



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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 13281/02
by GRÜNE ALTERNATIVE WIEN
against Austria

The European Court of Human Rights (First Section), sitting on 2 February 2006 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS,

Mr P. LORENZEN,

Mrs N. VAJIĆ,

Mrs S. BOTOCHAROVA,

Mrs E. STEINER,

Mr K. HAJIYEV, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 25 March 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is the Vienna regional branch of an Austrian political party, Grüne Alternative Wien. It is represented before the Court by Mr T. Prader, a lawyer practising in Vienna. The respondent Government are represented by The Austrian Government (“the Government”) were

represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

A. The circumstances of the case

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

The applicant is the publisher of a periodical, “wien.direkt”, with a print run of 8,000. It is an “internal” paper of Grüne Alternative Wien which is delivered to sympathisers and functionaries of that party.

On 13 July 2000 Mr. H. Kabas, the chairman of the Vienna regional branch of the Austrian Freedom Party (FPÖ), brought compensation proceedings against the applicant claiming compensation under Section 6 of the Media Act (*Mediengesetz*) for defamation. He submitted that the applicant published in the issue no. 4 June/July 2000 of the periodical a picture of a modified election poster of the FPÖ posted in the course of the Vienna Municipal elections. Mr. H. Kabas contended that the modified picture showed him, wearing a Nazi-uniform. The poster was annotated with the following text sequence in Gothic letters:

“Our offer: honour & loyalty”

Mr. H. Kabas stressed that the picture implied that he stands for National Socialist ideas or at least sympathises with these ideas as the text sequence referred to the SS-maxim “Loyalty is my honour” (“*Meine Ehre heißt Treue*”) and that, therefore, the publication of the picture met the offence of defamation. He requested to order the applicant to pay compensation. Further he requested supplementary measures under the Media Act, such as the publication of a notice that proceedings under that Act had been opened and the publication of the judgment.

On 12 September 2000 the applicant filed observations. It stressed that the picture did not imply that Mr H. Kabas stood for National Socialist ideas but was a caricature expressing that a front man of the FPÖ maintains a questionable approach to the National Socialist era. The caricature referred to a recent speech of Mr E. Windholz, the chairman of the Lower Austria regional branch of the FPÖ, given to party members in the course of a regional branch party congress. In his speech Mr E. Windholz used the expression “Loyalty is our honour”. Mr H. Kabas defended Mr. E. Windholz and his statement in public. The applicant wanted to criticise these statements by the caricature at issue.

On 23 October 2000 the Vienna Regional Court (*Landesgericht*) ordered the applicant to publish a notice that the proceedings under the Media Act were pending. It found that the published picture showed Mr. H. Kabas wearing a uniform similar to a SA-uniform (*Sturmabteilung*). The tie of the uniform showed instead of the swastika an “F” as short form of “FPÖ”. The

court considered that this picture with the annotated text sequence (cited above) associated Mr. H. Kabas with National Socialism.

On 14 November 2000 the applicant submitted further observations. It pointed out that functionaries of the FPÖ had repeatedly used expressions which were typically used in National Socialist parlance and referred to the report of September 2000 by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja who received a mandate from fourteen member states of the EU to deliver a report covering, *inter alia*, the evolution of the political nature of the FPÖ in which the experts concluded that the FPÖ is a “right wing party with extremist expressions”. The applicant stressed that it wanted to criticise the repeated use of typical National Socialist expressions in a satirical way through a caricature and to point at the questionable approach to the National Socialist era by Mr H. Kabas and other functionaries of the FPÖ. Moreover, it contended that the picture, which was printed in black-and-white, could not give the impression that Mr H. Kabas was pictured with a Nazi-uniform. The election poster was modified in that a harness was put on Mr H. Kabas and on his tie a white circle with an “F” was added. It also submitted that the court has to consider the political context in which the picture was published.

On 8 January 2001 Mr. H. Kabas submitted his observations. He repeated his prior allegations and contended that the FPÖ did not stand for a xenophobic policy. The wrong and distorted statement of fact of the picture, associating Mr H. Kabas with National Socialism violated his personality rights which had to be respected.

On 30 January 2001 the Vienna Regional Court, after having held a hearing, awarded Mr H. Kabas a compensation of ATS 10,000 (EUR 726.73) and ordered the applicant to publish the judgment in its periodical. It found that the published picture showed Mr H. Kabas in a uniform which was clearly similar to a SA-uniform and this was obvious to the average reader of the periodical at issue. The tie of the uniform showed instead of the swastika an “F” as short form of the “FPÖ”. It was common knowledge that the SA was a National Socialist combat unit. Thus, the picture at issue alleged that Mr H. Kabas had a National Socialist attitude. Since the Prohibition Act (*Verbotsgesetz*) criminalises activities inspired by National Socialist ideas the picture could violate Mr H. Kabas’ honour and, thus, meet objective elements of the offence of defamation within the meaning of Section 111 of the Criminal Code. Moreover, the used annotation associates Mr H. Kabas with National Socialism. The applicant’s submissions about the political nature of the FPÖ and the political attitude of its functionaries did not constitute sufficient evidence for proving that Mr H. Kabas performed National Socialist activities which would have been necessary pursuant to the Austrian courts constant case-law concerning media offences. Although politicians were required to sustain a higher degree of criticism than other people, there were nevertheless limits to such

criticism. The unproven allegation of National Socialist attitudes constituted a massive attack on a person's reputation even when he was a politician.

On 18 April 2001 the applicant filed an appeal. It submitted that the Regional Court has qualified the picture as statement of fact which alleges that Mr H. Kabas had performed National Socialist activities. However, referring to the case *Jerusalem v. Austria* (no. 26958/95, 27.2.2001, ECHR 2001-II, § 33), the published picture constituted a justified value judgment concerning Mr H. Kabas' questionable approach to National Socialism. Moreover, the choice of a caricature and persiflage as satirical means of expression and the publication of the picture in the periodical's rubric "commentaries" points out that the publication constituted a value judgment justified under Article 10 of the Convention. Further, the applicant stressed that the picture was published in a periodical of an opposition party, as immediate reaction to the statement of a functionary of the FPÖ, using the above mentioned SS-maxim and concerned the criticism of a high official of a ruling party. It has, therefore, to be considered as a political value judgment which by their nature is not accessible to proof of truth.

On 26 September 2001 the Court of Appeal dismissed the applicant's appeal. It found that the picture at issue implies that Mr M. Kabas performed National Socialist activities or, at least, has a National Socialist attitude. Although involving also the expression of a value judgment the picture essentially constituted a statement of fact, namely that Mr H. Kabas performed National Socialist activities. Such a statement is susceptible to proof of truth. As to the applicant's submission regarding the satirical and caricatural character of the picture, the court found that these arguments could not change its point of view as the emphasis of the publication was put on the personal statement which was insulting.

B. 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 can be awarded up to EUR 14,535. In this context "defamation" is defined in Section 111 of the Criminal Code as follows:

"1. As it may be perceived by a third party, anyone who accuses another 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 six months or a fine ...

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 ...

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."

COMPLAINT

The applicant complained under Article 10 of the Convention that the Austrian courts' decisions awarding Mr H. Kabas compensation in the proceedings at issue violated its right to freedom of expression.

THE LAW

The applicant complained under Article 10 of the Convention that the courts' decisions violated their right to freedom of expression.

The relevant part of 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....

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 ... for the protection of the reputation or rights of others...."

The Government accept that the award of damages against the applicant interfered with its right to freedom of expression. However, the measure at issue was justified under paragraph 2 of Article 10 as it was "prescribed by law", namely Section 111 of the Penal Code and Section 6 of the Media Act, and pursued the legitimate aim of protecting the rights and reputation of others. Furthermore, it was necessary in a democratic society in the interests of that aim.

The measure taken by the Austrian courts had the aim of protecting a politician from a party opposed to the applicant party against an insulting and wanton personal attack on his reputation. The presentation of Mr. H. Kabas in the issue no. 4/2000 of "wien.direkt", where he is depicted in a uniform that deviates from that of the SA only insofar as the tie does not bear a swastika but the letter "F", together with the annotation "Our offer: honour & loyalty", in the type of writing particularly common during the Nazi era constituted an offence of defamation, because it associated Mr. H. Kabas with National Socialism and implied the fact that he actually pursued National Socialist activities or had at least a National Socialist attitude. Thus, it constituted a statement of fact for which the appropriate

defence was the proof of truth. Since the illustration at issue was not confined to expressing a general criticism of the conduct of other politicians of the Freedom Party but explicitly referred to Mr Kabas the proof of truth adduced by the applicant, i.e. that other functionaries of the Freedom Party had repeatedly used formulations belonging to the National Socialist jargon, was not sufficient.

Even though the limits of acceptable criticism are wider with regard to politicians, in particular if they act in a provocative manner themselves, regard must be had in this context to the special stigma that attaches to any type of National Socialist activities and the National Socialist regime in Austria since 1945. Under the National Socialist Prohibition Act, pursuing National Socialist activities is threatened with life imprisonment. Presenting a person in a manner that insinuates that he or she is active in the National Socialist sense or at least has such an attitude, therefore calls for a special justification. In assessing the margin of appreciation given to the national courts, the Court in its *Wabl v. Austria* judgment, also had particular regard to the special stigma which attaches to National Socialist ideas (*Wabl v. Austria*, no. 24773/94, § 41, 21 March 2000).

The Government submit further that the Austrian courts showed moderation in interfering with the applicant's rights by requiring the latter to pay ATS 10,000 by way of damages to the person attacked, an amount which is extremely low.

This is disputed by the applicant. Referring to the case of *Scharsach and News Verlagsgesellschaft v. Austria* the applicant submits that the use of the term "Nazi" may constitute an admissible value judgement in the context of criticising persons for their failure to clearly dissociate themselves from the extreme right (*Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 42, ECHR 2003-XI). In the present case it had to be noted that Mr Windholz, a high-ranking official of the Freedom Party, when honouring longstanding members of that party had used the term "our honour means loyalty" and that he was subsequently defended by Mr Kabas. Therefore the use of this term in relation to Mr Kabas intended to criticise the FPÖ and its officials by means of satire and persiflage. Thus, taking the political context into account the publication at issue constituted a fair comment falling within the scope of protection by Article 10 of the Convention. In the same *Scharsach* judgment the Court had emphasised that in examining a statement the political context in which it had been made must be taken into account; it was precisely that that the Austrian courts failed to do.

In their respective judgments the Regional Court and the Court of Appeal disregarded the fact that a high-ranking official of the Freedom Party had used the motto of the SS "our honour means loyalty" in order to honour functionaries and that Mr Kabas had defended that conduct. They also failed to take into account that the impugned illustration satirised an election

poster of the Freedom Party's campaign for the elections to the Vienna Municipal Council. In short, the political context and the particular presentation of the impugned illustration had not been duly taken into account.

As to the Government's argument that the damages awarded to Mr Kabas consisted in a moderate sum, the applicant submits that as a consequence of the judgment the applicant had also been forced to publish that judgment and thus to admit that they had wronged their political opponent which was a much harder thing for them. Further, Mr Kabas also filed a civil-law action against the applicant for an injunction prohibiting the applicants from publishing again the illustration, and claimed further damages. In view of the existing judgment the applicant had refrained from defending itself in these proceedings and had accepted a judgment by default. It is therefore not correct to state that the adverse effect on the applicant was limited to the payment of a sum of 10,000 ATS as damages to Mr Kabas.

The Court considers, in the light of the parties' submissions, that the applicants' complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Søren NIELSEN
Registrar

Christos ROZAKIS
President