and for their great readiness to institute proceedings.

The second appeal proceedings

43. Both parties appealed again to the Vienna Court of Appeal. By its final decision of 29 October 1981, that court reduced the applicant's fine to AS 15,000.-, but in principle confirmed the Regional Court's decision.

44. As regards Mr. Kreisky's appeal, in which he had challenged the applicant's acquittal for the use of certain terms, the court noted that Mr. Kreisky had in particular challenged the scope which the Regional Court had left for admissible political criticism. Mr. Kreisky had claimed that the same standard must be applied for politicians as for private citizens as regards the protection of their reputation. In his view the Austrian law did not support the Machiavellian idea that different standards applied in political life, and that in politics one could hurl all sorts of abuse at one another unpunished.

45. The Court of Appeal observed, however, that s. 111 of the Penal Code provided for an offence involving an abstract danger for a person's reputation (abstraktes Cefährungsdelikt) and protected only the social and moral content of objective reputation, i.e. the respect which a person enjoyed in his relevant social environment. In relation to politicians this was the public opinion. A realistic approach showed that the public opinion had gained the impression from frequent use of insults in political argument (often conducted under cover of parliamentary immunity) that utterances in the sphere of politics could not be judged by the same criteria as those in private life. One should not therefore attach too much weight to reproaches made during a political debate, because the general public obviously did not generally consider that they had the strict ethical meaning of serious moral value judgments. They were often, as in this case,

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rhetorical bombast supposed to denote particularly sharp criticism and rejection of specific political behaviour. The tolerance level of politicians therefore should be higher than in private arguments. As a rule, reproaches made in heated political discussions casted a slur on someone's reputation only when they impinged on the personal sphere of the individual concerned. This could not be said to be the case as regards the use of the terms "minimum requirement of political ethics" or "monstrosity" by the applicant as they clearly attempted to reduce Mr. Kreisky's political standing and were not related to his private sphere. Mr. Kreisky's appeal in this respect was therefore rejected.

46. As regards the applicant's own appeal, the Court of Appeal first dealt with the evidence taken by the Regional Court in order to determine whether Mr. Kreisky had been assailed in his official capacity as Federal Chancellor, or otherwise. It noted that there was a close connection between the allegations made against Mr. Peter and the general elections as these allegations were meant to prevent a coalition Government with Mr. Peter as a result of these elections. In this respect Mr. Kreisky had been attacked as a party leader. Insofar as he had been criticised for making certain remarks on Mr. Wiesenthal in this context, he was in addition attacked as a private person because the applicant would probably have criticised also similar remarks against Mr. Wiesenthal made by someone other than Mr. Kreisky.

47. The use of the term "ugliest opportunism" meant acting for utility regardless of moral considerations, and was therefore as such a reproach against a person's character. If used, as in the present case, in relation to specific behaviour, it meant dishonourable conduct and therefore came under s. 111 of the Penal Code. The applicant had made this reproach to Mr. Kreisky himself, and the formulations used which referred to "someone else" had not in reality withdrawn this argument.

48. As regards the terms "immoral", "undignified", the court noted the applicant's claim that in the present case these terms had not been used to describe a despicable trait or attitude in general, but as a personal evaluation of uncontested behaviour in exercise of his freedom of expression. The court observed however that the law did not give an unlimited right to express value judgments, as the freedom of expression was in this respect subject to the legal restrictions providing for the protection of reputation. The press merely had the task to provide information, while the assessment and evaluation of the imparted facts must primarily be left to the discretion of the reader. If a journalist himself expressed a judgment it must keep within the limits laid down by the protection against defamation afforded by criminal law. This limit was overstepped if the reproach made created in the reader's mind the idea of a blameworthy inner attitude.

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49. As regards the attitude of Mr. Kreisky concerning national socialism, the applicant had submitted that in this respect he had criticised Mr. Kreisky's personality as such, and that it must therefore be admissible in the proof of truth to have regard also to statements made by him after the publication of the articles. The court observed, however, that only the specific behaviour described in the article as such, where it had been enumerated in six points, could form the basis of the proof of truth. It did not appear from the article that the behaviour in question related to Mr. Kreisky's personality in general, and therefore the exclusion of evidence relating to subsequent statements had been correct.

50. The court finally observed that the results of the proceedings confirmed that there had been no "immoral" or "undignified" behaviour of Mr. Kreisky. Contrary to the applicant's submission, Mr. Kreisky had not made his remarks concerning Mr. Wiesenthal by twisting facts and without possessing sufficient grounds, but had been subjectively convinced that Mr. Wiesenthal was using Mafia methods.

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III. SUBMISSIONS OF THE PARTIES

51. All essential submissions of the parties in the present case have been made already at the admissibility stage of the proceedings, and the Commission therefore may simply refer to the summary of these submissions as set out in the decision on admissibility at Appendix II (cf. pp. 31 et seq).

52. In their additional written observations on the merits, the parties have only added emphasis to some of the arguments previously made, and it suffices therefore to indicate briefly to which of their arguments the parties attach special importance.

A. The applicant

53. The applicant stresses in particular that Mr. Kreisky's remarks concerning Mr. Wiesenthal (both as regards "Mafia methods" and collaboration with the Nazis) were made without any reasonable basis in the facts. This had been the starting point of his criticism of Mr. Kreisky, but the court had assumed that at least subjectively Mr. Kreisky had had reasons to believe in a campaign conducted against him by Mr. Wiesenthal, and this was a sufficient ground for the court to consider the applicant's criticism of Mr. Kreisky's behaviour as unjustified.

54. The applicant observes in this context that his criticism was exclusively expressed in the form of personal value judgments which in his view he must be able to make in exercise of his freedom of expression. The Government's argument according to which no protection of reputation would exist if personal value judgments would be always permitted is not correct. The limits of freedom of expression are overstepped where such value judgments are being made without any reasonable basis in the facts.

55. The applicant claims that in this case there was indeed a reasonable basis for criticism of Mr. Kreisky's behaviour. This was admitted by the court itself. The criticism expressed in his articles did not reach the level of personal insult, as submitted by the Government. In principle, it must be left to the reader to draw the conclusions from any criticism which is being published in the press. In a democratic society it is a basic assumption that the citizen participating in the fight of opinions is grown-up enough and capable of forming his own opinion by either sharing the views of an author or rejecting them on the basis of his own subjective evaluation. In fact the public and private discussion of the background issues of this case was characterised by extremely divergent opinions.

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56. To sum up, the applicant submits that the decisions of the Austrian courts in this case interfered with freedom of expression, and in particular with critical journalism and the right of the public to receive information, to an extent which is not compatible with the basic principles of a democratic society.

B. The Government

57. The Government submit that the background of the case, as described in particular in the judgment of the Regional Court of 1 April 1981, shows that Mr. Kreisky's remarks criticised by the applicant were a reaction to a campaign which in his view was being waged against him. For this reason the courts judged the criticism made by the applicant as unreasonable and unfair.

58. The Government submit that this cannot be seen as a curtailment of the right of freedom of expression going beyond the scope allowed by Art. 10 (2) of the Convention. For if one made the reverse check, assuming the applicant's acquittal by the courts, then the terms in question would virtually fall outside the purview of the protection of a person's honour provided by criminal law, and everyone would have a warrant for accusing people active in public life of serious faults of character such as "immorality", "lack of dignity" or "the worst opportunism". This could set off an unhealthy trend in the style of political debate.

59. As the Commission admitted in the decision on admissibility, s. 111 (2) of the Austrian Penal Code pursues a legitimate purpose, i.e. the protection of the reputation of others. The domestic courts are given a certain scope in assessing cases (cf. the Handyside and Sunday Times judgments of the European Court of Human Rights). In the present case, the courts remained within their domestic margin of appreciation, because the real issue is not legitimate criticism, but personal defamation in the context of critical remarks. There is no reason to fear that the decision of the Austrian courts might impair the freedom of information and the practice of critical journalism.

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IV. OPINION OF THE COMMISSION

A. Point at issue

60. The only point at issue in the present case is the question whether or not the restriction of the applicant's freedom of expression by his conviction for defamation of the Austrian Federal Chancellor, Mr. Kreisky, can be justified under Art. 10 of the Convention.

B. The scope of interference with the applicant's freedom of expression (Art. 10 (1) of the Convention)

61. Article 10 of the Convention 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."

62. As the Commission has already observed in the decision on admissibility, the present case concerns the exercise of freedom of expression in the sensitive area of political discussion. As a journalist of a political magazine the applicant criticised certain behaviour of the then Federal Chancellor, Mr. Kreisky. It was political behaviour, in particular public political statements of Mr. Kreisky, which were criticised in the applicant's articles, and not any conduct coming within Mr Kreisky's sphere of privacy.

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63. The matter discussed in the applicant's articles was moreover of primary interest in the general political debate which took place in Austria at the relevant time. The articles were published shortly after general elections and before a new Government had been formed by Mr. Kreisky. Prior to the elections, many people had thought it possible that Mr. Kreisky would form a coalition government with the Liberal Party under Mr. Peter if his own Socialist Party failed to secure an absolute majority. It is against this background that Mr. Peter's past involvement with the national socialist movement, and Mr. Kreisky's attitude in relation thereto, attracted public attention. Although as a result of the elections it was clear that there would be no coalition government, the relationship of Mr. Kreisky to Mr. Peter still occupied the public mind in particular after the latter's hitherto undisclosed involvement with a certain SS-brigade was brought to light by the Director of the Jewish Documentation Centre, Mr. Wiesenthal, shortly after the elections. Mr. Kreisky's public attacks on Mr. Wiesenthal in this connection stirred up many emotions.

64. Insofar as the relevant facts - which were already public knowledge - were reported or restated in the articles, it was not alleged in Mr. Kreisky's action against the applicant that he had wrongly described Mr. Kreisky's statements concerning Mr. Peter and Mr. Wiesenthal, or the circumstances in which these statements had been made. For the purposes of Art. 10 (1) of the Convention, it can therefore be said that there has been no interference with the applicant's right "to impart information".

65. The applicant was sanctioned only because he had in a press publication expressed a certain opinion or certain ideas on Mr. Kreisky's behaviour by describing it as coming near to "ugliest opportunism" (in the first article) and as "immoral" or "undignified" (in the second article). It is therefore exclusively the applicant's right "to impart ideas" which was interfered with.

The interference took the particular form of the imposition of a criminal penalty in respect of the use of the expressions mentioned. In addition, the publication as a whole was declared forfeited and the applicant was obliged to publish the judgment.

Thus the applicant's freedom of expression was restricted by the imposition of a criminal penalty on him for expressing in a journal opinions which the courts considered to be defamatory.

C. The justification of the interference with the applicant's freedom of expression under Art. 10 (2) of the Convention

66. In order to be compatible with the requirements of Art. 10 (2) of the Convention, any restriction on the freedom of expression must

- a. be prescribed by law,
- b. pursue one of the legitimate purposes enumerated in this paragraph, and

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c. be necessary in a democratic society having regard to the duties and responsibilities which the exercise of this freedom carries with it.

67. As the Commission has already stated in the decision on admissibility, no issue arises in this case concerning the observance of the first two of the above requirements.

68. The restriction was "prescribed by law" because it was based on the provisions of section 111 of the Austrian Penal Code.

The applicant alleges that these provisions were not correctly applied as regards the qualification of personal value judgments as being defamatory and the administration of the proof of truth in relation to such value judgments. However, the Commission finds no indication that the courts applied the above section of the Penal Code in a manner which was not in line with the relevant criteria established by the Austrian law itself and the case law of the Austrian courts. The Austrian law does not distinguish between different kinds of published statements as to their potential defamatory character and personal value judgments are therefore subject to the same rules as any other statements.

69. The restriction complained of pursued a legitimate aim covered by Art. 10 (2) of the Convention, namely "the protection of the reputation of others". There can be no doubt that this was the purpose of the applicable legal provision as such, and of its application in the concrete case.

70. The Commission must now turn to the crucial question whether the restriction complained of was also in line with the third requirement of Art. 10 (2), i.e. the necessity in a democratic society.

71. In the Handyside judgment the European Court of Human Rights underlined that in exercising their supervisory functions the Convention organs must pay the utmost attention to the principles characterising a "democratic society" and the fundamental role which freedom of expression has to fulfil in such a society. The Court put it in these words (Publications of the Court, Series A, Vol. 24., para 49) :

"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

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72. In the Sunday Times judgment (ibid. Vol. 30, para 65) the Court added that these principles are of particular importance as far as the press is concerned.

The Commission cannot share the opinion expressed by the Court of Appeal in the present case (page 22 of its judgment of 29 October 1981) according to which

"the press has merely the task to provide information, while the assessment and evaluation of the imparted facts must primarily be left to the readers".

73. The Commission observes that the exercise of freedom of expression by the press by imparting ideas or opinions is of particular importance in a democratic society where, as in the present case, the matter discussed relates to political issues, or more precisely, the behaviour and attitudes of individual politicians in matters of public interest.

74. It is obvious that by his public office a politician exposes himself to public criticism to a larger degree than the ordinary citizen. The existence of such criticism is an essential condition for the functioning of an "effective political democracy" as defined in the Preamble of the Convention. The democratic system requires that those who hold public power are subject to close control not only by their political adversaries in the institutions of the State or other organisations, but also by the public opinion which is to a large extent formed and expressed in the media. To exercise such control is not only a right, but may even be considered as a "duty and responsibility" of the press in a democratic State.

75. This does not mean that regulations against defamation would not apply to publications dealing with the behaviour and attitudes of politicians. Also the right of a politician to be protected against unjustified attacks on his reputation, whether published in the press or expressed in another way, is recognised by the Convention as a ground justifying restrictions on the freedom of expression.

76. While it is justified in this context to provide effective guarantees against abuses of the freedom of the press, including guarantees against defamation in the press, it must at the same time be ensured that any regulations existing in this respect do not become more restrictive of the freedom of expression than necessary.

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77. On this subject, the Commission has made the following observations in the decision concerning the present applicant's previous application No. 8803/79 (DR 26, 171, at p. 181):

"In view of the fundamental importance which this freedom has in the field of political discussion it is of the utmost importance that these restrictive regulations should only be applied where it is really necessary in the particular case. They should not be used to curb legitimate criticism in the press of the behaviour and statements of a politician since it is the very function of the press in a democratic society to participate in the political process by checking on the development of the debate of public issues carried on by political office-holders. A politician must be prepared to accept even harsh criticism of his public activities and statements, and such criticism may not be understood as defamatory unless it throws a considerable degree of doubt on his personal character and good reputation."

The Commission maintains and confirms this opinion also in relation to the facts of the present case.

78. The articles written by the applicant clearly came within the field of political journalism. They concerned events which were of great public interest at the relevant time, and were troubling public opinion in the country. The articles formed part of a public discussion in which also Mr Kreisky had used strong critical language with respect to Mr Wiesenthal.

79. The articles described certain aspects of Mr Kreisky's policy and in order to express his personal evaluation of that policy the applicant used expressions which Mr Kreisky considered to be insulting. Some of these expressions the courts found to be defamatory of Mr. Kreisky, while some others, in relation to which the applicant had equally been charged with defamation, were considered to fall short of this qualification.

80. The Government submit that by making this distinction the Austrian courts applied the same criterion which the Commission had followed in its decision on application No. 8803/79, namely the distinction between attacks on "political" morality and attacks on his "personal" morality. The applicant contests this, claiming that all his statements were essentially of the same type in that they exclusively discussed aspects of the political morality of Mr. Kreisky's behaviour.

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In the opinion of the Commission it is not, however, decisive in the present case whether or not the applicant's criticism of Mr. Kreisky's behaviour involved a discussion of certain aspects of his "private" morality as also the latter could be of public relevance in the context of the political debate on the issue under consideration. On the other hand it is in no way excluded that even a discussion limited to an appreciation of the "political" morality of certain acts might reach the level of defamation in relation to which it would be justified to restrict the freedom of expression.

81. The Commission cannot accept that critical value judgments may be made by the press only if their "truth" can be proven. Value judgments are an essential element of the freedom of the press and the impossibility of proof is inherent in value judgments. The use of strong wording may itself be a means of expressing disapproval of a particular behaviour and should be restricted only where the terms used are incommensurate to the legitimate object of the intended criticism.

82. As mentioned above the present case is concerned with a central aspect of freedom of expression, namely the freedom of the press in political matters where a broad although not unlimited freedom is of fundamental importance.

83. In evaluating whether the restrictions on the applicant's freedom of expression can reasonably be considered as necessary in a democratic society the expressions used by the applicant - "ugliest opportunism", "immoral" and "undignified" - must be read in the context of the articles in which they appeared.

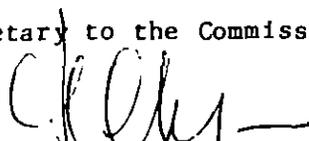
84. In the Commission's opinion it is essential in a democratic society that a pluralism of opinions including those which shock or offend is in principle recognized. In order to secure effectively the freedom of expression, any restrictions must be applied in a spirit of pluralism, tolerance and broadmindedness in particular where freedom of expression in political matters is involved.

85. Having regard to all the circumstances of the case and on the basis of the above considerations, the Commission does not find that the need to protect the reputation of others was so pressing that the restrictions imposed on the applicant's freedom of expression can be considered justified as being necessary in a democratic society.

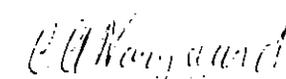
D. Conclusion

87. The Commission concludes unanimously that there has been a breach of Art. 10 of the Convention.

Secretary to the Commission


(E.C. Krüger)

President of the Commission


(C.A. Nørgaard)

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APPENDIX I

History of proceedings

Item	date	note
Introduction of the application	19 April 1982	
Registration	3 May 1982	
<u>Proceedings on admissibility</u>		
Commission's deliberations and decision to give notice of the application to the respondent Government, inviting them to submit written observations on admissibility and merits	6 October 1982	MM. Nørgaard Frowein Triantafyllides Opsahl Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Schermers
Government's observations	17 December 1982	
Applicant's observations	28 February 1983	
Commission's deliberations and decision to hold an oral hearing on admissibility and merits	13 May 1983	MM. Frowein Sperduti Ermacora Busuttil Opsahl Jörundsson Tenekides Kiernan Melchior Weitzel Soyer Schermers Danellius

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Item	date	note
Hearing on admissibility and merits. Deliberations and decision to declare the application admissible	5 October 1983	MM. Nørgaard Frowein Ermacora Fawcett Triantafyllides Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Schermers Danelius Batliner <u>Government</u> MM. Türk Okresek Felsenstein <u>Applicant</u> Mr. Masser
 <u>Proceedings on the merits</u>		
Decision on admissibility sent to the parties who are invited to make proposals for a friendly settlement or to submit supplementary observations on the merits	4 January 1984	
Government's supplementary observations	5 March 1984	

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Item	date	note
Consideration of state of procedure	9 March 1984	MM. Nørgaard Frowein Ermacora Fawcett Busuttil Jörundsson Tenekides Trechsel Melchior Sampaio Schermers Danelius Batliner
Deliberations on the merits and final votes	9 July 1984	MM. Nørgaard Frowein Ermacora Jörundsson Tenekides Trechsel Kiernan Melchior Gözübüyük Weitzel Schermers Danelius Batliner
Further deliberations on the merits	2 October 1984	MM. Nørgaard Frowein Ermacora Jörundsson Tenekides Trechsel Kiernan Gözübüyük Weitzel Schermers Danelius Batliner
Further deliberations on the merits and adoption of Report under Art. 31 of the Convention	11 October 1984	MM. Nørgaard Jörundsson Tenekides Trechsel Kiernan Melchior Gözübüyük Weitzel Schermers Danelius Batliner