



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

FIRST SECTION

**CASE OF SCHARSACH AND NEWS VERLAGSGESELLSCHAFT
v. AUSTRIA**

(Application no. 39394/98)

JUDGMENT

STRASBOURG

13 November 2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Scharsach and News Verlagsgesellschaft v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS,

Mrs N. VAJIĆ,

Mrs S. BOTOCHAROVA,

Mr A. KOVLER,

Mr V. ZAGREBELSKY, *judges*,

Mr F. MATSCHER, *ad hoc judge*,

and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 28 November 2002 and 23 October 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 39394/98) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr Hans-Henning Scharsach (“the first applicant), an Austrian national, and News Verlagsgesellschaft mbH, the owner and publisher of the weekly magazine *News* with its seat in Vienna (“the applicant company”), on 24 October 1997.

2. The applicants were represented by Lansky, Ganzger & Partner, lawyers practising in Vienna.

3. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

4. The applicants alleged, in particular, that their conviction for defamation under the Criminal Code and the Media Act, respectively, had infringed their right to freedom of expression under Article 10 of the Convention.

5. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

6. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. On 19 September 2000 the Court communicated the complaint under Article 10 and declared the remainder of the application inadmissible.

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

9. Mrs E. Steiner, the judge elected in respect of Austria, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Matscher to sit as *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

10. By a decision of 28 November 2002, the Court declared the application admissible as far as it concerned the above complaint under Article 10.

11. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The first applicant, an Austrian national, born in 1943 and living in Vienna, is a journalist by profession. The applicant company is the owner and publisher of the Austrian weekly magazine *News*.

13. In 1995 the first applicant published a one-page article under the heading “Brown instead of Black and Red? (*Braun statt Schwarz und Rot?*)” in the applicant company's magazine *News*. In the Austrian political context “Brown” means a person or group having some affinity to National Socialist ideology, “Black” refers to the People's Party (*ÖVP*) and “Red” to the Social Democratic Party (*SPÖ*). The article discussed the question whether it was possible and desirable to form a coalition government with the Austrian Freedom Party (*FPÖ*) under the leadership of Jörg Haider.

14. The first applicant explained why such a coalition government was not desirable in his view. He gave nine reasons, each of which was dealt with under a separate subtitle. Referring to statements by Haider and other FPÖ members, he tackled topics such as the FPÖ's specific view of history, its German jingoism (*Deutschtümelei*), i.e. its chauvinist and nostalgic affinity to Germany, its inclination to racism, the opinion poll “Austria first”

(*Österreich zuerst*) initiated by it, its political style and the possible negative reaction by foreign countries.

1. The passage at issue

“4. Violent Scene (*Gewaltszene*)

Right-wing thugs (*Braune Schläger*), fire-raisers and bomb-throwers have emerged from the FPÖ. Leading figures of brown terror, such as Burger, Haas, Honsik and Küssel, started their career with the Freedom Party. Under Steger the ‘old closet Nazis (*Kellernazi*)’ had left the party. Under Haider they are returning and are even allowed to run for office. Names such as B., Bl., D., Dü., G., Gr., H., Hat., K., M., Mi., Mrs Rosenkranz, S., Sch., St., Su. and W. show that the dissociation from the extreme right (*Abgrenzung*) that is constantly being stressed by Haider has in reality never taken place.”

15. Mr Steger was the FPÖ's chairperson in the early 1980s when the party supported more moderate positions. In 1986 Mr Haider became chairman of the FPÖ. Mrs Rosenkranz is a politician, at the material time member of the Lower Austria Regional Parliament (*Landtag*) and deputy chairperson of the Lower Austria regional branch of the FPÖ, and, at present, member of the Austrian National Assembly (*Nationalrat*) and chairperson of the Lower Austria regional branch of the FPÖ. Her husband is a well known right-wing politician and the editor of the magazine “facts” (*fakten*), which is considered to be extreme right-wing.

2. Defamation proceedings and compensation under the Media Act

16. Mrs Rosenkranz filed a private prosecution for defamation (*üble Nachrede*) against the first applicant, and a compensation claim against the applicant company under the Media Act (*Mediengesetz*), in the St. Pölten Regional Court (*Landesgericht*).

17. On 21 June 1998 the first applicant was convicted of defamation under Section 111 of the Criminal Code (*Strafgesetzbuch*). The court sentenced him to a fine of 40 daily rates (*Tagessätze*) of ATS 1,500 each (i.e. a total of ATS 60,000) or 20 days' imprisonment in default, suspended for a three-year probationary period. The applicant company was ordered to pay ATS 30,000 in compensation to Mrs Rosenkranz, pursuant to Section 6 of the Media Act.

18. The court noted in its reasoning that the passage at issue was to be understood in the way it would be perceived by an average reader. The term “closet Nazi” was used to describe a person who supported National Socialist ideas, not in public but in private through clandestine activities. Belonging to such a circle of persons meant having a contemptible character and behaving in a manner contrary to honour or morality. According to the court, it could not be established that Mrs Rosenkranz was a co-author of her husband's magazine. Even assuming that she had contributed to certain

passages of some of the articles published in it, as contended by the applicants, these were unproblematic in the light of the Prohibition Act (*Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP, Verbotsgesetz 1947*). As regards a statement of Mrs Rosenkranz, in which she had observed that she did not find her husband's activities immoral, the court found that Mr Rosenkranz had so far not been convicted of contravening the Prohibition Act. Mrs Rosenkranz, on the other hand, had not said that she supported her husband's activities or identified herself with them either. Moreover, a wife could not be expected to criticise her husband in public. Although she had criticised the Prohibition Act in public statements, the court found that the applicants had failed to provide evidence of any clandestine National Socialist activities undertaken by Mrs Rosenkranz that would justify calling her a “closet Nazi”.

19. The applicants appealed, arguing that the term “closet Nazi” had been created by Mr Steger, the then chairman of the FPÖ. It was meant to describe those of his party colleagues who officially demonstrated support for democracy, but unofficially or clandestinely did not dissociate themselves from neo-Nazi ideas or from contacts with the neo-Nazi scene. Therefore their relation with the extreme right appeared to be unclear. The applicants complained that the court had in fact failed to conclude that Mrs Rosenkranz had contributed to the editing of her husband's xenophobic magazine. They argued that Mrs Rosenkranz, as a politician, exposed herself to public scrutiny and advocated views of a political nature. As a politician, it was part of her functions to participate in political debate. Therefore, in the light of the right to freedom of expression and information of citizens and the electorate, it was legitimate to expect her to take a stand also in regard to her husband's political activities. Taking sides with her husband might dignify her as a wife, but as a politician she had to bear criticism under such circumstances as her failure to dissociate herself from the extreme right could be perceived as an approval of her husband's political activities. Had the court correctly assessed the meaning of the incriminated passage, it would have concluded that the applicants had furnished proof of its factual basis.

20. On 3 March 1997 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the appeal and upheld the lower court's judgment.

21. It considered that the Regional Court had correctly found that the term “closet Nazi” was to be assessed from the point of view of an average reader who could not be expected to know the original meaning given to it by Mr Steger some six years before. Therefore the article had insinuated clandestine neo-Nazi activities by Mrs Rosenkranz which were not proved. Consequently, it was irrelevant to take evidence relating to possible extreme right activities of her husband, as proposed by the applicants. Moreover, the first instance court had correctly found that neither Mrs Rosenkranz's public speeches when compared to certain passages of articles in her husband's

magazine, nor her statement that she did not find her husband's activities immoral warranted the conclusion that Mrs Rosenkranz supported National Socialist ideas. Therefore, the applicants' proposal to hear and assess evidence that Mrs Rosenkranz knew the contents of her husband's magazine and that she in fact contributed from time to time to its editing was not sufficient to furnish proof of her clandestine support for National Socialist ideas.

II. RELEVANT DOMESTIC LAW

Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim damages from him. Compensation up to EUR 14,535 can be awarded. In this context "defamation" is defined in Section 111 of the Criminal Code as follows:

"1. Anyone who accuses another, as it may be perceived by a third party, of having a contemptible character or attitude, or of behaving contrary to honour or morality, and of such a nature as to make him contemptible or otherwise lower him in public esteem, shall be liable to imprisonment not exceeding either six months or a fine of 360 daily rates.

2. Anyone who commits this offence in a printed document, by broadcasting or otherwise, in such a way as to make the defamation accessible to a broad section of the public, shall be liable to imprisonment not exceeding one year or a fine of 360 daily rates.

3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicants complained that their convictions for defamation under the Criminal Code and the Media Act respectively had infringed their right to freedom of expression under Article 10 of the Convention, which, as far as material, reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Whether there was an interference

23. The Court considers, and this was common ground between the parties, that the applicants' convictions by the Austrian courts constituted an interference with their right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

B. Whether the interference was justified

24. An interference contravenes Article 10 of the Convention unless it is “prescribed by law”, pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is “necessary in a democratic society” for achieving such an aim or aims.

1. “Prescribed by law”

25. The Court considers, and this was acknowledged by the parties, that the interference was prescribed by law, namely by Section 111 of the Criminal Code and Section 6 of the Media Act.

2. Legitimate aim

26. The Court further finds, and this was likewise not disputed between the parties, that the interference served a legitimate aim, namely “the protection of the reputation or rights of others” within the meaning of Article 10 § 2 of the Convention.

3. “Necessary in a democratic society”

27. The applicants argued that the courts had wrongly classified the term at issue as a statement of fact instead of a value judgment, which, at all events, was based on true facts: Mrs Rosenkranz was a member of the FPÖ; through her husband she was in direct contact with neo-Nazis; she had occasionally helped in the correction of orthographic and grammatical mistakes in an extreme-right magazine and – despite Mr Haider's announcements and proclamations on that issue – she had not clearly and publicly dissociated herself from National Socialist ideas. The meaning of the term at issue was clear for an average reader of the magazine as Mrs Rosenkranz's name was quoted in the context of criticism for failure to

dissociate from right-wing extremists within the FPÖ. The first applicant's obvious intention had never been to defame Mrs Rosenkranz or to link her with criminal conduct, but to criticise her position within the FPÖ and her failure to dissociate herself in public from neo-Nazi ideas. Therefore the statement was in no way excessive and Mrs Rosenkranz, as a politician and member of a Regional Parliament, had to bear the criticism contained therein. The first applicant's criminal conviction and the imposition of a fine on the applicant company had in any event been disproportionate.

28. The Government noted that the courts had classified the offending passage as a statement of fact, which insinuated clandestine neo-Nazi activities by Mrs Rosenkranz that had not been proved. Any allegation that a person had an ambiguous relation to National Socialism constituted a massive reproach in Austria coming close to a charge of criminal behaviour under the Prohibition Act, which bans National Socialist activities in various forms and provides for severe terms of imprisonment. Finally, the penalties imposed on the applicants had been within the lowest range of possible punishment; the interference with Article 10 had therefore not been disproportionate.

29. The Court reiterates the principles established by its case-law under Article 10 of the Convention:

(i) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-234, § 37). Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog” (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 28, § 63; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III; and *Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, § 46, 26 February 2002).

(ii) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. 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. As set forth in Article 10 § 2, this freedom is subject to exceptions, which must, however, be construed strictly and the need for any restrictions must be established convincingly (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

(iii) There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest

(see *Sürek v. Turkey* (No. 1) [GC], no. 26682/95, § 61, ECHR-IV). Moreover, the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens v. Austria*, judgment of 8 June 1986, Series A no. 103, p. 26, § 42; or *Incal v. Turkey*, 9 June 1998, Reports 1998-IV, p. 1567, § 54).

(iv) The notion of necessity implies a “pressing social need”. The Contracting States enjoy a margin of appreciation in this respect, but this goes hand in hand with a European supervision which is more or less extensive depending on the circumstances. In reviewing under Article 10 the decisions taken by the national authorities pursuant to their margin of appreciation, the Convention organs must determine, in the light of the case as a whole, whether the interference at issue was “proportionate” to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are “relevant and sufficient” (see *Lingens*, cited above, p. 25, §§ 39-40; and *The Sunday Times v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, p. 28-29, §§ 50).

(v) The nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; and *Perna v. Italy* [GC], no. 48898/99, § 39, 25 July 2001).

30. Turning to the particular circumstances of the case, the Court will assess the following elements: a) the nature of the interference; b) the position of the applicants and of Mrs Rosenkranz who instituted the proceedings; c) the subject matter of the article; d) the reasons given by the national courts.

a) The nature of the interference

31. As to the nature of the interference, the Court observes that the first applicant was sentenced to a suspended fine in the amount of ATS 60,000 (EUR 4,360). Even though this fine was in the lower range of possible penalties and was suspended for a three-year probationary period, it was a sentence under criminal law, registered in the first applicant's criminal record.

32. The second applicant was ordered to pay ATS 30,000 (EUR 2,180) as compensation to Mrs Rosenkranz in the related civil proceedings. The Court considers this fine to be moderate.

b) The position of the applicants and of Mrs Rosenkranz

33. As to the position of the applicants, the Court notes that the first applicant is a journalist by profession, the applicant company is the owner

of the magazine in which the article was published. Mrs Rosenkranz is a politician, at present leader of the Lower Austria regional branch of the FPÖ and member of the Austrian National Assembly, at the material time deputy chairperson of the Lower Austria regional branch of the FPÖ and member of the Lower Austria Regional Parliament.

c) The subject matter of the article

34. Subject matter of the article were the first applicant's thoughts on a possible coalition government with the FPÖ under the leadership of Mr Haider, expressing the first applicant's view that such a coalition government was not desirable. The article, including the passage at issue, was, therefore, of a political nature on a question of public interest at that time.

d) The reasons given by the national courts

35. As regards the qualification of the impugned statement by the Austrian courts, the Court observes that they did not accept the applicants' argument that the statement at issue was a value judgment, but considered it to be a statement of fact, insinuating clandestine neo-Nazi activities by Mrs Rosenkranz which had not been proved. In the Austrian courts' view, belonging to such a circle of persons meant having a contemptible character and behaving in a manner contrary to honour or morality. The passage at issue had therefore defamed Mrs Rosenkranz.

36. The Court considers that the reasons given by the Austrian courts were "relevant" to justify the interference complained of. It remains to be examined whether the reasons adduced were also "sufficient" within the meaning of Article 10 § 2.

37. The Court observes that the article was written in a political context, namely when a possible coalition government including the FPÖ was being mooted, and that it expressed the first applicant's view that such a coalition government was not desirable. The term "closet Nazi" was used in connection with a passage criticising FPÖ politicians, amongst them Mrs Rosenkranz, for failure to dissociate themselves from the extreme right. Moreover, the Court considers unconvincing the Regional Court's finding that a wife could not be expected to criticise her husband in public, as the statement in the present case clearly addressed Mrs Rosenkranz as a politician and public figure, at the material time, as a member of the Lower Austria Regional Parliament and deputy chairperson of the Lower Austria regional branch of the FPÖ, in respect of whom the limits of acceptable criticism are wider than for a private individual (see *Feldek v. Slovakia*, no. 29032/95, § 85, 12 July 2001). The Court thus finds that the Austrian courts failed to take sufficient account of the political context in which the impugned term was used when assessing its meaning.

38. Considering that Mrs Rosenkranz's name in the article in question was mentioned together with other FPÖ politicians in the phrase criticising their failure to dissociate themselves from the extreme right, i.e. to take a stand against extreme-right positions, the Court considers that the term “closet Nazi”, which appears in inverted commas in the article, taken in its context, was to be understood in the sense given to it by Mr Steger who had first used this expression in the political debate in his party, namely describing a person who had an ambiguous relation to National Socialist ideas (see § 18 above).

39. Further, the Court observes that much of the parties' arguments turn around the assessment whether the term “closet Nazi” was a statement of fact or a value judgment, and that the domestic courts, considering it to be a statement of fact, had never examined the question whether it could be considered as a value judgment. The Court notes in this respect that the assessment whether a certain statement constitutes a value judgment or a statement of fact might in many cases be difficult. However, since under the Court's case-law a value judgment must be based on sufficient facts in order to constitute a fair comment under Article 10 (see *De Haes and Gijssels v. Belgium*, cited above, § 47; and *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II), their difference finally lies in the degree of factual proof, which has to be established (see *Krone Verlag GmbH & CoKG and Mediaprint Zeitschriften Verlag GmbH & CoKG v. Austria* (dec.), no. 42429/98, 20 March 2003).

40. The Court accedes to the domestic courts' finding that there is no indication in the present case that Mrs Rosenkranz herself is a neo-Nazi. However, contrary to the domestic courts' position, the Court considers that the impugned statement, taken in its context, is not a statement of fact but has to be understood as a permissible value judgment. Mrs Rosenkranz is the wife of a well-known right-wing politician, who is the editor of a magazine considered to be extreme right-wing. This is an element which in itself does not constitute a sufficient factual basis, but she is a politician as well, has never publicly dissociated herself from her husband's political views but has criticised the Prohibition Act, which bans National Socialist activities, in public statements. In this context it is to be noted that the essence of the impugned article was exactly the reproach that FPÖ politicians failed to dissociate themselves clearly from the extreme-right. Therefore the body of facts available constituted a sufficient factual basis for the contested statement, understood in the above sense, i.e. that Mrs Rosenkranz's stand towards extreme right political positions was at the least unclear. The Court considers that the applicants published what may be considered to have been their fair comment, namely the first applicant's personal political analysis of the Austrian political scene. Therefore his opinion was a value judgment on an important matter of public interest.

41. In respect of the Government's argument that any allegation that a person has an ambiguous relation to National Socialism constitutes a massive reproach in Austria coming close to a charge of criminal behaviour under the Prohibition Act, the Court refers to the case of *Wabl v. Austria* (no. 24773/94, § 41, 21 March 2000), in which the Court acknowledged that the special connotation of the term "Nazi" in Austria, *inter alia*, justified the interference under Article 10 § 2 of the Convention. Unlike the *Wabl* case, the interference in the present case was not an injunction issued under civil law, prohibiting the repetition of a particular statement, but a criminal conviction for the first applicant and a fine for the applicant company.

42. The Court further considers that use of the term "Nazi" does not automatically justify a conviction for defamation on the ground of its attached special stigma. The Court reiterates in this context that the degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of a value judgment (see *Unabhängige Initiative Informationsvielfalt*, cited above, § 46). Therefore the Court is not convinced by the Regional Court's reasoning that Mr Rosenkranz had so far not been convicted of contravening the Prohibition Act in response to Mrs Rosenkranz's statement that she saw nothing immoral in her husband's political activities. The standards applied when assessing someone's political activities under the aspect of morality are different from those required for establishing an offence under criminal law.

43. Moreover, the Court observes that in the *Wabl* case the expression "Nazi" was used without any connection with the underlying debate, while in the present case it was used precisely in the context of the allegation that certain politicians of the FPÖ had failed to dissociate themselves from the extreme right.

44. Considering on the one hand that Mrs Rosenkranz is a politician and, on the other, the role of a journalist and the press to impart information and ideas on matters of public interest, even those that may offend, shock or disturb, the use of the term "closet Nazi" did not exceed what may be considered acceptable in the circumstances of the present case.

45. In conclusion, the Court finds that the standards applied by the Austrian courts were not compatible with the principles embodied in Article 10 and that the domestic courts did not adduce "sufficient" reasons to justify the interference at issue, namely the first applicant's conviction for defamation and the imposition of a fine on the applicant company for having made the critical statement in question. Therefore, having in mind that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest, the Court finds that the domestic courts overstepped the narrow margin of appreciation afforded to

Member States, and that the interference was disproportionate to the aim pursued and was thus not “necessary in a democratic society”.

Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The first applicant claimed EUR 386,50 in respect of pecuniary damage for ten hours' loss of earnings resulting from attending court hearings and lawyer's consultations. The applicants sought EUR 3,417.38, corresponding to costs awarded to Mrs Rosenkranz by the Austrian courts. Under the head of pecuniary damage, the applicant company requested reimbursement of ATS 30,000 (EUR 2,180.19) paid to Mrs Rosenkranz by virtue of the court sentence, and of EUR 7,049.26 for loss of advertisement fees resulting from the publication of the judgment in its newspaper. The applicants sought EUR 10,000 each in respect of non-pecuniary damage for loss of reputation resulting from the judgments against them.

48. As regards the claims for pecuniary damage, the Government argued that the first applicant's claim was unsubstantiated; they did not comment on the applicant company's requests or the applicants' claim for reimbursement of Mrs Rosenkranz's costs in the domestic proceedings. In respect of non-pecuniary damage, the Government submitted that the finding of a violation would constitute sufficient reparation.

49. The Court considers as regards the first applicant's claim for pecuniary damage that there is no causal link between the violation found and the alleged loss of earnings. Even if the Austrian courts had not convicted him, his preparation for and attendance at the court hearings would have been necessary. Therefore, no award can be made under that head to the first applicant. Having regard to the direct link between the applicants' claim concerning reimbursement of Mrs Rosenkranz's costs in the domestic proceedings and the violation of Article 10 found by the Court, the applicants are entitled to recover the full amount of EUR 3,417.38. As regards the applicant company, the Court finds that the claims resulted from the order made against it by the Austrian courts and thus awards the full amount of EUR 9,229.45 in respect of pecuniary damage.

50. The Court considers that the first applicant's criminal conviction registered in the criminal record entailed adverse effects and awards on an equitable basis EUR 5,000 under the head of non-pecuniary damage (see *mutatis mutandis*, *Nikula v. Finland*, no. 31611/96, § 65, 21 March 2002). As regards the applicant company the Court finds, like the Government, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant company.

B. Costs and expenses

51. The applicants sought reimbursement of EUR 3,417.40 for costs and expenses incurred in the domestic proceedings. They further requested EUR 3,007.54 for costs and expenses incurred in the Strasbourg proceedings.

52. The Government did not comment on the costs claim for the domestic proceedings. As regards the claim concerning the Convention proceedings, they considered that the amounts charged for written submissions to the Court were reasonable, whereas the claims for telephone calls and correspondence were unsubstantiated.

53. The Court finds the above claims reasonable and awards the full amount of EUR 6,424.92 under this head.

C. Default interest

54. 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

1. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;
2. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company;
3. *Holds*
 - (a) unanimously, that the respondent State is to pay the applicants:
 - (i) EUR 12,646.83 (twelve thousand six hundred and forty-six euros and eighty-three cents) in respect of pecuniary damage;

- (ii) EUR 6,424.94 (six thousand four hundred and twenty-four euros and ninety-four cents) in respect of costs and expenses;
 - (b) by six votes to one, that the respondent State is to pay the first applicant:
 - (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
 - (c) unanimously, that the respondent State is to pay the applicants:
 - (i) any tax that may be chargeable on the above amounts;
4. *Holds*, unanimously, that the above amounts are to be paid within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, and 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;
5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 November 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:

- (a) partly dissenting opinion of Mr Matscher.

C. R.
S. N.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

To my regret I cannot subscribe to the reasoning or to the decision of the majority of the Chamber on two points.

The merits

The applicants were not able to adduce the slightest evidence that Mrs Rosenkranz's behaviour or statements justified her description as a “closet Nazi” or that she had clandestinely supported Nazi ideas.

The mere fact that Mrs Rosenkranz is married to a (locally) known right-wing politician and had refused to dissociate herself in public from her husband's ideas does not show that she identified herself with those ideas. People cannot be held liable for the ideas of a member of their family (see *mutatis mutandis*, *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, Reports of Judgments and Decisions 1997-I, p. 236, § 45: “It is unacceptable that someone should be exposed to opprobrium because of matters concerning a member of his family”).

Under these circumstances, the allegation that Mrs Rosenkranz had an ambiguous relationship with National Socialism constituted a massive reproach in Austria which justified a criminal conviction and, therefore, an interference under Article 10 § 2 of the Convention (*Wabl v. Austria*, no. 24773/94, § 41, 21 March 2000).

Moreover, the applicants' argument that the term “closet Nazi” has to be understood in the special meaning given to it by Mr Steger is not convincing. Mr Steger, a former leader of the Austrian Freedom Party (*FPÖ*) created the expression in the early 1980s. The impugned article was published in 1995. At that time virtually no one remembered the special sense of the term “closet Nazi” that had been given to it ten years earlier by Mr Steger and the vast majority of the population understood it in its ordinary meaning, as a person supporting Nazi ideas and perhaps acting clandestinely for the Nazi movement.

The decision on the alleged non-pecuniary damage

It is not realistic to consider that the first applicant's criminal conviction caused him, as a journalist, particular damage; rather, the contrary is more plausible. The reference to *Nikula v. Finland* (no. 31611/96, § 65, 21 March 2002) is not pertinent because the situation in that case was very different.

It is for this reason that in comparable Austrian cases (such as *Oberschlick v. Austria*, judgment of 23 May 1991, Series A no. 204, p. 29, § 69; and *Schwabe v. Austria*, judgment of 28 August 1992, Series A no. 242-B, p. 35, § 39) no award was made for non-pecuniary damage. I see no reason to depart from that jurisprudence.