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

FIRST SECTION

CASE OF VERLAGSGRUPPE NEWS GMBH v. AUSTRIA

(Application no. 76918/01)

JUDGMENT

STRASBOURG

14 December 2006

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 Verlagsgruppe News GmbH v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
Mr K. HERNDL, *ad hoc judge*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 23 November 2006,

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

PROCEDURE

1. The case originated in an application (no. 76918/01) 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 Verlagsgruppe News GmbH ("the applicant company"), on 23 October 2001.

2. The applicant company was represented by Lansky and partners, a company of lawyers practising in Vienna. 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.

3. The applicant company alleged that it had been violated in its rights under Article 10 of the Convention.

4. The application was allocated to the First 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. Mrs E. Steiner, the judge elected in respect of Austria, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr K. Herndl to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. By a decision of 8 September 2005, the Court declared the application admissible.

6. The applicant company, but not the Government, filed further written observations (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant company is the owner and publisher of the weekly magazine News and has its registered seat in Vienna.

A. Background of the case

8. In June 2000 the Vienna City Counsel for Cultural Affairs (*Kulturstadtrat*), Mr Marboe, authorised the performance of Mr Schlingensief's "Container Action" during the Vienna International Festival (*Wiener Festwochen*). The staging took place in a container where actors figured as asylum seekers in Austria who were successively voted out for expulsion by the public. This container action met severe criticism by the public, *inter alia*, by members of the Austrian Freedom Party (FPÖ).

9. On 30 June 2000 the newspaper *Kurier* published an open letter to Mr Marboe written by the Austrian artist André Heller, in which he thanked and congratulated Mr Marboe for having allowed Mr Schlingensief's performance. One passage of the open letter read as follows:

> "... It is not to be expected that the Haiders, Böhmdorfers, Westenthalers, Riess-Passers, Mölzers, and whatever else these spiritually depraved political upstarts and their various beer-tent entertainers may be called, will have the slightest awareness of how embarrassing, dastardly and frequently absurd they are. ...
>
> *(German)*
>
> *... Man kann von den Haiders, Böhmdorfers, Westenthalers, Riess-Passers, Mölzers und wie diese seelenhygienisch heruntergekommenen Politemporkömmlinge und ihre sonstigen Bierzeltanimateure heißen mögen, nicht die geringste Einsicht in ihre eigene Peinlichkeit, Niedertracht und häufige Absurdität verlangen. ...*"

10. Subsequently the FPÖ politicians quoted in this letter, except for Mr Mölzer, filed private prosecution proceedings for defamation against Mr Heller, which they withdrew later on.

11. On 7 September 2000 the applicant company published the following article on page 46 of its issue no. 36/00:

> **"Lawsuit against André Heller**
>
> *FPÖ grandees sue critical artist André Heller. They are not 'spiritually depraved', they maintain.*
>
> Böhmdorfer is suing Heller. He is not alone, though: Jörg Haider, Peter Westenthaler and Susanne Riess-Passer have all launched a powerful attack on André Heller with the assistance of the law firm Böhmdorfer-Gheneff Rechtsanwälte KEG.

The reason is that the artist André Heller, a critic of the Government, wrote an 'open letter' in the *Kurier* lavishing praise on the Vienna city councillor for cultural affairs, Peter Marboe (ÖVP). Shortly before this, however, Peter Marboe had allowed Schlingensief's provocative container to be installed outside the Vienna State Opera House as a spectacle for the International Festival – despite bitter opposition from the *Kronen Zeitung*, a furious Vienna FPÖ and the Minister of Justice, Dieter Böhmdorfer, who threatened prosecution.

André Heller wrote in the *Kurier* at the time: '*It is not to be expected that the Haiders, Böhmdorfers, Westenthalers, Riess-Passers, Mölzers, and whatever else these spiritually depraved political upstarts and their various beer-tent entertainers may be called, will have the slightest awareness of how embarrassing, dastardly and frequently absurd they are*' (end of quotation). Böhmdorfer & Co. will not stand for this humiliation. They have instructed Böhmdorfer-Gheneff KEG, with which the Minister of Justice severed ties in March, to file a peppery lawsuit against Mr Heller.

'Dastardly'. In the private lawsuit it was stated that the allegations made in Mr Heller's letter were '*untrue*' and that the '*unsubstantiated accusation*' that Böhmdorfer & Co. were "*dastardly*" amounted to '*what would appear to be an absolutely classic case of defamation within the meaning of the Criminal Code'*. The same applied to the expression '*spiritually depraved political upstarts*'.

Huberta Gheneff-Fürst, now the sole partner of the law firm to which the current Minister of Justice Mr Böhmdorfer still belonged six months ago, has called for André Heller to be given '*punishment commensurate with his guilt'* as the person responsible for the deceitful smear.

Last stop Maurer. As has happened in a number of similar cases, André Heller could be acquitted of defamation at first instance, since an artist really should have the right to express strong criticism. But at final instance Judge Ernest Maurer, known to be FPÖ-friendly, could come into the frame. Ernest Maurer was appointed to the Austrian Broadcasting Corporation's board of governors by the FPÖ, and that creates at least an appearance of bias.

Suspicion. Even the President of the Judges' Association, Barbara Helige, is somewhat astonished at Ms Gheneff-Fürst, especially as the lawyer persists in retaining 'Böhmdorfer' in the law firm's name: 'If a former partner of the current Minister of Justice is stressing how important it is for Böhmdorfer's name to appear on the law firm's notepaper, the uninformed observer will suspect there is something political behind it.'

Indeed."

Above the article a photo showing Mr Westenthaler standing between Mr Haider and Mr Böhmdorfer was published.

B. Proceedings for forfeiture

12. Mr Westenthaler, one of the FPÖ politicians concerned, filed a request for forfeiture of the applicant company's issue no. 36/00 of 7 September 2000.

13. On 9 October 2000 the St. Pölten Regional Court (*Landesgericht*), after having held a hearing, granted this request pursuant to section 33 § 2 of the Media Act and ordered the applicant company to pay the costs of the proceedings.

14. The court noted in its reasoning that the quoted passage consisted of value statements which insulted the plaintiff within the meaning of Article 115 of the Criminal Code (*Strafgesetzbuch*). The fact that the article merely quoted the impugned statements and had reported in a neutral manner about the criticism at issue was irrelevant for the proceedings under section 33 of the Media Act. In the light of Article 10 of the Convention, the court nevertheless expressed doubts as to the constitutionality of section 33 of the Media Act as it did not provide for protection of a correct quotation of an incriminated passage at stake in pending defamation proceedings. Thus, in the court's view, comprehensive reporting and criticism about pending defamation proceedings would be rendered practically impossible.

15. The applicant company appealed, arguing that the forfeiture infringed its right to freedom of expression under Article 10 of the Convention.

16. On 4 April 2001 the Vienna Court of Appeal (*Oberlandesgericht*) upheld the Regional Court's decision in essence. The court first noted that the article showed by its appearance and structuring that it did not intend neutral reporting. The court referred in this regard to the repeated hints to Mr Böhmdorfer, the allusions to the political motivations and misuse of the law-suits and the passage concerning the outcome of the defamation proceedings before the Court of Appeal, which in particular expressed that an artist should have the right to sharp criticism. The court further noted that the passage at issue had to be assessed in the light of the article as a whole. In this regard, the court found that the reporting style used was typical for *News*, namely the use of special layout, highlighting certain words in bold or italics and adding pictures etc., which aimed at influencing the reader unconsciously. The first part of the article, including the passage at issue, might still be regarded as objective reporting when being assessed isolated. Furthermore, however, the subtitle of the subsequent passage, namely the word “dastardly” written in bold, caught the reader's eye and focused his mind in an unambiguous direction, incriminating the plaintiff. Even though the subsequent passage merely dealt with the contents of the law-suits, it conveyed to the reader that the plaintiff was in fact dastardly as some words were emphasised in italics and thereby attained independent significance. The court concluded that the article had not limited itself in objective citation. The first instance court had falsely classified the article as reporting on court proceedings as such reporting presumed the existence of court trials whereas in the present case there had only been a private prosecutors' action. When balancing the interests involved, i.e., the right to freedom of expression of the applicant company on the one hand, and the interest of the

plaintiff not to be defamed, on the other, the court found in favour of the latter. It noted that even accepting that there was a public interest in the subject matter at issue, the allegation against the plaintiff, namely that he had a dastardly character without having provided any factual basis for this assertion, defamed him within the meaning of Article 111 of the Criminal Code and was worthless information for public debate. Therefore, it exceeded the limits of lawful criticism under Article 10 of the Convention. Thus, the interference with the applicant company's right to freedom of expression, namely the forfeiture of the above issue, was necessary and also proportionate to the aim pursued. This all the more as forfeiture concerned in general only older issues with no relation to the present actuality and with merely historical interest.

17. Finally, the Court of Appeal did not share the Regional Court's concern as regards a possible unconstitutionality of section 33 of the Media Act. The court noted that, in any way, the criteria set up under Article 10 of the Convention had to be considered when assessing whether or not a statement concerned established an offence within the meaning of Article 111 of the Criminal Code.

18. This decision was served on the applicant company's lawyer on 26 April 2001.

II. RELEVANT DOMESTIC LAW

19. Article 111 of the Criminal Code (*Strafgesetzbuch*) provides:

> "1. Anyone who in such a way that it may be perceived by a third party 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...
>
> 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..."

20. Article 115 of the Criminal Code provides:

> "1. Anyone who, in public or in the presence of several others, insults, mocks, mistreats or threatens to mistreat a third person, shall be liable to imprisonment not exceeding three months or a fine ... unless he is liable to a more severe penalty under another provision..."

21. A specific sanction provided for by the Media Act is forfeiture (*Einziehung*) of the publication concerned (section 33). Forfeiture may be ordered in addition to any normal sanction under the Criminal Code (section 33 § 1).

22. Forfeiture can also be ordered in separate so-called "objective" proceedings for the suppression of a publication, as provided for under section 33 § 2 of the Media Act, by virtue of which:

> "Forfeiture shall be ordered in separate proceedings at the request of the public prosecutor or any other person entitled to bring claims if a publication in the media satisfies the objective definition of a criminal offence and if the prosecution of a particular person cannot be secured or if conviction of such person is impossible on grounds precluding punishment, has not been requested or such a request has been withdrawn..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

23. The applicant company complained under Article 10 of the Convention that the Austrian courts' decision ordering the forfeiture of its issue no. 36/00 of 7 September 2000 infringed its right to freedom of expression.

Article 10, 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."

A. The parties' submissions

24. The applicant company argued that the open letter of Mr Heller fell under the protection of Article 10 of the Convention. It was part of a debate in the media concerning cultural and educational policy which included fundamental political aspects, included true statements of fact and value-judgments based on a factual basis and addressed, *inter alia*, Mr Westenthaler as leading politician of the FPÖ party. Consequently, the quotation of parts of this letter also enjoyed the protection of Article 10. In addition, the applicant company did not make the objectionable statements itself but restricted itself to a careful quotation. As criminal proceedings

against Mr Heller were at that time pending, this information was of public interest. The structure and wording of the article at issue were neutral. Reporting about pending court proceedings could only be informative if also the subject of these proceedings was mentioned. The domestic courts had interpreted the article at issue and the applicant company's possibility of justifying the quotation of the impugned statements narrowly and in breach with Article 10 of the Convention. The mere fact that a statement had to be considered as an offence within the meaning of the relevant legislation did not imply that a report about such a statement amounted *ipso iure* to an offence against a person's honour. The wording of section 33 of the Media Act was not in conformity with the requirements of Article 10 of the Convention as it did not provide for protection of a correct quotation. The measure at issue constituted a punishment which nature remained unchanged irrespective of the severity of its consequences. It had suffered material damage from the order of forfeiture.

25. The Government argued that according to the "quotation case-law" of the Austrian courts, the publication of a statement which satisfies the definition of an offence may lead to sanctions against the medium concerned unless there is any objective reason, such as e.g. the protection by a basic right, justifying such statement. In the present case, having carefully weighed the freedom of expression against the protection of the reputation of others, the second instance court set out comprehensively the arguments in favour of the application of section 33 of the Media Act. It rightly considered that the statement "spiritually depraved" amounted to an offence and violated the concerned person's right to reputation. Referring to case-law of the Court of Appeal, the Government asserted that the correct quotation of an insult of one person by another person was protected by Article 10 of the Convention and did not justify forfeiture. In the present case, however, the applicant company had not reported about the pending defamation proceedings in a neutral way but had identified itself with the content of the quoted statements. The Government referred in this regard to the Court of Appeal's findings as regards the structure and style of the article and, furthermore, to the article's subtitle which wording between the lines in their opinion called the rejection of the reproach of being "spiritually depraved" into question. A victim's right would be almost completely void without an adequate protection against abuse of quotations, if a medium was free to publish and add to defamation by third persons. The applicant company had not been deprived of the possibility to inform the public about the fact that criminal proceedings against Mr Heller were pending. Finally, the forfeiture was principally a safeguarding measure containing elements of minor punishment. It appeared proportionate as most of the issues of the weekly magazine had, in any way, already been published. The applicant company had not sufficiently substantiated the alleged damage resulting from the forfeiture.

B. The Court's assessment

26. The Court recalls at the outset that its task is not to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention (see *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 49, ECHR 2004-X, with further references). In order to assess whether there has been a violation of Article 10 of the Convention, the Court will therefore examine the standpoint of reasoning adopted by the second instance court which ordered forfeiture as it found that the interests of Mr Westenthaler overweighed those of the applicant company in its right to freedom of expression.

27. The Court finds, and this was common ground between the parties, that there was an interference with the applicant company's right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. The interference at issue had its legal basis under section 33 of the Media Act and pursued the legitimate aim of protecting the reputation and rights of others.

28. The parties' arguments concentrated on the necessity of the interference. The Court refers to the general principles relating to the freedom of the press and the question of assessing the necessity of an interference with that freedom, as set out in the summary of its established case-law in the case of *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-I). In accordance with its case-law, the Court will examine whether the reasons adduced by the domestic courts were "relevant and sufficient" and whether the interference was proportionate to the legitimate aim pursued. In so doing the Court will have regard to the domestic courts' margin of appreciation.

29. In the present case, the article at issue included extracts of Mr Heller's letter calling several FPÖ politicians, among them Mr Westenthaler, "spiritually depraved political upstarts" who "have [not] the slightest awareness of how embarrassing, dastardly and frequently absurd they are". The domestic courts ordered the forfeiture as they considered that these statements amounted to insults and defamation. The second instance court, unlike the first instance court, further argued that the forfeiture was necessary because the article had adopted, at least in part, the content of the quotation.

30. The Court notes at the outset that the statements concerning *inter alia* Mr Westenthaler might certainly be considered as polemical. The Court finds, however, that it is of particular relevance in the present case that the article did not make the objectionable statements itself but assisted in their further dissemination by quoting them. At this time the impugned statements had in fact already been widely disseminated as another newspaper had published Mr Heller's open letter some months ago. The

applicant company quoted this letter in the context of its reportage about the then pending defamation proceedings against Mr Heller which, involving several FPÖ politicians on the one hand and a well-known artist criticising them publicly on the other hand, was certainly a subject of public interest. The Court further recalls that the press' duty to impart information and ideas on all matters of public interest extends to the reporting and commenting on court proceedings (see, *mutatis mutandis, News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 56, ECHR 2000-I, with further references). Not only do the media have the task of imparting such information and ideas: the public has a right to receive them. This is all the more so where, like in the present case, the persons involved i.e. well-known politicians, have laid themselves open to public scrutiny (see *mutatis mutandis Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 38, ECHR 2003-XI). The Court endorses the applicant company's and the first instance court's argument, that comprehensive reporting about the defamation proceedings at issue would have been considerably restricted without the possibility to inform the readers about the very subject of these proceedings .

31. In these circumstances, the Court cannot find that the reproduction of the impugned extracts of Mr Heller's letter was in itself a valid ground for the forfeiture at issue (see *mutatis mutandis Sunday Times v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, § 55). On the contrary, due to the fact that the publication of Mr Heller's statements contributed to the discussion of a subject of public interest and addressed well-known politicians, particularly strong reasons had to be put forward in order to explain any punishment of the applicant company for assisting in their dissemination (see *mutatis mutandis Thoma v. Luxembourg*, no. 38432/97, § 62, ECHR 2001-III, with further references).

32. The second instance court found that the article's report lacked neutrality and referred in this regard to the repeated hints to the Minister of Justice, Mr Böhmdorfer, whose former law-firm represented the plaintiffs in the defamation proceedings, the article's allusions to political motivations of the law-suits and its passage concerning the outcome of the defamation proceedings before the second instance court, which in particular, expressed that an artist should have the right to sharp criticism. It next noted that the quoted passage had to be assessed in the light of the article as a whole. While the first part of the article, including the passage at issue, might still be regarded as objective reporting when assessed isolated, the following paragraph, namely by its layout, suggested to the reader that Mr Westenthaler, as stated in the quoted passage, was in fact dastardly.

33. The Court cannot find that these are “particularly strong reasons” within the meaning of the above cited case-law. It is certainly true that the article at issue reflected a rather critical approach towards the defamation proceedings. This in itself cannot, however, justify the conclusion that the

article identified and adopted the content of the impugned statements of the quoted passage. In this regard the Court further recalls that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see *Thoma v. Luxembourg*, cited above, § 64). The Court finds that in the present case the article remained within the limits of acceptable comment on court proceedings.

34. Turning to the second instance court's remaining arguments, the Court notes that the paragraph following the quoted passage cited extracts of the law-suit's wording which challenged precisely the impugned passage. This paragraph was headed by one of the words subsequently cited, namely the word "dastardly" ("*niederträchtig*") published between quotation marks and printed in bold. The Court does not find that this form of presentation suggested any message beyond quoting the actual wording of Mr Heller's statement and the subsequent law-suit.

35. In any event, the Court points out that the quoted passage was clearly distinguishable from the remainder of the article as it was published between quotation marks, printed in italic letters and finished off with: "end of quotation" in brackets. No further comment on Mr Westenthaler's character was made in the article or its headings. In these circumstances, the Court cannot accept the argument that the article adopted Mr Heller's criticism as its own.

36. Thus, the domestic courts restricted the applicant company's freedom of expression while relying on reasons which cannot be regarded as "relevant" and "sufficient". They therefore went beyond what would have amounted to a "necessary" restriction on the applicant company's freedom of expression. The Government's argument as to the limited nature of the interference is therefore not decisive.

37. It follows that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant company did not submit any claim for damages. However, under the head of costs and expenses, it claimed reimbursement of Mr Westenthaler's domestic proceedings costs which it was ordered to pay. The note of fees accompanying this claim put these costs at 1,956.64 euros (EUR) including value-added tax (VAT).

40. The Government did not make any comment on this claim.

41. The Court finds that this claim should be considered under the head of pecuniary damage. Having regard to the direct link between the applicant company's claim and the violation of Article 10 found by the Court, it awards the applicant company the full amount of EUR 1,956.64. This amount includes VAT.

B. Costs and expenses

42. The applicant claimed reimbursement of its costs of the domestic proceedings and the Strasbourg proceedings. These claims were substantiated in the amount of EUR 1,911.69 including VAT, as regards the domestic and EUR 7,010.60, including VAT, as regards the Court proceedings.

43. The Government contended that the applicant company's claim as regards the costs of the Strasbourg proceedings was excessive and that, according to the Austrian Autonomous Remuneration Guidelines for Lawyers, a maximum amount of EUR 1,832.04 should be granted.

44. As to the costs of the domestic proceedings, the Court finds that they were actually and necessarily incurred and also reasonable as to quantum. It therefore awards the full amount claimed, namely EUR 1,911.69. This amount includes VAT. The costs of the Convention proceedings were also necessarily incurred. Having regard to the sums awarded in comparable cases (see, for instance, *Öllinger v. Austria*, no. 58547/00, § 59, 29 June 2006) and making an assessment on an equitable basis, the Court awards EUR 3,500. This amount includes VAT.

45. Thus, the Court awards a total of EUR 5,411.69 including VAT under the head of costs and expenses.

C. Default interest

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

2. *Holds*
   (a) that the respondent State is to pay the applicant company, 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 1,956.64 (one thousand nine hundred fifty six euros and sixty four cents) in respect of pecuniary damage;
      (ii) EUR 5,411.69 (five thousand four hundred eleven euros and sixty nine cents) in respect of costs and expenses;
   (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;

3. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 14 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN Registrar	Christos ROZAKIS President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following concurring opinions are annexed to this judgment:

(a) Concurring opinion of Mr Jebens;
(b) Concurring opion of Mr Herndl.

CONCURRING OPINION OF JUDGE JEBENS

I agree with the majority that the forfeiture of the 7 September 2000 issue of the weekly magazine *News* was in violation of Article 10 of the Convention. However, I do not fully share the majority's reasoning on two points. I will discuss this in the following.

First, the only justifiable reason for finding a violation of Article 10 in this case is, in my opinion, the fact that the applicant company had quoted the statement previously expressed by Mr Heller, in its reportage about a pending defamation case against him. This is so, because it transpires from the Court's case law that the privileged position of newspapers is based on "the contribution of the press to discussion of matters of public interest" (*Jersild v. Denmark*, judgment of 23 September 1994, A 298, § 35). Therefore, if the objectionable statements in the article in the newspaper *Kurier* were not in themselves protected by Article 10, neither the fact that the magazine had not made them, but "assisted in their further dissemination by quoting them" nor the fact that the statements had "already been widely disseminated", as argued by the majority in para 30, is in my opinion relevant with regard to Article 10. By emphasizing these factual elements, the majority goes beyond what in my opinion is necessary in order to protect the role of the press.

Second, with regard to the critical approach in the *News'* coverage of the defamation proceedings, I would like to make another clarification as to my own view. I agree with the majority that "the article remained within the limits of acceptable comment on court proceedings", as argued in para 33. However, regard must in this respect be had to the nature of the statements. When evaluating the *News'* coverage of the defamation proceedings against Mr Heller, it is in my opinion relevant that the statements which were quoted in the article were negative value judgments, not false factual allegations. This is so, because it must be assumed that the newspaper's rather critical approach to the defamation proceedings did not create additional damage to the persons described, as opposite to the situation if the quoted statements had contained factual allegations. Distinguishing between different types of allegation in this respect is in my opinion fully consistent with the press' role of providing information, as described in the *Thoma v. Luxembourg* judgment, cited above, § 64.

CONCURRING OPINION OF JUDGE HERNDL

The purpose of this concurring opinion is to lay emphasis on two points.

1. In para. 30 of the judgment the Court stresses the fact that the incriminated article published in the weekly magazine NEWS on 7 September 2000 "did not make the objectionable statements itself but assisted in their further dissemination by quoting them."

At the time No. 36/2000 of NEWS was issued, the impugned statements had already been widely disseminated as another newspaper had printed Mr Heller's "open letter" several months earlier. Accordingly, and in line with the Court's established jurisprudence (see the leading case, i.e. *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 33 ss.; also the *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, p. 22: the incriminated relevant information had already become "public knowledge"), the reproduction of the impugned extracts of the "open letter" in the framework of an article published by NEWS cannot be regarded as a valid ground for the decisions of the Austrian courts as regards the forfeiture of issue no. 36/2000. There was indeed a violation of Article 10 of the Convention.

2. The content of Mr Heller's "open letter", however, and the choice of the incriminated words should not easily be qualified as a simple value judgment criticising as it does certain politicians. The phraseology used by the author was apparently and primarily meant to insult those persons, and as such – as a personal insult couched in demeaning words like "seelenhygienisch heruntergekommen" (spiritually depraved) and "niederträchtig" (dastardly) – should not enjoy the protection of Article 10 of the Convention. As judges Matscher and Thór Vilhjálmsson stated in their dissenting opinion in the Oberschlick (no. 2) case, "an insult can never be a value judgment" (*Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p.1279). Furthermore, in the latter case the Court was careful in tying its opinion on the proportionality (or rather the disproportionality) of the reaction to the insulting word "Trottel" (idiot) to the indignation knowingly aroused by the speech of a polititcian (loc. cit. para. 34). Would the Court have said the same if, as in the present case, the insulting words had been contained in an "open letter" congratulating the competent authority for having allowed the performance of somewhat spectacular actions which met with severe criticism by the public? (see para. 8 above).