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Äußerungsfreiheit von Journalisten bei Publikationen zur möglichen Befangenheit eines Gerichts (Meinungsfreiheit und Beleidigungen von Richtern; faires Verfahren; Urteilsschelte; Abgrenzung von Tatsachen und Wertungen).

Art. 10 EMRK; Art. 6 EMRK; Art. 5 GG; Art. 103 Abs. 1 GG; Art. 2 Abs. 1, 20 Abs. 3 GG; § 185 StGB; § 186 StGB; § 193 StGB

Leitsätze des Bearbeiters

1. Obschon die Presse bestimmte Grenzen insbesondere zugunsten der Ehre und der Rechte anderer sowie der ordnungsgemäßen Rechtspflege nicht übertreten darf, liegt ihre Pflicht doch darin, Information und Ideen zu allen Fragen öffentlichen Interesses auf verantwortliche Art und Weise zu verbreiten. Ein verantwortliches Handeln setzt voraus, dass Journalisten in gutem Glauben handeln, auf der Grundlage einer korrekten Faktenbasis agieren und präzise Informationen in Übereinstimmung mit journalistischen Standards publizieren. Die Methoden der objektiven und ausgewogenen Berichterstattung können sich aber in erheblichem Umfang unterscheiden. Die Gerichte dürfen insoweit ihre Einschätzung nicht kurzerhand an die Stelle derjenigen der Presse setzen.

2. Auch die Freiheit, Richter und die Justiz zu kritisieren, fällt klar unter den Schutz des Art. 10 EMRK. Die besondere Bedeutung der Justiz für die Gesellschaft muss jedoch beachtet werden. Es kann erforderlich sein, die Gerichte gegen destruktive und im Wesentlichen unbegründete Angriffe der Presse zu schützen.

3. Einzelfall der legitimen Verurteilung eines Verlages zu einer zivilrechtlichen Entschädigungszahlung wegen der nicht hinreichend durch Tatsachen belegten Publikation des Vorwurfs gegenüber einem Richter, er habe ein skandalöses und mit Befangenheit zu erklärendes Urteil gefällt, indem er einen Täter vom Vorwurf der Vergewaltigung einer Asylsuchenden freigesprochen habe.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is the owner and publisher of the weekly newspaper Falter. 1

A. The background to the case

6. On 2 May 2005 the Wiener Neustadt Regional Court, sitting as a court with two professional and two lay judges (Schöffengericht) under Presiding Judge I.K., acquitted H.P., a security officer at the Traiskirchen Reception Centre, of a charge of raping K., an asylum seeker from Cameroon, basing its ruling on the principle of in dubio pro reo. 2

7. The reasoning of the judgment contained the following passage: 3

"Lastly, the statement made by witness K. during her examination [recorded on video tape in a separate room - kontradiktorische Einvernahme], to the effect that she had previously been engaged in prostitution in her country of origin, allows inferences to be drawn with regard to the statement by the accused [P.] that the witness might have become involved with him because she expected - for whatever reason - to gain some advantage."

B. The article published by the applicant company

8. In issue no. 19/05 of Falter, an article was published on page 14 concerning the criminal proceedings against P., which read as follows: 4

"'Sex with a nigger woman' 5

The courts: An asylum seeker lodges a criminal complaint alleging rape against a security officer. The case takes on a political dimension because it exposes conditions in the Traiskirchen centre. One year later only the victim is still before the courts. The chronicling of a judicial scandal. 6

F. K. 7

She thought she had made it to safety. Elaine B. (name changed, ed.) had been ill-treated by police officers in Cameroon, kicked by them in the abdomen and placed with 18 other women in 'stinking, damp cells' for having demonstrated on behalf of her son, abducted by the authorities. She had survived her escape on a container ship, during which she 'nearly went mad' because in mid-ocean she 'no longer knew whether it was night or day outside'. Finally, after a lorry journey lasting several days, she found herself in Vienna, where all at once, she was 'surrounded by white people'. She thought she was safe. Her case was so well documented that Austria, in the form of the normally very strict Federal Refugee Office, granted her asylum quickly and without red tape. 8

But then this country revealed its other side. Elaine B., 35, a well-groomed businesswoman and mother of three, holds on tight to her handbag during the interview and breaks down in tears repeatedly, says her life is a mess [and that] she can no longer trust the authorities here because they treat her like a liar and a prostitute. 9

Elaine B. caused a media stir last year when she became the first asylum seeker to lodge a complaint against a blind-drunk security officer who she claims abused his authority in the Traiskirchen centre in order to rape her. Now she faces trial for defamation. A few fellow Cameroonians, as well as the campaigning lawyer W.R. and his colleague R.H., are continuing to stand by her. 'Otherwise I would have killed myself', says Elaine. 10

It's difficult to know where to begin in this case. With the then Interior Minister E.S. who, while the proceedings were in progress, told the National Assembly that the woman's accusations were 'unfounded'? With the company European Homecare, engaged by him, which ostensibly ran the centre on a much smaller budget than Caritas, but in fact used sub-contractors employing drunken nightwatchmen who had to be dismissed for sexual assault? With centre director F.S., who later commented on the attacks in the washrooms of the women's quarters by telling the court: 'According to our information such incidents are very common and no one thinks anything of them'? Or with Judge I.K., who at the end of the drama would no longer 'refute' the suggestion that Elaine B. was just a 'prostitute' - although not even the accused security officer claimed that that was the case? 11

Spring 2004. With a thousand asylum seekers, Traiskirchen is hopelessly overcrowded. Another hundred arrive every day. The Interior Ministry is coming under political pressure and discredits Caritas. Security officers at the centre later state in court that female asylum seekers could be paid for quick sex. They also tell of pimps rolling up to the centre in their cars. The sexual exploitation seems to have been unbearable. In a series of articles for profil, a female journalist published an email and statements from several women complaining of sexual assaults by security staff. 'Please help us!' pleaded the women. The Interior Ministry stated at the time that the police were confronted with a 'wall of silence'. 12

At that time Elaine B. from Cameroon demanded an interview with the head of the Traiskirchen [branch of the] Gendarmerie. She placed a pair of torn red underpants on the interview room table and described 'through her tears' how a drunken security officer had pursued her for days, pointing to his uniform and threatening to have her thrown out of the centre and to slit her throat. One night he had crept into the room, switched on the light and told her to go with him. Elaine B., who had not yet been granted asylum and feared his authority, wrapped a towel around herself and followed the uniformed officer into the office, where there was a bed and a roll of kitchen towel. He had prepared the kitchen towel for 'ejaculating into', as he later admitted. 'At first I didn't realise what the man wanted. I thought I'd done something wrong. But there in that room I realised that he was going to rape me', stated Elaine B. She could smell the drink on his breath and didn't dare cry out. 13

The practising Christian from Cameroon is called upon to describe the incident many more times in the most intimate detail, without contradicting herself. She describes with precision how the man locked the door and removed the key. She tells of the pains in her lower abdomen afterwards and how she washed herself with warm water for weeks. She immediately identifies the security officer in a photo. The officials record in the minutes that Elaine B. appears disturbed. 14

'We were in no doubt that it happened as she described it. The woman was intimidated and seemed very anxious', recalls District Inspector W.S., who investigated the case, a year later in court. His statement, like that of the victim, is 15

disregarded.

Disturbing errors occur. For the first interview in the interview room no trained interpreter can be found; moreover, the traumatised woman is initially interviewed by a man. In their minutes the police officers at times refer to Elaine B. not by her name but as 'the nigger woman'. She is repeatedly linked to prostitution. 16

H.P., 48, is interviewed as the presumed perpetrator. When first questioned the trained bricklayer with the thick moustache states: 'I didn't have sex with the nigger woman.' The next time his recall is more accurate: 'It's possible that I had intercourse with the nigger woman. I'd had twelve and a half litres of beer and one and a half litres of herb lemonade mixed with red wine.' He claims it was entirely consensual. However, he doesn't recognise Elaine in a photo. Police officer: 'Could the woman have left the room if she'd wanted to?' Answer: 'No, only I had a key'. Again the question: 'Did you pay the nigger woman for sexual intercourse?' Answer: 'No way!' Third [interview] record: 'I'd noticed the nigger woman about a week before we had sex. I fancied her from the beginning. I went into her room and gestured to her to come out.' According to him, she followed him out of her own accord, undressed in front of him, took hold of his penis, inserted it and then got dressed again. Then she disappeared for good - without making any demands. 'Maybe she thought she'd be given asylum sooner' speculates the security officer. Something else occurs to him. He had offered to buy the woman a drink in the bakery a few days before. She had stroked his back and 'cosied up' to him. 17

Elaine B. denies this version of events. She says that she had other things on her mind at the time. She is not a whore. She felt repelled by this fat man with a moustache who smelled of alcohol, she was afraid of him. Also: if she had really been hoping to be granted asylum, why would she then have defamed the security officer? 18

Next to take the witness stand are the employees of the bakery. The first to be examined is saleswoman R.Z.: 'She gave him a kiss. She was fairly young, I'd say between 20 and 25. The two of them were talking quietly. I couldn't describe the woman.' When confronted with Elaine B. Z. says: 'I'm not quite sure whether it's her.' At the second confrontation a year later she suddenly says: 'Yes, that's her!' She has something else to get off her chest: 'I have to say that we're losing a lot of customers because of the black Africans. It's bad for business!' Likewise the second saleswoman. The first time she gives evidence: 'I'm not sure'. The second time: 'I'm 99 per cent certain.' 19

Elaine B. is 35 years old and speaks neither German nor English - only French. The quiet talk described could not have taken place. One detail, however, is never mentioned: at the time, the bakery was delivering tens of thousands of bread rolls to the reception centre. 20

The Wiener Neustadt Public Prosecutor's Office, which sees the Africans from Traiskirchen most often in connection with drug dealing, wants to discontinue the proceedings on the basis of the statements by the bakery employees. Elaine's lawyer, W.R., then brings a 'subsidiary private prosecution' (Subsidiaranklage) before the Court of Appeal. The victim can take over the role of the public prosecutor at his or her own risk. The unexpected happens: the Court of Appeal finds in the woman's favour and orders the Justice Ministry to prosecute the security officer. 'As the case file currently stands, both the factual element of the offence of rape and the element of coercion appear to be made out beyond doubt', states the judgment. According to the court, the bakery employees could not have identified Elaine. 21

The trial with judges and lay assessors before Wiener Neustadt Criminal Court does not last long. No evidence is taken either from other asylum seekers or from the female staff in the women's quarters. Judge I.K. acquits the security officer. Of course, if she has doubts as to the defendant's guilt, she has to do so. But this judge and her lay assessors are in no doubt as to the woman's guilt. They have unfinished business with the African woman and attribute the basest intentions to her - without furnishing any proof. The reasoning is diametrically opposed to that of the Court of Appeal: 'It cannot be established that the accused performed sexual intercourse against the will of Elaine B.' And what of the statements of the bakery employees, called into question by the Court of Appeal? 'Clear proof' that Elaine B. had also been lying about the sexual encounter. The fact that the bakery employees got her age wrong by ten to fifteen years? 'The difficulty of correctly estimating the age of persons with a different skin colour is known to the courts.' And the constantly changing replies of the security officer? 'He is a very simple man' and it therefore spoke in his favour 'that he himself admitted that intercourse with the witness was not easy to achieve.' The 'black African' on the other hand, appeared 'very confident', with the result that 'it is hard to imagine that she could have felt so intimidated by the accused, who appears somewhat unsure of himself, that she left her quarters against her will.' And what of the only piece of physical evidence, the torn red underpants? 'These have no evidentiary value' according to Judge K. Why not? Because the accused said that the underpants had been 'beige'. 22

Not another word from the detectives who had been faced with a crying, completely intimidated woman. No mention of the fact that the security officer himself admitted locking Elaine in [the room] and removing the key. Not a single line about the predicament in which female asylum seekers found themselves at the time. Complete understanding, on the 23

other hand, for the accused: 'The accused's objection that the woman may have hoped, since her asylum claim had not been decided, to obtain Austrian citizenship by marrying him, has not been completely refuted'. Even if this were true, why would she then lodge a complaint against him two weeks later?

The judgment fails to give rise to a scandal. 'Flirtation in Traiskirchen' runs the title in the Kurier. Then, what women's shelters have been complaining of for years happens: the woman becomes the presumed perpetrator. With the approval of Justice Minister K.M., the principal public prosecutor's office institutes preliminary proceedings for defamation. Elaine B. must appear before the investigating judge 'or be brought by force'. She could face up to five years in prison. 'That's just routine, nothing unusual' says a Justice Ministry spokesman. According to principal public prosecutor P.: 'After [the] acquittal we have no choice but to initiate proceedings.' 24

Justice Minister K.M. has promised to do more to protect the victims of crime. She should study this case. She is the highest-ranking public prosecutor. She has the right to give instructions. She bears the political responsibility if this woman, in addition to everything else, faces charges." 25

C. The compensation proceedings under the Media Act

9. Subsequently, Judge I.K. brought an action for defamation against the applicant company under section 6 of the Media Act and Article 111 of the Criminal Code, and requested that the applicant company be ordered to pay compensation and retract the following statements made in the article, which she claimed amounted to a statement that she had grossly misused her office as a judge: 26

"Judge I.K. alleges that the asylum seeker had immoral motives." 27

Judge I.K. alleges in the judgment - without giving any reasons - that the asylum seeker was driven by the basest motives. 28

"Judge I.K. acquits the security officer. Of course, if she has doubts as to the defendant's guilt, she has to do so. But this judge and her lay assessors are in no doubt as to the woman's guilt. They have unfinished business with the African woman and attribute the basest intentions to her - without furnishing any proof." 29

Judge I.K. had no doubt about the woman's guilt. 30

The judge ignored relevant evidence and delivered a scandalous judgment ("The judgment fails to give rise to a scandal.") 31

10. On 1 September 2005 the first hearing in the defamation proceedings was held. The applicant company argued that the impugned statements were true and sought to prove the truth of those statements by asking the court to call several witnesses and admit as evidence the files of the proceedings concerning K.'s asylum request and the criminal proceedings against H.P. It considered that by publishing the impugned statements it had merely expressed criticism, protected by the freedom of speech, which had not concerned the acquittal itself but rather the way in which the victim of the crime had been treated in the written version of the judgment, which had neglected important evidence and had accused the victim, K., of having been a prostitute. 32

11. In October 2005 the applicant company sought the disqualification of Judge N.F., the judge assigned to the media proceedings, for bias. It submitted that the lawyer representing the claimant, I.K., had also represented N.F. in the past in court proceedings. As Judge N.F. had to decide on a case in which her previous lawyer was acting as representative of one of the parties, there was reasonable doubt that she would not decide the case objectively. The president of the Vienna Regional Court dismissed the motion on 17 October 2005 and held that the issue raised by the applicant was not sufficient to give rise to doubt that Judge N.F. would not decide the case objectively. 33

12. On 17 October 2005 a further hearing was held in the defamation proceedings. The hearing was adjourned in order to hear three witnesses proposed by the applicant company. The Regional Court refused to hear other witnesses proposed by the applicant company, as it considered that those persons could not make any statements relevant to the proceedings. The applicant company had sought to call R., who had been K.'s lawyer in the criminal proceedings, in order to clarify the meaning of statements that K. had given during her examination as a witness which had been recorded on video in order to prevent her as the victim having to face the accused (kontradiktorische Einvernahme). This request was refused by the Regional Court on the grounds that the transcript of K.'s examination had been included in the case file and therefore no additional witness was required. 34

13. On 12 December 2005 the Regional Court held another hearing in the defamation proceedings in which it examined two of the witnesses proposed by the applicant company. The third witness proposed did not appear. On the same date the Regional Court found against the applicant company. It held that the impugned statements had constituted defamation under Article 111 of the Criminal Code and that I.K. was therefore entitled to compensation, which it set at 7,000 euros (EUR). It also ordered the applicant company to publish a summary of the judgment. 35

14. The Regional Court found that the contents of the article had given a biased account of the taking of evidence at the trial of H.P., taking the side of K. and characterising any statement of a witness which did not coincide with hers as lacking credibility. According to the article, the judge had acted arbitrarily and out of racist motives and had disregarded evidence produced, whereas the rape asserted by K. had been described as proven and the assessment of evidence by the Regional Court as absurd. Such an account was not an objective critique of the judgment. 36

15. As regards the criminal proceedings against H.P., the Regional Court observed that: (a) they had been discontinued by the Public Prosecutor; and (b) upon a subsequent decision by the Senior Public Prosecutor H.P. had been committed for trial (Versetzung in den Anklagestand). Following three hearings at which a total of seven witnesses had been heard, the tape recording of the questioning of the victim had been viewed in part by the court and a confrontation between two witnesses and K. had taken place, the court had acquitted the accused. 37

16. In its judgment of 2 May 2005 the court had found that it could not be excluded that the sexual intercourse which had taken place between K. and the accused had been consensual, in accordance with the version of events given by the accused and which had, to some extent, been corroborated by the statements of witnesses who had seen the accused and K. together in a coffee shop in town. K.'s assertion that she had been the victim of an assault had not been excluded but because it contradicted the statements of witnesses it had been considered to be partially implausible. The accused had not therefore been acquitted because his innocence had been proven but rather on the basis of the principle of in dubio pro reo. 38

17. The Regional Court also referred to one passage of the written judgment on which the article had put much emphasis, namely a reference to a statement by K. made in the course of her questioning as a witness to the effect that she had previously been engaged in prostitution in her country of origin, which the judgment stated had allowed inferences to be drawn with regard to the statement by the accused that the witness might have become involved with him because she expected - for whatever reason - to gain some advantage. 39

18. The Regional Court found that the applicant company had not succeeded in proving the truth of the impugned statements. From the case file concerning the proceedings against H.P. and, in particular, the written version of the judgment it appeared that Judge I.K. had dealt with all the evidence taken and had assessed each item of evidence extensively. Therefore, it could not be established that Judge I.K. had made base insinuations (üble Unterstellungen) or disregarded evidence. The judgment had clearly indicated the court's reluctance to accept the version of events given by K. also. In addition, the indication of K. having been a prostitute in the past had been based on a statement from the questioning of that witness and had not been made up out of thin air. The relevant part of the transcript in question read as follows: 40

<Original> 41

"Untersuchungsrichter: Es gibt einen Zeugen. Er sagt aus: "im Haus Nr. 8 gibt es Frauen die auf den Strich gehen." Wissen Sie was davon? 42

Zeugin: Keine Ahnung, ich nicht, nein. Seit meiner Heimat habe ich es nie gewagt." 43

<English translation> 44

"Investigating judge: There is one witness. He said: "at no. 8 there are women who walk the streets." Do you know anything about it? 45

Witness K.: No idea, not me, no. Since leaving my country I haven't dared it." 46

An error in the translation of that statement could not be excluded, but that did not allow the conclusion that there had been no basis in the file for the above finding of Judge I.K. 47

19. The accusation that a judge, who was under the duty to act objectively and impartially, had without any factual basis 48

and out of racist motives deliberately disregarded evidence in order to acquit an accused from the same country (inländischen Angeklagten) had to be qualified as defamation and there was hardly a more severe accusation which could be levied against a judge. The term scandal of justice was a value judgement, which, however, was based on assertions of fact which had been disproven in the proceedings.

20. Insofar as the applicant company had relied on Article 10 of the Convention, the Regional Court referred to the case of Prager and Oberschlick v. Austria (26 April 1995, Series A no. 313), and observed that the press had the right and the duty to impart information on matters of public interest, including questions concerning the functioning of the justice system, and to criticise any shortcomings found, but in doing so it had to be mindful of the special role of the judiciary in society. It was therefore necessary to protect public confidence in the judiciary against destructive attacks that were essentially unfounded. Taking these principles into account, the sharp critique of Judge I.K. in the impugned article, which had lacked any sufficient factual basis, had been excessive. 49

21. Taking the gravity of the attacks on the claimant's professional reputation, the broad public attention the article had received and the consequences it had had for the claimant, the Regional Court found that the amount of EUR 7,000 in compensation was appropriate. 50

22. The applicant company appealed on 8 March 2006 against the Regional Court's judgment. On 19 June 2006 the Court of Appeal dismissed the appeal and upheld the judgment. This judgment was served on the applicant's company lawyer on 29 June 2006. 51

52

II. RELEVANT DOMESTIC LAW

23. Section 6 of the Media Act (Mediengesetz), as in force at the time of the events, read as follows: 53

"6 (1) If the factual elements of the offence of defamation ... are established in a medium, the person affected shall be entitled to claim compensation from the owner of the medium for [any] damage sustained. ... 54

(2) No claim shall lie under (1), if: 55

... 56

(ii) in the case of defamation: 57

(a) the statements published are true; 58

..." 59

24. Article 111 of the Criminal Code (Strafgesetzbuch) reads as follows: 60

"1. Anyone who accuses another of having a contemptible character or attitude, or of behaving contrary to honour or morality, in such a way as to make the person concerned appear contemptible in the eyes of a third party or otherwise lower him in the public esteem, shall be liable to imprisonment not exceeding six months or to a fine ... 61

2. Anyone who commits this offence in a printed document, in a broadcast or otherwise in such a way as to make the defamatory statement accessible to a broad section of the public, shall be liable to imprisonment not exceeding one year or to a fine ... 62

3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true." 63

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicant company complained under Article 10 of the Convention that the judgment of the Regional Court of 12 December 2005, upheld by the Court of Appeal, had violated its right to freedom of expression. Article 10 reads as follows: 64

"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. 65

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." 66

26. The Government contested that argument. 67

A. Admissibility

27. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible. 68

B. Merits

28. The Court notes that it is common ground between the parties that the Vienna Regional Court's judgment of 12 December 2005, upheld by the Court of Appeal, which ordered the applicant company to pay compensation to I.K. on account of defamation, constituted an interference with the applicant company's right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. 69

29. An interference contravenes Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" for achieving such an aim or aims. 70

30. The Court considers, and this was acknowledged by the parties, that the interference was prescribed by law, namely by Article 111 of the Criminal Code and section 6 of the Media Act. Further, the Court sees no reason to doubt that the decision in issue was intended to protect the reputation of others, in this case Judge I.K., and to maintain the authority of the judiciary, which are legitimate aims for the purposes of Article 10 § 2. 71

31. The parties' arguments concentrated on the question of whether the interference was "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. 72

1. The parties' submissions

32. The applicant company maintained that the interference with its right to impart information had not been necessary in a democratic society. The article in question had constituted a contribution to an ongoing public debate on an issue of public concern, namely the conditions in accommodation facilities for asylum seekers such as the Traiskirchen Reception Centre and the treatment of asylum seekers therein. The article had concentrated on one particular facet of this discussion, namely the treatment of asylum seekers before the courts. It submitted further that the impugned statements had been value judgments which, as such, were not susceptible to being proved true. Therefore, the Regional Court should not have asked the applicant company to prove the truth of the impugned statements. However, in any event, there had been a sufficient factual basis for the statements made in the article. 73

33. Moreover, the impugned article had fully complied with journalistic ethics. It was true that the author had not attended the trial which had led to the judgment that had been criticised in the article, but he had carefully studied the written version of the judgment and the case file. On that basis, he had concluded that the judgment had contained numerous faults and inconsistencies. It had also not been necessary to give Judge I.K. an opportunity to respond because it was highly improbable that a judge would comment on a case he or she had decided upon. The result of the journalist's investigation had been sufficient to conclude that Judge I.K. had not properly assessed the evidence before her. As regards the statement of K., which had been considered a basis for the finding that she had been a prostitute in her country of origin, it was grammatically incorrect and therefore meaningless. No such conclusion as had been made by Judge I.K. could have been validly based on what K. had said. In addition, the statements of the two witnesses from the coffee shop had been unclear and contradictory and ought not to have led to the conclusion that the statements of K. had been wrong or contradictory. Since there had been a sufficient factual basis for the statements contained in the published article, the article had constituted fair comment on the events reported on and the judgment of the Regional Court of 12 December 2005, upheld by the Court of Appeal, had breached the applicant company's rights under Article 10 of the Convention. 74

34. The Government, while acknowledging the essential role played by the press as a "public watchdog", asserted that in the present case the interference with the applicant company's freedom of expression had been necessary within the meaning of Article 10 § 2 of the Convention. Both the Regional Court and the Court of Appeal had not deprived the applicant company of its right to report on a matter of public interest, perform its public watchdog role or to critically comment on judicial decisions and to express that criticism in a sharp and pointed manner. However, there had to be a sufficient factual basis for the criticism voiced. The Regional Court had, after taking extensive evidence, arrived at the conclusion that there had been no factual basis whatsoever for the serious accusations raised in the article, which had been particularly disparaging and insulting as they had presented the conduct of Judge I.K. as coming close to abusing her official authority and thus committing a criminal offence. The criticism in the article had not only concerned Judge I.K., but had also been liable to affect the reputation of the Austrian judiciary as a whole in the eyes of the reader and to undermine the authority of the judiciary's decisions. 75

35. The Government submitted further that the applicant company had also failed to give the judge in question, or the court she belonged to, the opportunity to respond to the accusations. Proper journalistic conduct would have required the author to give the judge or the court concerned, the latter through its spokesperson who communicated regularly with the media, an opportunity to comment. This had been all the more necessary given that the author of the article had not attended the trial at which the judgment which he had so vehemently criticised had been issued, but had merely informed himself by studying the case file. When weighing the right to freedom of expression on the one hand against the protection of the reputation and impartiality of the judiciary on the other hand, the Austrian courts had in the present case explained, in a sufficient and relevant manner and following the case-law of the Court on this matter, why the protection of the reputation and independence of the judiciary had to be given precedence. 76

2. The Court's assessment

(a) General principles

36. According to the Court's well-established case-law, the test of necessity in a democratic society requires the Court to determine whether the interference complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see The Sunday Times v. the United Kingdom (no. 1), 26 April 1979, § 62, Series A no. 30). In assessing whether such a need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation (see Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 58, ECHR 1999-III). 77

37. An important factor for the Court's determination is the essential function of the press in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others or of the proper administration of justice, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest (see Bladet Tromsø and Stensaas, cited above, § 59, and as a recent authority, Flinkkilä and Others v. Finland, no. 25576/04, § 73, 6 April 2010). By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, 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 and on an accurate factual basis and provide reliable and precise information in accordance with journalistic ethics (see Fressoz and Roire v. France [GC], no. 29183/95, § 54, ECHR 1999-I and, as a recent authority, Eerikäinen and Others v. Finland, no. 3514/02, § 60, 10 February 2009). 78

38. Whilst it is true that the methods of objective and balanced reporting may vary considerably and that it is therefore not for this Court, nor for the national courts, to substitute its own views for those of the press as to what technique of reporting should be adopted (Jersild v. Denmark, 23 September 1994, § 31, Series A no. 298), editorial discretion is not unbounded. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (Observer and Guardian v. the United Kingdom, 26 November 1991, § 59, Series A no. 216; Thorgeir Thorgeirson v. Iceland, 25 June 1992, § 63, Series A no. 239; Bladet Tromsø and Stensaas v. Norway, cited above, § 62; and, more recently, Gutiérrez Suárez v. Spain, no. 16023/07, § 25, 1 June 2010). This undoubtedly includes questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them (Prager and Oberschlick v. Austria, 26 April 1995, § 34, Series A no. 313). The freedom to criticize judges and the judiciary clearly falls within the scope of Article 10. 79

39. Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a 80

fundamental value in a State subject to the rule of law, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see Prager and Oberschlick, cited above, § 34).

40. The assessment of these factors falls in the first place to the national authorities, who enjoy a certain margin of appreciation in determining the existence and extent of the necessity of an interference with the freedom of expression. That assessment is, however, subject to European supervision and the Court's task in exercising its supervisory function is to look at the interference complained of in the light of the case as a whole and to determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether the measure taken was proportionate to the legitimate aim pursued (see Koprivica v. Montenegro, no. 41158/09, § 62, 22 November 2011). 81

41. Lastly, a careful distinction needs also to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof (see Cumpana and Mazare v. Romania [GC], no. 33348/96, § 98, ECHR 2004-XI, and Kasabova v. Bulgaria, no. 22385/03, § 58 in limine, 19 April 2011). However, even 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 Jerusalem v. Austria, no. 26958/95, § 43, ECHR 2001-II). 82

(b) Application of these principles to the present case

42. In the present case, the applicant company published an article in issue no. 19/05 of its periodical Falter in which it commented on criminal proceedings against H.P., who had been accused of raping K., an asylum seeker from Cameroon, at the Traiskirchen Reception Centre but who had been acquitted of that charge. The author of the article commented extensively on the taking and assessment of evidence in the proceedings and criticised the acquittal of H.P. with harsh words. Thereupon, the judge in the criminal proceedings, I.K., brought an action for defamation against the applicant company on account of statements made in the impugned article accusing her of having ignored relevant evidence and having given a scandalous judgment and to the effect that the judge had unfinished business with the asylum seeker. The Regional Court, in its judgment of 14 December 2005, granted the action and ordered the applicant company to pay compensation in the amount of EUR 7,000, as well as to publish a summary of the judgment. 83

43. The Court considers that the issue concerned a matter of public interest and the applicant company must therefore be deemed to have been reporting on this issue. However, it also observes that the article not only contained criticism of the trial against H.P but also a harsh criticism of the presiding judge I.K. as having been biased. 84

44. Before the Court the applicant company argued that, contrary to the findings of the Regional Court, the impugned statements had not been statements of fact but rather value judgements, not susceptible to being proved to be true. The Court, which must not lose sight of the article's overall contents and its very essence (see Perna v. Italy [GC], no. 48898/99, § 47, ECHR 2003-V), agrees that the impugned statements must be considered as statements of fact. This had also been the applicant company's position in the domestic proceedings and it was the applicant company which had sought to have evidence admitted in order to prove the statements made in the article. The Regional Court, after having obtained part of the evidence requested by the applicant company, concluded that the applicant company had failed to furnish proof that the relevant statements were true. 85

45. The Court considers that the statements in question clearly contained the core message that not only Judge I.K. had failed to give sufficient weight to certain items of evidence and had given too high a weight to others but, moreover, had done so on purpose. The Court agrees with the domestic courts that such assertions were particularly serious and needed a very solid factual basis. From the material before it, the Court does not consider that the applicant company could have relied on such a factual basis. 86

46. Moreover, the Court considers that the interference with the applicant company's right to impart information was proportionate. The applicant company was not subject to a fine imposed in criminal proceedings but ordered to pay compensation for the injury caused to the person concerned by the article. The amount of compensation, EUR 7,000, even though substantial, appears reasonable taking into account the length of the article and its contents, which, as established by the Austrian courts, had been particularly disparaging and damaging to the reputation of I.K. 87

47. In sum, the Court finds that, by awarding compensation for defamation against the applicant company for the article in issue, the respondent State acted within its margin of appreciation and is satisfied that the judgments by the Regional Court and the Court of Appeal were supported by reasons that were relevant and sufficient and that the interference was proportionate to the legitimate aims pursed. 88

48. There has accordingly been no violation of Article 10 of the Convention. 89

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

49. The applicant company complained that Judge N.F., who had sat on the bench hearing the proceedings under the Media Act, had not been impartial because I.K.'s counsel had also represented Judge N.F. in previous media-related proceedings. The applicant company relied on Article 6 of the Convention which, insofar as relevant, reads as follows: 90

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law." 91

Admissibility

50. The Government submitted that in previous proceedings under the Media Act not related to the ones at issue, Judge N.F. had been represented as a claimant by the same lawyer who had represented I.K. in the proceedings which had given rise to the present application. This fact in itself had not rendered Judge N.F. biased, as merely representing a client as a lawyer would not lead to a close personal relationship, given that a lawyer's task was to represent parties, and the working relationship would end once the proceedings for of which representation had been sought ended. If the applicant company's argument were accepted, this would lead to the consequence that any lawyer who had once represented a judge as a party to proceedings was no longer permitted to act in any other proceedings before that judge. 92

51. The applicant company argued that the relationship between a client and his lawyer was one of trust which created a bond lasting longer than just the period of time that a lawyer actually represented his or her client and which might influence a judge in further proceedings in which that same lawyer appeared if the proceedings were of a similar kind as the ones in which the lawyer had represented the judge. For this reason Judge N.F. should have withdrawn from sitting in the case. 93

52. According to the Court's settled case-law, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had to the personal convictions and behaviour of a particular judge in a given case - the subjective approach - as well as to whether the tribunal afforded sufficient guarantees to exclude any legitimate doubt in this respect - the objective approach (see Švarc and Kavnik v. Slovenia, no. 75617/01, § 37, 8 February 2007 with further references). 94

53. Firstly, as to the subjective test, the tribunal must be subjectively free of personal prejudice or bias. In this respect, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, Padovani v. Italy, 26 February 1993, § 26, Series A no. 257-B, and Morel v. France, no. 34130/96, § 41, ECHR 2000-VI). 95

54. In the present case, in the absence of any evidence to the contrary, there is no reason to doubt Judge N.F.'s personal impartiality. 96

55. Secondly, under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality, since "justice must not only be done; it must also be seen to be done". In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see Morris v. the United Kingdom, no. 38784/97, § 58, ECHR 2002-I). Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, among many other authorities, Pescador Valero v. Spain, no. 62435/00, § 23, ECHR 2003-VII). 97

56. In the case of Micallef v. Malta the Court found that the close family ties between a judge and a lawyer for the opposing party (whose uncle he was) sufficed to objectively justify the applicant's fears that that judge lacked impartiality (see Micallef v. Malta [GC], no. 17056/06, § 102, 15 October 2009). 98

57. In the present case, however, the lawyer for I.K. had in the past represented Judge N.F. as a lawyer in proceedings under the Media Act to which she had been a party and it is, moreover, not in dispute that, at the time Judge N.F. had to hear the case involving the applicant company, that lawyer-client relationship had already ended. The applicant company has not provided any further information which would allow the Court to question Judge N.F.'s impartiality. In 99

these circumstances, the Court cannot find that the applicant company's fears as to Judge N.F.'s impartiality were objectively justified.

58. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. 100

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

59. Lastly, the applicant complained under Article 6 of the Convention that the proceedings concerning the claim for compensation had been unfair because the Regional Court had refused to hear witness R. 101

60. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that this part of the application does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. 102

61. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. 103

FOR THESE REASONS, THE COURT UNANIMOUSLY

1 . Declares the complaint that the Austrian court judgments ordering the applicant company to pay compensation infringed its right to impart information admissible and the remainder of the application inadmissible;

2. Holds that there has been no violation of Article 10 of the Convention;