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

FIRST SECTION

CASE OF STANDARD VERLAGS GMBH AND KRAWAGNA-PFEIFER v. AUSTRIA

(Application no. 19710/02)

JUDGMENT

STRASBOURG

2 November 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 Standard Verlags GmbH and Krawagna-Pfeifer 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 F. TULKENS,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 12 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 19710/02) 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 Standard Verlagsgesellschaft mbH, a limited liability company with its seat in Austria, and Ms Katharina Krawagna-Pfeifer, an Austrian national ("the applicants"), on 16 May 2002.

2. The applicants were represented by Ms M. Windhager, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Tauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. On 12 May 2005 the Court decided to communicate 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

I. THE CIRCUMSTANCES OF THE CASE

4. The first applicant is the owner of the daily newspaper "der Standard", the second applicant was at the material time the chief editor of its internal politics section.

5. In the issue of "der Standard" of 9 October 1998 the second applicant published an article about the Austrian Freedom Party (*Freiheitliche Partei Österreichs*, "the FPÖ") in its regular section "commentary". So far as material, it read as follows:

"Sacrifice of the decent

The FPÖ is becoming ever truer to itself and many people are developing an increasingly similar image of it. For any organisation, whether a movement, party or whatever, is moulded by those at the top – how they interact with one another, which people they choose, how they cope with crises. All of this rubs off and has its effects. In the case of the FPÖ leader Jörg Haider this means: people are useful idiots, you can entice them with fine words, appeal to their nobler principles and, indeed, use them as long as they are of service to your own interests.

Dealings within the FPÖ are correspondingly cunning. Haider has never even been soft towards his closest friends and backers and has dropped them as soon as they no longer fitted in with his plans. Friedrich Peter, Mario Ferrari-Brunnenfeld and Krimhild Trattnig are all examples. Others, such as Walter Meischberger or Gernot Rumpold, are allowed all kinds of liberties because they know too much. They have not been damaged either by convictions for tax evasion or by any other slip-ups.

The MP Hermann Mentil was not excluded from the FPÖ on that account and was not scorned by his former colleagues because proceedings had been instituted against him for fraud. That is of little consequence to Jörg Haider, especially as he would otherwise have to bar himself from the FPÖ. After all, Haider was convicted in criminal proceedings at first instance because he had ruined a person's good reputation and prospects for the future. A conviction, in any event, is of a different order from the institution of proceedings. Mentil was in fact dropped because in the Rosenstingl case Haider needs as many sacrificial victims as possible, to show to the public as and when required."

6. The article alluded to Mr Haider's conviction of 1 October 1998 by the Vienna Regional Criminal Court, which had found him guilty of attempted defamation of a university professor, D., in that he and his then lawyer Mr B., who had at the material time become Minister of Justice, had prepared a video-taped statement for the purpose of having it broadcast by the Austrian Broadcasting Corporation which contained defamatory statements about D. The broadcast had been refused, after a number of TV journalists and other staff of the Broadcasting Corporation had seen the video-tape.

7. This background was not mentioned in the above article but "der Standard" had reported on Mr Haider's conviction in its issue of 2 October 1998. It read as follows:

"*Criminal court convicts Haider*
Lawyer Böhmdorfer also convicted of defamation

The FPÖ federal party leader, Jörg Haider, and his lawyer, Dieter Böhmdorfer, were convicted of attempted defamation on Thursday and fined 167,400 schillings and 257,400 schillings respectively. The convictions relate to their ongoing six-year legal dispute with D. [full name], an Innsbruck-based expert in financial law, who was thwarted in his bid to become President of the Audit Office when Mr Haider

embroiled him in a motorway-building scandal. Mr Haider had repeatedly been asked to withdraw his allegations in the course of civil proceedings over the past few years. Since no such action was taken, he and his lawyer have now been convicted at first instance by a criminal court. Both have appealed.

In 1992 Mr Haider blocked Mr D.'s candidacy for the post of President of the Audit Office by accusing him of having been involved in a major scandal of the time concerning the building of the Pyhrn motorway. Mr D. lodged a complaint and obtained an order from the Supreme Court requiring Mr Haider to withdraw his accusations in a television broadcast. But according to Thursday's judgment, the videotape prepared for that purpose once again contained defamatory accusations. As the tape was not broadcast, however, the court ruled that the offence should be classified merely as attempted defamation."

8. Mr Haider brought two sets of proceedings against the applicants as regards the statement *"After all, Haider was convicted in criminal proceedings at first instance because he had ruined a person's good reputation and prospects for the future"* contained in the issue of "der Standard" of 9 October 1998.

A. Proceedings under the Media Act

9. On 14 October 1998 Mr Haider brought private prosecution proceedings for defamation under the Media Act (*Mediengesetz*).

10. On 23 November 1999 the applicants made submissions to the St. Pölten Regional Court (*Landesgericht*) drawing its attention to the Vienna Court of Appeal's judgment of 14 May 1999 in the preliminary injunction proceedings (see paragraphs 22-23), which had found that Mr Haider's interest in the protection of his reputation was outweighed by the public interest in receiving the information at issue.

11. On 24 March 2000 the St. Pölten Regional Court ordered the applicant company to pay compensation of 20,000 Austrian schillings (ATS) to Mr Haider and to publish the judgment.

12. Referring to Section 6 of the Media Act, the Regional Court found that the statement at issue fulfilled the elements of defamation (*üble Nachrede*) under Article 111 of the Criminal Code. Having regard to the judgment against Mr Haider of 1 October 1998, the applicant company had failed to prove the truth of its statement that Mr Haider had ruined D.'s good reputation and his prospects for the future. Although the distinction between an attempted and a completed offence was, as a general rule, not relevant for proving the truth of a statement concerning a person's conviction, the applicant had claimed that the defamation committed by Mr Haider had had the effect of ruining D.'s good reputation and his prospects for the future. However, as Mr Haider had only been convicted of attempted defamation, D. had not suffered any actual damage and the judgment did not establish any causal link between Mr Haider's offence and the alleged negative consequences for D.

13. The Regional Court acquitted the second applicant of the charge of defamation under Article 111 of the Criminal Code, finding that she had been present in court on 1 October 1998, when the judgment against Mr Haider had been read out and had gained the impression that he had ruined D.'s good reputation and future perspectives. Consequently, she had not acted with criminal intent.

14. The applicant company and Mr Haider appealed. The applicant company contested in particular the Regional Court's view that it had failed to establish the truth of its allegation. It argued that the distinction between a conviction for the completed offence and a conviction for the attempted offence was contrary to established case-law under the Media Act. Further, it complained that the Regional Court had failed to deal with its requests for the taking of evidence.

15. On 10 October 2001 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicant company's appeal. Upon Mr Haider's appeal, it convicted the second applicant of defamation und ordered her to pay a fine of ATS 15,000 (15 days' imprisonment in default) suspended on probation.

16. In the Court of Appeal's view the second applicant, being an experienced journalist must have known the impression which her statement made on the reader. She had claimed to have acted in good faith, however under Article 111 (3) of the Criminal Code, the defence of good faith was not available where the defamatory statement at issue had been published in the media. The court repeated that the truth of the impugned statement had not been established. The second applicant had inappropriately linked Mr Haiders's conviction with events relating to D.'s candidature for President of the Audit Office dating years back.

17. Finally, the appellate court noted that the Regional Court, without giving reasons, had dismissed the applicant's requests for taking of evidence, namely to hear professor D. and a number of staff members of the Austrian Broadcasting Corporation as witnesses in order to show that D.'s reputation had been ruined, as the latter had actually seen the video tape containing defamatory statements about him. The appellate Court found, firstly, that the requests at issue were irrelevant, as the article had not claimed that D.'s reputation and perspectives for the future had been ruined with regard to staff members of the Austrian Broadcasting Corporation. Secondly, it noted that the applicants had not repeated their request in due form after the hearing before the Regional Court had been postponed once.

18. The judgment was served on the applicants' counsel on 23 November 2001.

B. Proceedings under the Civil Code

19. On 22 January 1999 Mr Haider filed an action under 1330 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) and a request for a preliminary injunction.

20. On 6 March 1999 the St. Pölten Regional Court issued a preliminary injunction ordering the applicants to refrain from stating that Mr Haider had been convicted since he had ruined a person's good reputation and perspectives for the future.

21. The Regional Court had regard to the content of the article as a whole and considered that, against this background, the reference to Mr Haider's conviction was not aimed at informing about the judgment against him, but was used to criticise his character. The main thrust of the article was not a political criticism of the FPÖ and its leadership but an attack on Mr Haider with the aim of disparaging him. Thus, the court concluded that the boundaries of acceptable criticism had been transgressed.

22. On 14 May 1999 the Vienna Court of Appeal allowed the applicant's appeal and dismissed Mr Haider's request for a preliminary injunction.

23. Having regard to the judgment of 1 October 1998 against Mr Haider, the court found that the incriminated sentence contained a true statement of facts. The offence of defamation was defined as accusing another of behaviour such as to make him contemptible and lower him in public esteem. It could therefore be equated with ruining a person's good reputation and perspectives for the future, in particular in a case like the present one where D. had been a candidate for a public office. The dissemination of true statements of fact could only violate the interests of the person concerned if there was no prevailing public interest in receiving the information. However, information about the personal credibility of a politician, demonstrated by his conviction for defamation, was in the public interest, in particular in pre-election times when the general public gathered information about the different parties and their representatives.

24. On 29 September 1999 the Supreme Court rejected Mr Haider's extraordinary appeal on points of law, finding that it did not raise an important legal issue.

25. In the main proceedings the St. Pölten Regional Court gave judgment on 28 July 2002, ordering the applicants to refrain from the statement at issue, to withdraw it and to publish its judgment.

26. It observed that the notion of defamation in Article 1330 of the Civil Code had to be construed in the light of the criteria established by criminal law. The civil courts were not formally bound by a judgment of the criminal courts. However, it was the Supreme Court's established case-law that a person convicted of a criminal offence could not argue in any subsequent proceedings that he had not committed that offence. The Regional Court therefore considered itself bound by the Vienna Court of Appeal's final

judgment of 10 October 2001 in the proceedings under the Media Act (see paragraphs 15-17).

27. On 12 February 2003 the Vienna Court of Appeal dismissed the applicants' appeal.

28. It confirmed the first instance court's view as regards the binding effect of the applicants' conviction under Section 6 of the Media Act and added that the weighing of interests between the protection of Mr Haider's good reputation on the one hand and the public interest in receiving the information was inherent in the conviction and could not be assessed anew in the civil proceedings.

29. On 26 June 2003 the Supreme Court rejected the applicants' extraordinary appeal on points of law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. 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. In this context "defamation" has been defined in Article 111 of the Criminal Code (*Strafgesetzbuch*), as follows:

> "1. Anybody who, in such a way that it may be noticed by a third person, attributes to another a contemptible characteristic or sentiment or accuses him of behaviour contrary to honour or morality and such 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. In the case of the offence defined in paragraph 1 he shall also not be liable if circumstances are established which gave him sufficient reason to believe that the statement was true."

31. Section 1330 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides as follows:

> "1. Anybody who, due to defamation, suffered a damage or loss of profit, may claim for compensation.
>
> 2. The same applies if anyone is disseminating facts, which jeopardize another person's reputation, gain or livelihood, the untruth of which was known or must have been known to him. In this case there is also a right to claim a revocation and the publication thereof..."

32. It is the Supreme Court's constant case-law that a person who has been convicted in criminal proceedings cannot argue in subsequent civil proceedings that he has not committed the offence at issue (lead-case 1 Ob 612/95, 17 October 1995, SZ 68/195). The Supreme Court has also

held that a judgment under Section 6 of the Media Act has this binding effect in subsequent civil proceedings (6 Ob 105/97b, 16 October 1997).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicants complained that the courts' decisions in the proceedings under the Media Act and in the proceedings under the Civil Code violated their right to freedom of expression. They relied on Article 10 of the Convention, which 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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."

34. The Government contested that argument.

A. Admissibility

35. The Court notes that this complaint 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

1. The parties' submissions

36. The applicants' submissions concentrated on the necessity of the interference with their right to freedom of expression. They asserted in the first place that the article containing the incriminated statement contributed to a political debate concerning Mr Haider's style of leadership within the FPÖ and his way of treating opponents.

37. As to the criminal proceedings under the Media Act, the applicants contended that the courts had failed to see the impugned statement against its proper background, on which "der Standard" had reported shortly before, namely the years of litigation between D. and Mr Haider as a result of which the latter had been ordered to retract false accusations made against D. via television broadcast. Instead of doing so Mr Haider and his lawyer had prepared a statement for the purpose of broadcasting which again contained defamatory statements. Moreover, the applicants had duly stated that Mr Haider had been convicted at first instance which implied that the conviction was not yet final.

38. In addition, the applicants maintained that the courts had refused to take evidence, namely to hear a number of witnesses, without giving sufficient reasons. They asserted that they had duly repeated their request for the hearing of witnesses at the hearing of 24 March 2000 and complained about the refusal of the taking of evidence in their appeal on points of law. Since the appellate court dismissed the latter it also dismissed the implied request to hear the witnesses at the appeal stage.

39. With regard to the civil proceedings, the applicants relied in essence on the same arguments. In addition they submitted that the approach of the civil courts which considered themselves bound by the judgment given in the criminal proceedings under the Media Act was in itself in breach of Article 10. It curtailed their possibility to forward any grounds of justification and prohibited the civil courts from carrying out a weighing of interests which would normally be required in this kind of civil proceedings.

40. The Government also limited their submissions to the necessity of the interference at issue. They conceded that, in a case like the present one, concerned as it was with the press exercising its role as "public watchdog" and criticising a leading politician, the State's margin of appreciation was narrowly defined. However, the Austrian courts did not transgress their margin of appreciation in the present case.

41. In the proceedings under the Media Act the courts rightly considered the incriminated statement as an incorrect statement of fact. The applicants had failed to report that Mr Haider had only been convicted of attempted defamation. Instead they had conveyed the impression that he had actually ruined a person's reputation and prospects for the future. Moreover, the applicants had failed to make it clear that the conviction had not yet become final. In sum, the courts had correctly weighed the applicants' right to contribute to a political discussion against Mr Haider's interest in the protection of his reputation. Finally, the penalty imposed on the second applicant was also proportionate. It was a fine of about 1,000 euros (EUR) suspended on probation for a probationary period of one year.

42. As to the courts' refusal to hear certain witnesses, the Government asserted that the applicants had failed to request their hearing in due form. A global statement that all requests for the taking of evidence as submitted in

writing were maintained was not sufficient. Parties were required to make an oral request which specified the topic on which the witness was to be heard. Even if the applicants had complied with the procedural requirements, the courts had rightly refused the taking of evidence since it was not relevant for the proceedings at issue.

43. As to the proceedings under the Civil Code the Government confirmed that the civil courts were bound by a decision of the criminal court under the Media Act, in line with the general principle that a person who has been finally convicted cannot plead in subsequent civil proceedings that he had not committed the offence at issue. Thus, the same considerations as set out above also applied in respect of the civil proceedings. Again, the measures imposed were proportionate in that they prohibited only one particular statement without preventing the applicants from expressing their opinion in any other way.

2. The Court's assessment

44. The present case concerns two sets of proceedings brought by Mr Haider against the applicants in respect of the article published by "der Standard" on 9 October 1998. In the proceedings under the Media Act the first applicant was ordered to pay Mr Haider compensation and the second applicant was convicted of defamation and sentenced to a fine suspended on probation. In the civil proceedings the applicants were ordered to refrain from repeating the impugned statement, to retract it and to publish the judgment. It is undisputed that the courts' judgments in both sets of proceedings constituted an interference with the applicants' right to freedom of expression.

45. It is not in dispute either that the interference was "prescribed by law" and served a legitimate aim, namely the protection of the rights and reputation of others.

46. The parties' argument concentrated on the necessity of the interference. As regards the general principles relating to the freedom of the press in the context of political criticism and the question of assessing the necessity of an interference with that freedom, the Court refers to the summary of its established case-law in the cases of *Feldek v. Slovakia* (no. 29032/95, §§ 72-74, ECHR 2001-VIII, with further references) and *Scharsach and News Verlagsgesellschaft v. Austria* (no. 39394/98, § 30, ECHR 2003-XI).

47. 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. Moreover, the Court observes that the two sets of proceedings at issue are very closely linked since they related to the same set of facts and raised similar legal issues. It will therefore examine them together.

48. As it did in similar cases, the Court will take the following elements into account: the position of the applicants, the position of Mr Haider who brought the proceedings and the nature and subject matter of the article at issue (see, for instance, *Scharsach and News Verlagsgesellschaft*, cited above, § 31, and *Jerusalem v. Austria*, no. 26958/95, § 35, ECHR 2001-II).

49. The first applicant is the owner of one of the leading daily newspapers in Austria. The second applicant was at the material time its chief editor responsible for the internal politics section. In that connection the Court reiterates that the press, in order to play its vital role of "public watchdog" has the duty to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many other authorities, *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37).

50. Mr Haider is a well-known politician, who was at the material time the leader of the Austrian Freedom Party. According to the Court's well-established case-law the limits of acceptable criticism are wider as regards a politician than as regards a private individual (see, for instance, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42).

51. The article at issue was a political commentary which criticised Mr Haider's style of leadership, accusing him of letting party members down when he saw fit while continuing to support others despite their conviction by a criminal court. It was in that context that the impugned statement referring to Mr Haider's conviction by a first instance court was made.

52. The Austrian courts considered the statement at issue "After all, Haider was convicted in criminal proceedings at first instance because he had ruined a person's good reputation and prospects for the future" as a statement of fact. With the exception of the Vienna Court of Appeal in the preliminary injunction proceedings under the Civil Code (see above, paragraphs 22-23) they further considered that the truth of this statement had not been proven. They laid much emphasis on the fact that Mr Haider had only been convicted of attempted defamation and found that this fact did not allow to draw the conclusion that he had ruined a person's good reputation and perspectives for the future.

53. The Court is not convinced by the domestic courts' approach. It disregards the nature of the article as a political commentary and the connection with the previous article concerning Mr Haider's conviction which had been published by "der Standard" a week before.

54. In the Court's view the impugned phrase contained a statement of fact and a value judgment. The first part of the phrase, referred to Mr Haider's conviction, thus mentioning a factual element, while its second part contained a value judgment namely the journalist's assessment that Mr Haider had ruined a person's reputation and prospects for the future. It is

the Court's established case-law that, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see, for instance, *Feldek*, cited above, §§ 75-76; *Jerusalem,* cited above, § 43; *De Haes and Gijsels*, cited above, § 47; *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1276, § 33). As the Court has noted in previous cases, the difference lies in the degree of factual proof which has to be established (see *Scharsach and News Verlagsgesellschaft*, cited above, § 40).

55. It therefore remains to be examined whether the statement of fact was true and whether it provided – possibly in connection with the previous article published in "der Standard" – a sufficient factual basis for the value judgment. The fact of Mr Haider's conviction is uncontested. It is true that the article itself did not mention any details concerning Mr Haider's conviction. It simply referred to his conviction at first instance without mentioning the offence of which he was convicted. However, the Court has accepted that the necessity of a link between a value judgment and its supporting facts may vary from case to case according to the specific circumstances (see, *Feldek*, cited above, § 86). The necessity to provide the facts underlying a value judgment is less stringent where these facts are already known to the general public (ibid.).

56. In the present case, "der Standard" had reported a week before about Mr Haider's conviction of attempted defamation and had provided the background of this conviction. The article at issue had referred to years of litigation between Mr Haider and D. whose candidature for the post of President of the Audit Office had been hindered by Mr Haider by making false accusations against him. As a result of this litigation, Mr Haider had been ordered to retract his statements via television broadcast. The video-tape which he had prepared for the purpose of being broadcast had again contained defamatory statements. In these circumstances, the Court finds that there was a sufficient factual basis for the impugned statement. The Court considers that the public interest in receiving information on the personal credibility of a leading politician outweighed his interest in the protection of his reputation.

57. As regards the conviction of the second applicant in the proceedings under the Media Act, the Court notes that the Regional Court had acquitted her, finding that she had acted in good faith since she had been present in court when the judgment against Mr Haider had been read out and had gained the impression that he had ruined D.'s good reputation and perspectives for the future (see paragraph 13 above). In contrast, the Vienna Court of Appeal convicted her on the ground that, pursuant to Article 111 § 3 of the Criminal Code, the defence of good faith was not available in

cases like the present one, in which a defamatory statement had been published in the media. In this connection the Court reiterates its case-law, according to which the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, *Radio France and Others v. France*, no. 53984/00, § 37, ECHR 2004-II, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-II). In the present case, the second applicant had acted in good faith but was unable to plead that defence since it is excluded under Austrian law, where defamation is committed in the media.

58. Turning finally to the applicants' argument that the courts failed to take evidence proposed by them, the Court notes that the parties disagree as to whether or not the requests for the taking of evidence were made in due form. However, the Court is not required to examine this issue. It notes that the Vienna Court of Appeal in its judgment of 10 October 2001 did not dismiss the applicant's request on formal grounds but found that they were in any case irrelevant to the proceedings, since it followed from the text of the article at issue that the applicants had not accused Mr. Haider of having ruined D.'s reputation with regard to staff members of the Austrian Broadcasting Corporation. The Court agrees with this view. Having regard to the context in which the article was written Mr Haider was accused of having ruined D.'s reputation with regard to the general public in respect of his candidature for the post of President of the Audit Office.

59. In conclusion, the Court finds that the reasons adduced by the domestic courts were not "relevant and sufficient" to justify the interference. Moreover, the Court is not convinced by the Government's argument that the sanctions imposed on the applicants were proportionate. In particular, as regards the second applicant what matters is not that she was sentenced to a relatively modest fine suspended on probation but that she was convicted at all (see *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 36, ECHR 2000-X).

60. It follows that the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

61. There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

62. The applicants complained about the courts' refusal to hear a number of witnesses proposed by them. Article 6 § 1, so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

63. The Government referred to their argument made in connection with Article 10. They maintained that the applicants had failed to submit their requests for the taking of evidence in due form and that, in any case these requests were irrelevant to the proceedings. The applicants contested the Government's view.

64. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

65. Having regard to the finding relating to Article 10 of the Convention, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 6 (see, among other authorities, *Jerusalem*, cited above, § 51).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The first applicant claimed a total amount of 16,334.06 euros (EUR), inclusive of value-added tax (VAT), in respect of pecuniary damage. EUR 8,687.24 for damage resulting from the criminal proceedings under the Media Act (composed of EUR 1,579.32 for notification of the proceedings and publication of the judgment in "der Standard", EUR 1,453.46 for compensation paid to Mr Haider and EUR 5,654.46 for reimbursement of the latter's legal costs) and EUR 7,646.82 for damage resulting from the civil proceedings (for reimbursement of Mr Haider's legal costs).

68. The second applicant claimed EUR 7,000 in respect of non-pecuniary damage, namely distress suffered as a result of her conviction.

69. As regards pecuniary damage, the Government commented that the first applicant has included surcharges in respect of the notification of the proceedings and the publication of the judgment under the Media Act which it had failed to justify. As regards non-pecuniary damage claimed by the second applicant, the Government asserted that the finding of a violation would constitute sufficient just satisfaction.

70. The Court observes, in respect of pecuniary damage, that the documents submitted by the applicant do not allow verification of the correctness of the surcharges claimed in respect of the notification of the

proceedings and the publication of judgment. The Court, noting that the Government do not dispute the correctness of the other amounts claimed by the first applicant, awards a total amount of EUR 16,000, inclusive of VAT, under the head of pecuniary damage.

71. Turning to the second applicant's claim for non-pecuniary damage, the Court and making an assessment on an equitable basis awards her EUR 2,000 plus any tax that may be chargeable on that amount.

B. Costs and expenses

72. The first applicant also claimed EUR 19,723.52 inclusive of VAT for the costs and expenses incurred before the domestic courts (composed of EUR 7,595.85 for the proceedings under the Media Act and EUR 12,127.67 for the civil proceedings) plus EUR 7,821.30 inclusive of VAT for costs and expenses incurred in the proceedings before the Court.

73. The Government asserted in respect of both sets of domestic proceedings that the bill of fees submitted by the first applicant was not detailed enough to verify whether the fees had been calculated correctly. In any case, the total amount claimed was excessive. Finally, as to the costs of the Convention proceedings, the Government contended that the rate applied was incorrect and that, consequently, the amount claimed was excessive.

74. 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.

75. In the present case, regard being had to the information in its possession and the above criteria, the Court finds that the costs claimed by the first applicant in respect of the domestic proceedings are excessive, having particular regard to the costs awarded to Mr Haider in the two sets of proceedings at issue (see above). Making an assessment on an equitable basis, it therefore awards a total amount of EUR 12,000 for costs incurred in both sets of domestic proceedings.

76. As to the costs for the Convention proceedings, the Court, having regard to the sums awarded in comparable cases and taking into account that in the present case two sets of domestic proceedings were at stake, awards an amount of EUR 4,000.

77. In sum the Court awards the first applicant a total amount of EUR 16,000 inclusive of VAT in respect of costs and expenses.

C. Default interest

78. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

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

3. *Holds* by four votes to three that there is no need to examine separately the complaint under Article 6 of the Convention;

4. *Holds* unanimously
   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,
      (i) the first applicant EUR 16,000 (sixteen thousand euros) in respect of pecuniary damage;
      (ii) EUR 16,000 (sixteen thousand euros) in respect of costs and expenses;
      (iii) the second applicant EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, plus any tax that my be chargeable on that 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;

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

Done in English, and notified in writing on 2 November 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 opinions are annexed to this judgment:

(a) concurring opinion of Mr Jebens;

(b) dissenting opinion of Mr Rozakis, Mrs Tulkens and Mr Spielmann.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE JEBENS

I agree with the majority that the conclusions of the proceedings against the newspaper and its editor amounted to interferences with the right to freedom of expression that violated Article 10 of the Convention. However, I cannot join the majority's reasoning regarding the Article 10 issue. That reasoning is to a large extent based on a characterization of the impugned sentence as partly a value judgment, which is not susceptible of proof.

The article, "Sacrifice of the decent", which was published by the second applicant in the 9 October 1998 issue of "der Standard", critizes the culture within the FPÖ party, and especially its leader, Mr Jörg Haider. The latter is presented as a rather cynical person in his relations with party colleagues, by references to his behaviour and attitude towards them. I agree that these negative assertions of Mr Haider are value judgments.

The impugned sentence, however, does in my opinion not contain a value judgment, but a factual statement. By claiming that "(a)fter all, Haider was convicted in criminal proceedings at the first instance because he had ruined a person's good reputation and prospects of the future", the article brings concrete factual information. Reading the sentence in its context it transpires that the purpose with this is to convince the readers about the correctness of the negative characterizations elsewhere in the article. This classification of the impugned sentence covers in my opinion the whole of it, because it gives the impression that Mr Haider was convicted of actually having ruined another person's reputation and future. By interpreting the impugned sentence as a value judgment, and consequently not requiring proof of its veracity, the reputation of others would, in my opinion, not be sufficiently protected.

The above referred statement in the 9 October 1998 issue of "der Standard" was correct, insofar as Mr Haider had been convicted in defamation proceedings at the first instance. Mr Haider was, however, only convicted of attempted defamation. The allegation that he had been convicted of having ruined a person's good reputation and prospects of the future was therefore incorrect.

It is, however, not necessary for me to go further into the questions that thereby arise. The reason is that the difference between the allegation in "der Standard" and the actual conviction of Mr Haider was in my opinion small and must have been of little relevance for its impact on the reader of the article (see, *mutatis mutandis*, *Bergens Tidende and Others v. Norway*, no. 26132/95, §§ 54-56, ECHR 2000-IV). Because of this, I agree with the majority that the interference by the Austrian courts with the applicants' right to freedom of expression was not necessary in a democratic society, and thus in breach of Article 10.

The refusal by the national courts to admit evidence as to the truth of the allegation covers in my opinion the procedural aspect of the case. I therefore agree that there is no need to examine separately the complaint under Article 6.

PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, TULKENS AND SPIELMANN

While we agreed with the other members of the Court that in the circumstances of the case there has been a violation of Article 10 of the Convention, we are unable to follow them when they consider that the complaint of the applicants under Article 6 of the Convention is absorbed by the complaints under Article 10, and, therefore, there is no need to examine it separately.

We consider that although the applicants raised the issue of the refusal of the domestic courts to hear a number of witnesses both as an aspect of their complaint under Article 10, and, separately, as a complaint under Article 6, their reference to the refusal of the courts to hear witnesses with regard to their complaint concerning freedom of expression merely supported the main argument of the applicants that the domestic courts did not proceed to a proper assessment of the interests involved in the case, namely the interest of the applicants to express themselves freely vis-à-vis the interest of Mr Haider. It is this reading of that part of the complaint under Article 10, which led the Chamber to its decision not to take up the issue, and not to answer the applicants' assertion (see paragraph 50 of the judgment). Under Article 6, on the other hand, the applicants raised the same issue, but this time, from a purely procedural angle ; namely that they were not given the opportunity to produce evidence before a court of law, and to examine witnesses who, according to the applicants, were important for the proper establishment of the facts of the case.

For these reasons, we believe that the complaint under Article 6 had to be examined separately, as a distinct complaint which deserved an answer by the Court.