CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF STANDARD VERLAGS GMBH v. AUSTRIA

(Application no. 13071/03)

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 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. 13071/03) 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 Standard Verlagsgesellschaft mbH, a limited liability company with its seat in Austria ("the applicant"), on 4 April 2003.

2. The applicant was represented by Ms M. Windhager, a lawyer 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 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 applicant is the owner of the daily newspaper "der Standard".

5. In the issue of "der Standard" of 1 March 2000 the applicant published an article in the context of criminal proceedings on charges of large scale fraud and embezzlement against a former Member of Parliament of the Austrian Freedom Party (*Freiheitliche Partei Österreichs*, "the FPÖ"), Mr Peter Rosenstingl.

6. The article whose author, D.G., is a well-known court room reporter, reads as follows:

"*'I had more important things to do' –*

Ewald Stadler claims he was unaware of Rosenstingl's loan machinations

As expected, no Freedom Party (FPÖ) politicians offered their resignation yesterday in connection with the Rosenstingl trial. (On the contrary: the FPÖ's long-serving legal counsel has suddenly become Minister of Justice.)

There is no way back for the two in the dock, however. Peter Rosenstingl, the former FPÖ member of the National Assembly, is accused of having colluded in aggravating the collapse of the poultry firm belonging to his brother Herbert, known as 'Chicken'. The public prosecutor has assessed the damage at 240 million schillings. Eleven people in all are said to have played a part in the chicken debacle. One of them may have been the former leader of the Lower Austrian branch of the FPÖ, Bernhard Gratzer.

He knew little about it

One member of Jörg Haider's former chicken coop (if this casual expression is permitted) who is still in office took his turn in the witness box yesterday: Ewald Stadler, now a member of the Lower Austrian regional government but at the time the leader of the FPÖ's parliamentary group. In that capacity he is alleged to have known even before November 1997 that loans and guarantees from the Circle of Liberal Entrepreneurs (RFW) nourished Rosenstingl's chickens, fed his suppliers and enticed his creditors. In any event, Peter Rosenstingl claims to have 'handed over all documents' to Stadler. But Stadler has no recollection of this. 'As parliamentary group leader I had more important things to do than worry about lists of that kind', he retorts. In short, the loan machinations apparently passed from him, like a cup, almost without trace.

Stadler claims that he heard about only one loan, in which Rosenstingl had agreed to borrow 3.5 million schillings from RFW funds. Stadler asked for an explanation. Rosenstingl duly 'served up a cock-and-bull story' and referred to an investment on favourable terms and with a better rate of interest in his tax consultancy firm, Omikron.

He is alleged to have reiterated that version of events in mid-November 1997 at a meeting of the Lower Austrian party executive, in the presence of the federal party leaders. And it was believed. Stadler himself was doubtful and made an early exit.

'Whether the federal party was informed or not is a matter on which everyone may now form his or her own view', the judge summed up exclusively for all the journalists in the courtroom. 'However, it will not settle the criminal proceedings.' Irrespective of this, the fraud trial will drag on further today with witness statements."

7. The article was accompanied by a photograph of Mr Stadler and the following text:

"The former leader of the FPÖ's parliamentary group, Ewald Stadler, gives evidence defending the party's ignorance of the co-financing of the Rosenstingl collapse".

8. The criminal proceedings against Mr Rosenstingl received extensive media coverage. Mr Rosenstingl and a number of co-accused were eventually convicted of large scale fraud and embezzlement by the Vienna Regional Criminal Court. Its judgment was confirmed by the Supreme Court on 25 September 2001.

A. Proceedings under the Media Act

9. On 17 August 2000 Mr Stadler brought private prosecution proceedings for defamation under the Media Act (*Mediengesetz*) as regards the statement:

> "He [Mr Stadler] is alleged to have known even before November 1997 that loans and guarantees from the Circle of Liberal Entrepreneurs (RFW) nourished Rosenstingl's chickens, fed his suppliers and enticed his creditors. In any event, Peter Rosenstingl claims to have handed over all documents to Stadler."

10. On 29 May 2001 the St. Pölten Regional Court (*Landesgericht*) held a hearing. Mr Rosenstingl, who had been called as a witness, had refused to give evidence on the ground that he risked incriminating himself. According to the minutes, the applicant contested that Mr Rosenstingl was entitled to refuse giving evidence and requested the court to impose a fine on him. The Court dismissed the request for the taking of evidence, finding that it was irrelevant and that the case was ready for decision. It did not give any detailed reasons.

11. At the close of the hearing, the court gave judgment ordering the applicant to pay compensation of 15,000 Austrian schillings (ATS, that is about 1,090 euros (EUR)) to Mr Stadler and to publish the judgment.

12. In the Regional Court's view, the incriminated passage meant that Mr Stadler already new of Mr Rosenstingl's fraudulent transactions before November 1997. However, having regard to the evidence adduced in the criminal proceedings against Mr Rosenstingl, the court found that there was no indication that Mr Stadler knew before November 1997 that loans or guarantees of the Ring of Liberal Entrepreneurs had been transferred to Rosenstingl's firm. It followed from the minutes of the trial against Rosenstingl, that the latter had not claimed to have given all relevant documents to Mr Stadler, but had only stated to have met another FPÖ politician in Stadler's office and to have given documents to that politician.

13. 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 as it insinuated that Mr Stadler had remained inactive despite being aware of fraudulent transactions. Thus, it accused him of behaviour likely to lower him in public esteem. Although the incriminated passage purportedly cited statements of third persons, the applicant company remained responsible since it had failed to present these quotes neutrally without identifying itself with their

content. The article's style and choice of wording did not fulfil the requirements of a neutral presentation. In any case, the quote was not correct as Mr Rosenstingl had not claimed to have given Mr Stadler all relevant documents nor had it been shown that the latter knew otherwise about the transactions. The applicant had, thus, failed to prove the truth of the impugned statement.

14. On 18 September 2002 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal.

15. It noted the applicant's argument that the article was of a satirical nature and that the reader, expecting a certain degree of exaggeration, concluded in essence that Mr Stadler had known more than he admitted, or could have known more had he made the necessary investigations on the basis of the documents given to him.

16. The Court of Appeal conceded that D.G.'s court room reports differed from usual reports of this genre. His irony and sarcasm were well-known and appreciated by the reader. In the present case however, the issue was not whether the author had made use of some degree of exaggeration. He had simply reported facts which were not true, as no documents at all had been handed over to Mr Stadler. Furthermore, the court confirmed the Regional Court's view that the article had not quoted third persons' statements correctly and neutrally.

17. Finally, the Court of Appeal confirmed that the Regional Court had rightly granted Mr Rosenstingl a right to refuse to give evidence in accordance with the relevant provisions of the Code of Criminal Procedure. As the article at issue had reported on the criminal proceedings against Mr Rosenstingl, it was likely that he would, *inter alia*, have to give evidence as regards his fraudulent transactions. He therefore risked incriminating himself as regards the charges against him.

18. The decision was served on the applicant's counsel on 8 October 2002.

B. Proceedings under the Copyright Act and the Civil Code

19. On 14 October 2002 Mr Stadler filed an action under Section 78 of the Copyright Act (*Urheberrechtsgesetz*) and under Article 1330 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) requesting the applicant to refrain from publishing his picture accompanied by the incriminated text, to publish the judgment and to pay him EUR 2,000 as compensation for non-pecuniary damage. He also requested a preliminary injunction.

20. On 22 November 2002 the applicant and Mr Stadler appeared before the Vienna Commercial Court (*Handelsgericht*) and concluded a partial agreement. The applicant undertook to refrain from publishing Mr Stadler's picture accompanied by any text similar to the impugned statement, and to

publish the agreement. The court therefore limited the hearing to the issue of compensation.

21. On 3 December 2001 the Vienna Commercial Court ordered the applicant to reimburse Mr Stadler's costs as regards the part of his claim that was covered by the partial agreement, but dismissed the latter's claim for compensation.

22. The Commercial Court, referring to the Supreme Court's established case-law as regards the binding force of a conviction in subsequent civil proceedings (see relevant domestic law and practice, below), noted that the publication of Mr Stadler's picture accompanied by the impugned statement which fulfilled the objective elements of defamation, had violated his legitimate interests within the meaning of Section 78 of the Copyright Act. He was, therefore, in principle entitled to receive compensation if the non-pecuniary damage suffered went beyond the annoyance usually caused by the unlawful publication of a picture. However, he had failed to substantiate that he had suffered any such damage.

23. On 16 October 2003 the Vienna Court of Appeal dismissed Mr Stadler's appeal.

II. RELVANT DOMESTIC LAW AND PRACTICE

24. 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."

25. Section 78 of the Copyright Act, so far as material, provides:

> "1. Images of persons shall neither be exhibited publicly, nor disseminated in any other way in which they are made accessible to the public, where the legitimate interests of the person in question or, in the event that they have died without having authorised or ordered publication, of a close relative would be injured."

26. 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..."

27. 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

28. The applicant company complained that the courts' decisions in both sets of proceedings violated its right to freedom of expression as provided in 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...
>
> 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."

29. The Government contested that argument.

A. Admissibility

30. The Government argued that the applicant could not claim to be victim as regards the proceedings under the Civil Code and the Copyright Act in which it entered into a partial settlement with Mr Stadler (see paragraph 20 above). Although the Supreme Court's case-law concerning

the binding effect of penal-law decisions on civil-law courts may have been one of the reasons for entering into a settlement, the applicant company would have been free to argue that the publication of Mr Stadler's picture did not violate Section 78 of the Copyright Act. Since it chose to enter into a settlement it could not complain before the Court that its right to freedom of expression had been violated.

31. The applicant company argued that, in the light of the Supreme Court's case-law, it had no prospects of success in the civil proceedings following its conviction under the Media Act.

32. The Court reiterates that where an applicant concludes a settlement in the domestic proceedings and renounces further use of local remedies, he or she will generally no longer be able to claim to be a victim in respect of those matters (see *Hay v. the United Kingdom* (dec.), no. 41894/98, ECHR 2000-XI; *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; and *Nikishina v. Russia* (dec.), no. 45665/00, 12 September 2000).

33. In the proceedings under the Civil Code and the Copyright Act, the applicant concluded a partial settlement in which it undertook to refrain from publishing Mr Stadler's picture accompanied by any text similar to the impugned statement. By concluding that settlement, the applicant accepted the limitation of its right to freedom of expression and renounced to use available remedies in respect of the complaint now before the Court.

34. In these circumstances, the Court considers that as far as the civil proceedings are concerned the applicant cannot claim to be a victim within the meaning of Article 34 of the Convention. Insofar, its complaint has to be rejected as being incompatible *ratione personae*, pursuant to Article 35 §§ 3 and 4 of the Convention.

35. As far as the applicant's complaint relates to the proceedings under the Media Act, 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 applicant company limited its submissions to the necessity of the interference with its right to freedom of expression. It asserted that the article containing the incriminated statement contributed to a political debate concerning the possible involvement of leading representatives of the Freedom Party in the Rosenstingl case.

37. The applicant underlined in particular that the impugned statement had not accused Mr Stadler of having had positive knowledge of Rosenstingl's machinations, but had merely referred to the allegation of a

third party and quoted Rosenstingl as having claimed to have handed over all documents to Mr Stadler. Moreover, the applicant emphasised the satirical nature of the article which had recourse to a certain degree of humoristic exaggeration.

38. Finally, the applicant asserted that the Austrian courts wrongly accepted Mr Rosenstingl's refusal to give evidence. The minutes of the criminal proceedings against Rosenstingl were not conclusive and could not replace his questioning as a witness.

39. The Government's observations also concentrated on the necessity of the interference. They conceded that, in a case like the present one, concerned as it was with the press exercising its role as "public watchdog" by criticising a politician, the limits of acceptable criticism were wider than in respect of a private individual and the State's margin of appreciation was narrowly defined. However, the Austrian courts did not transgress their margin of appreciation in the present case.

40. Referring to the Court's case-law relating to the distinction between facts and value judgments, the Government asserted that the courts rightly considered the impugned statement as a statement of fact for which the applicant had failed to adduce proof. The fact that the article at issue used reported speech to make the allegation against Mr Stadler was not considered relevant as the applicant had failed to present the quotation in a neutral manner. The Government contested the applicant's explanation that the article was a satire and the impugned statement was not to be taken literally, arguing that the article was presented as a court room report placed in the corresponding section of "der Standard". In sum, the courts correctly weighed the applicant's right to contribute to a political discussion against Mr Stadler's interest in the protection of his reputation. Finally, the sum of compensation imposed under the Media Act was very modest, namely about 1,090 euros.

41. As to the taking of evidence in the proceedings under the Media Act, the Government argued that the court's decision to accept Mr Rosenstingl's refusal to give evidence in the proceedings under the Media Act on the ground that he might incriminate himself, was justified since the criminal proceedings against him had not been terminated by final judgment when he was called as a witness on 29 May 2001.

2. The Court's assessment

42. The present case, so far as it has been declared admissible, concerns proceedings under the Media Act brought by Mr. Stadler against the applicant in respect of an article published in "der Standard" on 1 March 2000. The applicant was ordered to pay Mr. Stadler compensation and to publish the judgment. It is undisputed that the courts' judgments in these proceedings constituted an interference with the applicant's right to freedom of expression.

43. 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.

44. The parties' argument concentrated on the necessity of the interference. As regards the general principles relating to 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, §§ 72-76, ECHR 2001-VIII, with further references) and *Scharsach and News Verlagsgesellschaft v. Austria* (no. 39394/98, § 30, ECHR 2003-XI).

45. 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.

46. As it did in similar cases, the Court will take the following elements into account: the position of the applicant, the position of Mr Stadler 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).

47. The applicant company is the owner of one of the leading daily newspapers in Austria. 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).

48. Mr Stadler is a well-known politician, who was at the material time the leader of the parliamentary group 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).

49. Turning to the nature and subject matter of the article, the Court notes that the article was not a court room report but rather a political satire. Its aim was not to inform readers on the conduct of the criminal proceedings against Mr Rosenstingl, but to raise and discuss the question whether Mr Stadler or other leading representatives of the Freedom Party knew or should have known of Rosenstingl's machinations with funds of the Circle of Liberal Entrepreneurs. By dealing with the interrelationship between a political party and an organisation close to that party on the one hand and the accused of a large-scale fraud case on the other, the article addressed a subject of general interest. It therefore concerned a sphere in which

restrictions on freedom of expression are to be strictly construed. Accordingly, the Court must exercise caution when the measures taken by the national authorities are such as to dissuade the press from taking part in the discussion of matters of public interest (see, for instance, *Thoma v. Luxembourg*, no. 38432/97, § 58, ECHR 2001-III, and *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 25-26, § 35).

50. The Austrian courts considered the impugned statement as a statement of fact for which the applicant had failed to adduce proof. They found that the article at issue had raised the allegations against Mr Stadler by quoting statements purportedly made by third persons without presenting these quotes in a neutral manner. As regards the statement purportedly made by Mr Rosenstingl to "have handed over all documents" to Mr Stadler the courts found that the quote was incorrect since it followed from the minutes of the Rosenstingl trial that he had merely claimed to have handed over certain documents to a third person in Mr Stadler's office.

51. The Court is not convinced by the domestic courts' approach. It disregards the nature of the article as a political satire and its main thrust which was to cast doubt on the Freedom Party's ignorance of Mr Rosenstingl's machinations.

52. As to the statement allegedly made by Mr Rosenstingl, the Court observes that the domestic courts accepted his refusal to give evidence on the ground that he risked incriminating himself in the criminal proceedings which were pending against him when he was called as a witness. The acceptance of his refusal to testify therefore served to protect his rights under Article 6 §§ 1 and 2 of the Convention. However, it appears problematic that the courts based their finding that the quotation was incorrect on the minutes of the trial against Mr. Rosenstingl. There is force in the applicant's argument that the minutes were not conclusive, since the question which documents he had handed over in Mr Stadler's office and whether he handed them over to Mr. Stadler himself or to a third person was not a central issue in the criminal proceedings.

53. The domestic courts criticised in particular that the article had failed to present the above quotes in a neutral manner. Looking at the contents of the article as a whole, the Court finds it reasonable to say that it adopted – at least in part – the contents of the quotations. However, journalists are not required systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation since such a duty would not be reconcilable with the press's role of providing information on current events, opinions and ideas (see, *Thoma*, cited above, § 64).

54. The Court observes that the article at issue gave room to Mr Stadler's version of the events, namely that he had only known of one loan from funds of the Circle of Liberal Entrepreneurs by November 1997, had requested an explanation and had been deceived by the "cock-and-bull"

story Mr Rosenstingl had come up with. Finally, the article raised questions and allegations but did not claim that any facts were actually proven. This is demonstrated by the wording of the impugned statement which says that Mr Stadler "is alleged to have known" about Rosenstingl's machinations. Moreover, the article's concluding paragraph – by quoting the presiding judge of the Rosenstingl trial – invites the reader to form his own opinion on the Freedom Party's involvement in the Rosenstingl case.

55. Having regard to all these elements, the Court considers that the impugned statement seen in its proper context constituted fair comment on matters of public interest. It is therefore to be regarded as a value judgment rather than as a statement of fact (see, for instance *Jerusalem*, cited above, § 44). Its essential content was to raise the question whether Mr Stadler knew or should have known of Rosenstingl's machinations. That value judgment was not excessive since it had a certain factual basis even in Mr Stadler's own admissions.

56. In conclusion, the Court finds that the reasons adduced by the domestic courts were not "relevant and sufficient" to justify the interference. It follows that the interference was not "necessary in a democratic society" with the meaning of Article 10 § 2 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

58. The applicant complained that the Court's wrongly accepted Mr Rosenstingl's refusal to give evidence. 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..."

59. The Government submitted the argument set out above under Article 10. The applicant contested the Government's view.

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

61. 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

62. 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

63. The applicant claimed a total amount of 35,089.08 euros (EUR) in respect of pecuniary damage. This sum is composed of EUR 1,520.64 for the publication of the judgment, EUR 1,090.09 for compensation paid to Mr Stadler and EUR 11,078.35, inclusive of value-added tax (VAT), for reimbursement of the latter's legal costs. Moreover, the sum contains an amount of EUR 21,400 which the Vienna Court of Appeal, by decision of 26 November 2003, ordered the applicant to pay for failure to publish the judgment given in the proceedings under the Media Act in correct form. The applicant did not claim any compensation for non-pecuniary damage.

64. The Government commented that the applicant had included surcharges in respect of the publication of the judgment which it had failed to justify. Moreover, the amount of EUR 21,400 imposed as a fine by in separate enforcement proceedings was not to be reimbursed since it had been caused by the applicant's failure to publish the judgment properly. Finally, they argued that the costs reimbursed to Mr Stadler were excessive and were not properly itemised.

65. The Court observes that the documents submitted by the applicant do not allow verification of the correctness of the surcharges claimed in respect of the publication of the judgment. Furthermore, it agrees with the Government's view that the fine of EUR 21,400 is not to be reimbursed and that the costs reimbursed to Mr Stadler are excessive. Making an assessment on an equitable basis, the Court awards the applicant EUR 8,000 inclusive of VAT, in respect of pecuniary damage.

B. Costs and expenses

66. The applicant also claimed EUR 6,861.32, inclusive of VAT, for the costs and expenses incurred before the domestic courts and EUR 5,361.75, inclusive of VAT, for those incurred before the Court.

67. The Government asserted that the bill of fees submitted by the applicant in respect of the domestic proceedings was not detailed enough to verify whether the fees had been calculated correctly. In any case, the total amount claimed was excessive. 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.

68. 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.

69. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award EUR 5,000 in respect of costs incurred in the domestic proceedings and EUR 3,000 in respect of costs incurred in the Convention proceedings.

70. In sum, the Court awards a total amount of EUR 8,000, inclusive of VAT, under the head of costs and expenses.

C. Default interest

71. 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* unanimously the complaint that the courts' decisions in the proceedings under the Media Act violated the applicant's right to freedom of expression admissible and the remainder of the application inadmissible;

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 the issue separately under Article 6 of the Convention;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of pecuniary damage and EUR 8,000 (eight thousand euros) 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;

5. *Dismisses* unanimously the remainder of the applicant's 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	Christos ROZAKIS
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Rozakis, Mrs Tulkens and Mr Spielmann is annexed to this judgment.

C.L.R.
S.N.

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 considered that the complaint of the applicant company under Article 6 of the Convention was absorbed by the complaint under Article 10, and, therefore, there was no need to examine it separately.

We consider that although the applicant company raised the issue of the refusal of the domestic courts to hear a witness, both as an aspect of its complaint under Article 10, and, separately, as a complaint under Article 6, its reference to the refusal of the courts to hear the witness with regard to its complaint concerning freedom of expression merely supported the main argument of the applicant that the domestic courts did not proceed to a proper assessment of the interests involved in the case, namely the interest of the applicant to a free expression of its opinions vis-à-vis the interest of its opponent, to whom the incriminated statement referred.

The Chamber dealt with the issue of the refusal of the witness to give evidence on the ground that he risked incriminating himself while considering the Article 10 issue (see paragraph 52 of the judgment). In our view the Chamber should have dealt with that issue separately, under Article 6 of the Convention, which was also raised by the applicant, since both the merits of the complaint and the answer given by the Court (paragraph 52) pertained more to a discussion under Article 6, rather than under Article 10.

For these reasons, we believe that the complaint under Article 6 had to be examined separately, as a distinct procedural issue of the case.