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

FIRST SECTION

CASE OF NIKOWITZ AND VERLAGSGRUPPE NEWS GMBH v. AUSTRIA

(Application no. 5266/03)

JUDGMENT

STRASBOURG

22 February 2007

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 Nikowitz and Verlagsgruppe News GmbH v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 1 February 2007,

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

PROCEDURE

1. The case originated in an application (no. 5266/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Rainer Nikowitz, an Austrian national, and Verlagsgruppe News GmbH, a limited liability company with its registered office in Tulln, on 3 February 2003.

2. The applicants were represented by Mr H. Simon, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. On 15 September 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4. The applicant company is the owner and publisher of the weekly magazine *Profil*. The first applicant works as a journalist for the applicant company.

5. In the section of the issue of *Profil* of 3 September 2001 dealing with society matters the applicant company published, on page 124, a two-page

article by the first applicant with the headline "*Ouch*" and the strapline "*Hermann Maier. Austria is limping. Rainer Nikowitz too is suffering from acute phantom pains as a result of the national broken leg*." The article was accompanied by a portrait of Mr Maier together with the caption "*Hero Hermann's leg is causing millions of Austrians pain*".

6. The article was meant as an ironic essay on the reaction of the Austrian population and media scene to the road-traffic accident in which the Austrian ski-racing champion Hermann Maier had injured his leg some weeks before. In this context the article cited and commented on various statements from Austrian and German newspapers and Hermann Maier's Internet homepage. The article also mentioned one of Maier's competitors, the Austrian ski-racing champion Stefan Eberharter. The relevant passage reads as follows:

> "Even Maier's dear friend Stefan Eberharter had to say something, and he presumably decided against it at the last moment: 'Great, now I'll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too'."

> "Auch Maiers lieber Freund Stefan Eberharter musste was sagen, und er entschied sich vermutlich im letzten Moment gegen: 'Super, jetzt gwinn ich endlich auch einmal was. Hoffentlich prackt's den miesen Hund mit den Krücken hin, und er bricht sich den anderen Haxn auch noch'."

7. Subsequently, Mr Eberharter brought a private prosecution for defamation against the first applicant and a compensation claim under the Media Act (*Mediengesetz*) against the applicant company. He submitted that the above passage communicated a negative image of him as it suggested disdainful behaviour towards a colleague. Like all top athletes he earned the majority of his income from public-relations activities for sponsor companies. Because of the article in question he had already been repeatedly questioned about his attitude concerning Mr Maier's accident. If the suggested reproach of most objectionable competitiveness remained attached to him, this would entail a significant loss of value in his standing as a communication medium. His previous correspondence with the applicant company requesting it to publish his comment had remained unsuccessful.

8. On 6 December 2001 the Vienna Regional Criminal Court (*Landesgericht*), having held a hearing, convicted the first applicant of defamation under section 111 of the Criminal Code (*Strafgesetzbuch*) and sentenced him to a fine of 40 daily payments (*Tagessätze)* of 500 Austrian schillings (ATS) each (making a total of ATS 20,000 [approximately 1,450 euros (EUR)]) suspended for a three-year probationary period. It further ordered the first applicant to pay the costs of the proceedings. It held the applicant company jointly and severally liable for the fine and the costs of the proceedings and further ordered it to pay ATS 10,000 (EUR 726.23) in

compensation to Mr Eberharter under section 6 of the Media Act. Lastly, the court ordered the publication of extracts from its judgment.

9. The court noted that the offending passage was to be understood in the way it would be perceived by an average reader. The magazine *Profil* was aimed at an understanding and intellectual readership and the majority of readers could therefore be expected to discern the satirical and humorous content of the article and the passage in particular. This was not true, however, for a person who read the article only superficially and without the necessary concentration. Such a reader was confronted at the very beginning of the article, namely in its third paragraph, with the impugned passage suggesting that jealousy, rudeness and *schadenfreude* were obvious characteristics of Stefan Eberharter. The content of the offending statement could furthermore not be regarded as far-fetched, as in the milieu of skiing experts Stefan Eberharter was seen as the "eternal bridesmaid" in relation to Hermann Maier and known for his rather ribald expressions. Lastly, the rest of the article only informed the reader about the coverage of the accident in other media and did not say anything more about Stefan Eberharter's character.

10. The applicants appealed and submitted in particular that when assessing the meaning of the offending passage the court should not have applied the standard of a hasty and unfocused reader. In any event, the applicants' right to freedom of artistic expression outweighed Mr Eberharter's personal interests. The article at issue was a satirical and farcical essay on a subject of public interest. Stefan Eberharter was mentioned as the representative of all other ski-racing competitors who had no chance against the overpowering Hermann Maier. The wish put in Eberharter's mouth, to the effect that Hermann Maier should break his other leg too so that he could at last win something, was a humorous, exaggerated and furthermore comprehensible reaction. The humorous nature of the article was already evident from its headline, strapline and first paragraphs. Furthermore, the applicant company regularly published the first applicant's columns, whose satirical and humorous nature was therefore well-known to readers.

11. On 26 June 2002 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicants' appeal. It noted that the reading and understanding of the article demanded a very high level of intelligence and concentration. The court of first instance had therefore rightfully also taken account of readers who might peruse the first paragraphs of the article without understanding its satirical meaning and then discontinue their reading of the essay because it was too demanding. The fact that the offending statement was pure fiction and that Stefan Eberharter was only mentioned as a representative for all competitors of Hermann Maier was not discernable for such a reader. Stefan Eberharter was Hermann Maier's main challenger and he was the first to benefit from Hermann Maier's accident. Besides, any

reader would assume that the author of the article had used information not yet known to the public and that there was a real background even behind comic exaggeration. The reported reaction conveyed a negative image of a top athlete who was expected to win in fair competition instead of wishing his competitor serious bodily harm. Stefan Eberharter was presented as a most egocentric person who would stop at nothing and accept any harm done to his competitors. The court concluded that Stefan Eberharter's personal interests outweighed the applicants' right to freedom of artistic expression.

12. This judgment was served on the applicants' counsel on 5 August 2002.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

13. The applicants complained under Article 10 of the Convention that the Austrian courts' judgments violated their right to freedom of expression.

Article 10 of the Convention, as 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 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."

14. The Government contested that argument.

A. Admissibility

15. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

16. The applicants contended that the offending statement concerned a fictitious, but nevertheless conceivable and humanly understandable thought by Mr Eberharter, which was clearly discernable as such even by the hastiest of readers. The domestic authorities' reference to a reader who perused the text in such a quick or unfocused manner that he failed to understand its content was inadmissible. The applicants were not responsible for such readers and the freedom of expression guaranteed under Article 10 of the Convention was not restricted by the fact that a reader might misunderstand the ideas expressed. Any reader who honestly believed that Mr Eberharter had in fact uttered the impugned statement before the press was simply ignorant.

17. The first applicant's satirical essays had become a trademark of the magazine *Profil* and the reader would thus expect the first applicant to make use of satire. The text of the article moreover contained other fictitious satirical statements, such as its remark that an ORF reporter had interviewed Mr Maier's first replaced bandage or that God himself had addressed Mr Maier and asked for his help. In any event, the article's headings already indicated its humorous and satirical approach.

18. In this article the first applicant had wished to criticise the national hysteria after Mr Maier's accident. The essential statement behind the impugned fictitious quotation of Mr Eberharter's thought was that he had every reason to be happy about his strong rival dropping out and the consequential chance of his winning, but had not expressed this openly. In reality, Mr Eberharter had had extraordinary ski-racing successes after Mr Maier's injury. Almost everyone in Mr Eberharter's position would have had the same thought deep down inside and the statement did not imply that he had reprehensible character traits. In any event, it was clearly recognisable that he had not expressed such words at all.

19. The Government conceded that there had been interference with the applicants' rights, but that it was prescribed by law and sought to protect the reputation and rights of others. Furthermore, the interference had been necessary and proportionate within the meaning of paragraph 2 of Article 10 of the Convention. The article had quoted and commented on excerpts from various Austrian newspapers. In a total of eighteen quotations it had referred to headlines and passages from various other articles reporting statements which had actually been made in connection with Hermann Maier's accident. The impugned statement, attributed to Stefan Eberharter, was the only fictitious statement amongst all those quotations. As the Austrian courts had rightly pointed out, in those circumstances only a highly concentrated reader could have been expected to realise that this passage was pure fiction with comic exaggeration. The offending statement conveyed a negative image of Mr Eberharter's person in a striking and

blatant manner. Even considering the satirical nature of this statement, the limits to the guarantees under Article 10 of the Convention had clearly been transgressed as there was no factual basis for the reproach of envy and inappropriate glee. The Government also referred in this regard to the judgment in *Lopes Gomes da Silva v. Portugal* (no. 37698/97, ECHR 2000-X) and the decision in *Österreichische Schutzgemeinschaft für Nichtraucher and Rockenbauer v. Austria* (no. 17200/91, Commission decision of 2 December 1991, unreported). Mr Eberharter's interest in protection against statements which seriously affected his image as a sportsman had outweighed the applicants' interest in embellishing their article, which was of no particular public interest, by means of the impugned statement. Moreover, the interference with the applicants' rights had been proportionate as the fine imposed on the first applicant was a suspended penalty and the amount of compensation the second applicant had been ordered to pay was minor.

20. The Court notes that the domestic courts' decisions in the present case constituted an interference with the applicants' rights under Article 10 of the Convention. The interference was prescribed by law and pursued the legitimate aim of the protection of the rights of others. The parties differed as to whether the interference in question had been "necessary in a democratic society".

21. The Court reiterates in this regard that the test of "necessity in a democratic society" requires it to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision which covers both the legislation and the decision applying it, even one given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

22. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have delivered in the exercise of their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the statement held against the applicants and the context in which they made it.

23. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued". In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the

relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among other authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 88-90, ECHR 2004-XI, with further references).

24. In the present case, the domestic courts found that Mr Eberharter's personal interests in having his reputation protected had outweighed the applicants' right to freedom of expression. They noted in this regard that the reported reaction had conveyed a negative image of a top athlete who was expected to win in fair competition instead of wishing his competitor serious bodily harm. An unfocused reader could not have been expected to discern the satirical and humorous content of the article and impugned passage. Besides, any reader would have assumed that there was a real background even behind comic exaggeration.

25. The Court cannot find that these are "relevant and sufficient" reasons to justify the interference at issue. It notes that the article dealt with the road traffic accident in which the well-known Austrian skiing champion Hermann Mayer had been injured, this incident having attracted the attention of the Austrian media at the time. The article, as was already evident from its headings and the caption next to Mr Maier's photograph, was written in an ironic and satirical style and meant as a humorous commentary. Nevertheless, it sought to make a critical contribution to an issue of general interest, namely society's attitude towards a sports star. The Court is not convinced by the reasoning of the domestic courts and the Government that the average reader would be unable to grasp the text's satirical character and, in particular, the humorous element of the impugned passage about what Mr Eberharter could have said but did not actually say. This passage could at most be understood as the author's value judgment on Mr Eberharter's character, expressed in the form of a joke.

26. The Court notes that the impugned statement speculates on Mr Eberharter's true feelings about his competitor's accident and suggests, firstly, that he was pleased because he expected to benefit from this incident and, secondly, that he hoped his competitor would be further weakened. The Court acknowledges that such feelings, if actually expressed, would seriously affect and damage any sportsman's good image. However, the Court does not find that the same can be said about this humorous passage, which clearly mentions that Mr Eberharter made no such statement. The Court also notes in this regard that Mr Eberharter had already previously commented on Mr Maier's accident in public, obviously using different words. In sum, the Court considers that the impugned passage about Mr Eberharter remains within the limits of acceptable satirical comment in a democratic society.

27. Moreover, the Court, having regard to the fact that the Austrian courts convicted the first applicant of defamation and ordered the applicant company to pay compensation and to publish the judgment, cannot adhere

to the Government's argument that the Austrian courts showed moderation in interfering with the applicants' rights in the present case. In particular, as regards the first applicant, what matters is not that he was sentenced to a relatively minor suspended penalty, but that he was convicted at all (see *Lopez Gomez da Silva*, cited above, § 36).

28. It follows that the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. Consequently, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicants claimed a total of 7,288.13 euros (EUR) including value-added tax (VAT) in respect of pecuniary damage. This amount consisted of EUR 726.73 for the compensation the applicant company had been ordered to pay to Mr Eberharter, EUR 2,421.40 for the reimbursement of the costs incurred by Mr Eberharter in the domestic proceedings and EUR 4,140 for the loss of advertising revenue owing to the publication of extracts from the judgment in the applicant company's magazine *Profil*.

31. The Government contended that the amount claimed by the applicant company for the loss caused by having to publish the judgment was excessive. They contested, in particular, the inclusion of a surcharge of 15% on the normal advertising rate to account for special placement of the notice in the magazine's "Society" section. In any event, the applicants had incorrectly calculated this surcharge as EUR 740 instead of EUR 510. They did not comment on the other claims.

32. Having regard to the direct link between the applicants' claims for reimbursement of the compensation and of the costs of the domestic proceedings which had been awarded to Mr Eberharter, and the violation of Article 10 found by the Court, the Court finds that the applicants are entitled to recover the full amount of EUR 3,148.13 in this connection. The Court further considers that there is also a direct link between the applicant company's claim for the loss of advertising revenue caused by the publication of the judgment in its magazine and the violation found (compare *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98,

§ 50, ECHR 2003-XI). The Court agrees with the applicants that the loss of advertising revenue should be calculated on the basis of the normal advertisement rate for similar publication. The advertisement rate for an equal-sized insert in the applicant company's magazine amounted at the material time to EUR 3,400 to which a surcharge of 15% was to be added for special placement. In the present case, the relevant provisions of the Media Act obliged the applicant company to publish the judgment in a section that was the same as, or similar to, that in which the impugned original article had appeared. The Court accordingly awards the applicants EUR 3,910 for the loss of advertising revenue. In sum, the Court awards a total of EUR 7,058.13 in respect of pecuniary damage. This amount includes VAT.

B. Costs and expenses

33. The applicants also claimed a total of EUR 2,397.64 for the costs and expenses incurred in the domestic proceedings and EUR 2,561.46 for those incurred in the proceedings before the Court.

34. The Government submitted that the amount claimed for costs in respect of the domestic proceedings was excessive in so far as it included the sum of EUR 127.70 for "review of the publication of the judgment". They further argued that the amount claimed in respect of the present proceedings was also excessive.

35. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession, the above criteria and the Government's comment, the Court awards EUR 2,269.94 for costs in respect of the domestic proceedings. The Court further finds that the sum claimed by the applicants in respect of the present proceedings appears reasonable and awards the full amount, namely EUR 2,561.46. In sum, the Court awards a total of EUR 4,831.40 under the head of costs and expenses. This amount does not include VAT.

C. Default interest

36. 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 UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 7,058.13 (seven thousand and fifty-eight euros thirteen cents) in respect of pecuniary damage;
      (ii) EUR 4,831.40 (four thousand eight hundred and thirty-one euros forty cents) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the latter amount;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President