

## AS TO THE ADMISSIBILITY OF

Application No. 20834/92  
 by Gerhard OBERSCHLICK  
 against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 6 April 1995, the following members being present:

Mr. C.L. ROZAKIS, President  
 Mrs. J. LIDDY  
 MM. E. BUSUTTIL  
 A.S. GÖZÜBÜYÜK  
 A. WEITZEL  
 M.P. PELLONPÄÄ  
 B. MARXER  
 B. CONFORTI  
 N. BRATZA  
 I. BÉKÉS  
 E. KONSTANTINOV

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 15 September 1992 by Gerhard Oberschlick against Austria and registered on 23 October 1992 under file No. 20834/92;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 16 June 1994 and the observations in reply submitted by the applicant on 29 August 1994;

Having deliberated;

Decides as follows:

## THE FACTS

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

The applicant, an Austrian journalist born in 1942, was at the relevant time editor of the periodical 'Forum' - "Internationale Zeitschrift für kulturelle Freiheit, politische Gleichheit und solidarische Arbeit", i.e. an international magazine for cultural freedom, political equality and solidarity.

## A. Particular circumstances of the case

On 7 October 1990, on the occasion of a "peace-celebration" at the Ulrichsberg, Mr. Haider, leader of the Austrian Liberal Party (FPÖ) and then Regional Governor (Landeshauptmann) of Carinthia, gave a speech which glorified the role of the 'generation of soldiers' in World War II. According to Mr. Haider, all soldiers, even those in the German army, had fought for peace and freedom. Thus, nobody should differentiate between 'good' and 'bad' soldiers of this generation, but rather be grateful to all of them, as they had founded and built today's democracy and affluent society. He then criticized an Austrian writer, who had provoked anger for having, in his eyes, disparaged all

those killed in World War II. In this speech he continued then:

<German>

"Meine Damen und Herren, geistige Freiheit ist in einer Demokratie etwas Selbstverständliches, aber sie findet dort ihre Grenzen, wo Menschen jene geistige Freiheit in Anspruch nehmen, die sie nie bekommen hätten, hätten nicht andere für sie den Kopf hingehalten, daß sie heute in Demokratie und Freiheit leben können."

<Translation>

"Ladies and Gentlemen, freedom of opinion is taken for granted in a democracy, but, it finds its limits, where people lay claim to that freedom, who never would have got it, had not others risked their heads for them, that they may live today in democracy and freedom."

This speech was reproduced verbatim in the applicant's periodical and commented on by the applicant, and, inter alia, the aforementioned Austrian writer. The applicant's commentary, entitled "P.S.: 'Idiot' instead of 'Nazi'" ("P.S.: 'Trottel' statt 'Nazi'"), which was reproduced at the end of the speech, reads as follows:

<German>

"Ich werde Jörg Haider erstens keinen Nazi nennen, sondern zweitens einen Trottel. Dies rechtfertige ich wie folgt: Einleuchtend hat L., ... mich überzeugt, daß es Jörg Haider eher nütze, wenn man ihn einen Nazi nennt. So bitte ich meine Freundinnen um Vergebung, daß ich diese Benennung schon aus so gutem Grund unterlasse.

...

Da er uns anderen, die das in seinen Augen legitimierende Glück nicht hatten, im Ehrenkleid des Dritten Reiches für Hitlers Freiheit zu Raubkrieg und Endlösung den Kopf hinzuhalten, jegliches Recht abspricht, auch nur eine bloß 'geistige', geschweige gar eine politische 'Freiheit in Anspruch zu nehmen', und da er selber nie das Glück gehabt hatte, im Ehrenkleid der SS oder Wehrmacht dienen zu dürfen, also sich selbst zugleich mit der überwiegenden Mehrheit der Österreicher von allem Freiheitsgebrauche ausschließt, ist er in meinen Augen ein Trottel."

<Translation>:

"I shall call Jörg Haider firstly, not a Nazi, but, secondly, an idiot. That I justify as follows: Plausibly L. ... convinced me that it were rather of benefit to Jörg Haider if one calls him a Nazi. Thus, I ask my friends for pardon for abstaining for that good reason from that designation.

...

As he denies us, who did not have the legitimizing good fortune to have risked our heads in the Third Reich's 'honourable gown' for Hitler's freedom to rapacious war and Final Solution, indeed denies us the right to lay claim to freedom of opinion, or, even to political freedom, and as he himself never had the good fortune, to have been able to serve in the honourable gown of the SS or the Wehrmacht, thus at the same time excluding himself along with the vast majority of Austrians from this exercise of freedom, in my eyes, he is an idiot."

On 26 April 1991 Mr. Haider brought a private prosecution for

defamation (Üble Nachrede) and insult (Beleidigung) under Sections 111 and 115 of the Penal Code against the applicant with the Vienna Regional Criminal Court (Landesgericht). He also requested an order for the immediate seizure of the relevant issue of Forum and for publication of information about the institution of proceedings in the applicant's periodical.

On 30 April 1991 the Vienna Regional Criminal Court ordered the applicant to publish in its review the requested information about the institution of criminal proceedings against him. On 21 May 1991 the applicant lodged an appeal against that decision.

On 23 May 1991 the Vienna Regional Criminal Court found the applicant guilty of having insulted Mr. Haider and sentenced him to 20 daily rates of 200,- AS. The Regional Court held that the word "idiot" ("Trottel") is always an insult and has a disparaging character, and could therefore never be used for any objective criticism.

The written judgment, served upon the applicant's counsel on 16 August 1991, further ordered the seizure of the relevant copy of 'Forum' according to Section 33 of the Media Act.

On 30 August 1991 the applicant appealed against the Vienna Regional Criminal Court's judgment. He challenged in particular the findings, that the term idiot was as such an insult, which may only be used for disparaging purposes. He also criticized the Vienna Regional Criminal Court for failing to have regard to the context in which the statement was made. He emphasized that his comment was appropriate to the threat Mr. Haider's ideas constituted for freedom of opinion, having regard to the fact that the speech was given in his capacity as the Regional Governor of Carinthia. He further requested the transcripts of the court hearing to be completed and rectified, as they did not contain all relevant items of the trial. He finally complained that the order for seizure had not been delivered at the oral hearing.

On 18 October 1991 the Vienna Regional Criminal Court rectified parts of the transcript of the court hearing and rejected the further amendments requested by the applicant as irrelevant. On 10 December 1991 the applicant filed an appeal against that decision.

On 5 December 1991 the Vienna Regional Criminal Court rectified its judgment and deleted the order concerning the seizure of the relevant copies of 'Forum'.

On 18 March 1992 the Vienna Court of Appeal dismissed the applicant's appeal of 21 May 1991, concerning the order to publish in its periodical information about the institution of criminal proceedings. It also rejected the appeal lodged on 10 December 1991 as there was no appeal against a decision as to the rectification of a transcript of a court hearing.

On 25 March 1992 the Court of Appeal confirmed the judgment of the Regional Criminal Court, but reduced the amount of the fine.

The Court of Appeal, in its reasoning, referred to the interpretation of the impugned commentary by the average reader of 'Forum'. The Court accepted that the average reader, had he read beforehand the speech of Mr. Haider and the article of the criticized writer, would have been able to follow the applicant in his analysis, namely that Mr. Haider excluded the vast majority of Austrians including himself from all exercise of freedom of thought, and that the applicant was reproaching Mr. Haider with the term of "idiot" ("Trottel"). However, this reproach could not be comprehensible to those readers of the periodical who had not read Mr. Haider's speech,

but were only attracted by the title - "P.S.: 'Idiot' instead of 'Nazi'" (P.S.: 'Trottelt' statt 'Nazi') - of the applicant's column. According to the Vienna Court of Appeal, it would have only been acceptable to describe the content of Mr. Haider's speech as "idiotic" ("vertrottelt"). The Court of Appeal continued that it was true that the applicant's opinion had been toned down by the subsequent statement of the reasons why Mr. Haider was considered an "idiot" ("Trottelt"). However, the title of the column expressed the applicant's opinion too literally, and thus did not remain within its intended context. Moreover, the fact that Mr. Haider himself frequently resorted to insults and swearwords in political discussions was irrelevant.

The Court of Appeal also held that the applicant's comment could not be justified by Article 10 of the Convention, as allowing such statements would lower the level of political culture in Austria. The insult could not be justified by Section 115 para. 3 of the Penal Code either, as the applicant had not been personally insulted or provoked beforehand by Mr. Haider.

The judgment was served upon the applicant on 29 May 1992.

#### B. Relevant Domestic Law

Section 111 paras. 1 and 3 of the Austrian Penal Code deals with the offence of defamation ("Üble Nachrede") and read as follows:

"(1) Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour 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."

"(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."

Section 115 paras. 1 and 3 of the Penal Code deal with the offence of insult ("Beleidigung") and read as follows:

"(1) Anyone who, in public or in the presence of several others, insults, mocks, mistreats or threatens with ill-treatment a third person, shall be liable to imprisonment not exceeding three months or a fine not exceeding 180 daily rates, unless he might be punishable with a more severe penalty under a different provision."

"(3) Any person who, outraged at the behaviour of a third person, lets himself get carried away into insulting, mistreating or threatening the third person with ill-treatment in a way which is defensible in the circumstances, has a defence, if his outrage is generally understandable, especially having regard to the time having passed since then."

According to the relevant provisions of the Media Act, the person who has been defamed may request the forfeiture and seizure of the publication by which the media offence has been committed (Section 33 and 36). Under Section 37 of the Media Act it may also be requested that information about the institution of criminal proceedings be published.

## COMPLAINTS

1. The applicant complains under Article 10 of the Convention that his conviction of insult pursuant to Section 115 of the Austrian Penal Code violated his freedom of expression.

2. He further complains under Article 6 para. 1 of the Convention about the unfairness of the criminal proceedings. He submits in particular that the presiding judge of the Vienna Court of Appeal was biased as he had allegedly been hurt personally by the findings of the European Court of Human Rights in the case of Oberschlick v. Austria (judgment of 22 November 1990, Series A no. 204). Moreover, his request for the rectification of the transcript of the court hearing was not sufficiently considered by the Regional Court.

## PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 September 1992 and registered on 23 October 1992.

On 2 March 1994 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 16 June 1994 Government submitted their observations. The observations in reply by the applicant were submitted on 29 August 1994.

## THE LAW

1. The applicant complains under Article 10 (Art. 10) of the Convention that his conviction for insult pursuant to Section 115 of the Austrian Penal Code violated his freedom of expression.

Article 10 (Art. 10), so far as relevant, 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 health or morals, for the protection of the reputation or rights of others, ... ."

The Government submit that the applicant's conviction interfered with his right to freedom of expression under Article 10 para. 1 (Art. 10-1) of the Convention, but that this interference was justified under paragraph 2 of Article 10 (Art. 10-2) of the Convention. It was prescribed by law, namely Section 115 of the Penal Code and necessary for the protection of the reputation of others and for maintaining an orderly climate of discussion in a democracy. The measure at issue was also in proportion to the aim pursued. The applicant called Mr. Haider in the article at issue an "idiot" ("Trottel"), which in Austrian usage is a gross, vilifying insult. Such an insult can under no circumstances express objective criticism of the opinion or conduct of the person against whom it is directed but only constitutes a personal attack treating in an unfair manner the attacked person with contempt. There was no such thing as an insult on justified grounds as the applicant seems to believe. Rather, an insult was only excusable as an immediate reaction to a personal attack which, however, is not the

applicant's case. Having also regard to the lenient sentence imposed on the applicant the Austrian courts did not overstep the margin of appreciation afforded to Contracting States under paragraph 2 of Article 10 (Art. 10-2) of the Convention.

This is disputed by the applicant. He submits that his conviction was a disproportionate measure not justified under paragraph 2 of Article 10 (Art. 10-2) of the Convention. The Government's argument that the use of a vulgar or swear word always constituted an insult punishable under Section 115 of the Austrian Penal code was untenable as regard must be had to the context in which a certain expression is used. In the circumstances of the present case the use of a strong word was the only appropriate description of Mr. Haider's conduct and in his article he had also explained why. Moreover, resort to this strong expression was necessary to stimulate a public discussion of the highly controversial public speech Mr. Haider had given.

After an examination of this issue in the light of the parties' submissions, the Commission considers that this part of the application raises questions of fact and law which can only be determined by an examination of the merits. It follows that this complaint cannot, therefore, be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

2. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention about the unfairness of the criminal proceedings.

a. He complains in particular that the Presiding Judge S. of the Vienna Court of Appeal was biased as he had allegedly been hurt personally by the findings of the European Court of Human Rights in the case of *Oberschlick v. Austria* (judgment of 22 November 1990, Series A no. 204).

The Government submit that the applicant failed to exhaust domestic remedies in this respect. Although he had been aware in advance of the circumstances on which he based his assumption of bias, he did not file a motion under Section 73 of the Code of Criminal Proceedings challenging the Judge for bias.

The applicant submits that he could not have challenged the presiding judge for bias, as he had only found out about this judge's bias when he read the written judgment of the Court of Appeal, since only bias could explain the inconsistencies of the judgment.

The Commission, even assuming that the applicant exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention, recalls that the existence of impartiality for the purposes of Article 6 para. 1 (Art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (cf. *Eur. Court H.R., Fey judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28; Padovani judgment of 26 February 1993, Series A no. 257-B, p. 20, para. 25*).

Under the objective test it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality (*Fey judgment loc. cit., para. 30; Padovani judgment loc. cit., para. 27*).

In this respect the Commission observes that it does not jeopardise the impartiality of a judge if he had previously dealt with other cases brought against the same person (see No. 11831/85, Dec. 9.12.87, D.R. 54 p. 144). The same applies if a judgment in the previous case had been overruled by a higher court or has been at issue in proceedings before the Convention organs.

As regards the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (Padovani judgment, loc. cit., para. 26).

The Commission finds that the applicant's reference to the way in which the judgment was reasoned does not constitute a sufficient indication for the existence of biased personal conviction on the part of the Presiding Judge S. vis-à-vis the applicant.

b. The applicant complains further that his request for the rectification of the transcript of the court hearing was not sufficiently considered by the Regional Court.

The Commission observes that the Regional Court on 18 October 1991, upon a request by the applicant, partly rectified the transcript of the court hearing but rejected the further amendments requested by the applicant as irrelevant.

The Commission, having regard to the criminal proceedings as a whole, finds no indication that by the Regional Court's partial refusal of the applicant's request, his defence rights were infringed or that the applicant, who was represented by counsel, could not otherwise argue his case properly.

It follows that there is no appearance of a violation of the applicant's right to a fair hearing guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention.

This part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES ADMISSIBLE the applicant's complaint that his conviction of insult by the Austrian courts violated his right to freedom of expression, without prejudging the merits,

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber

President of the First Chamber

(M.F. BUQUICCHIO)

(C.L. ROZAKIS)