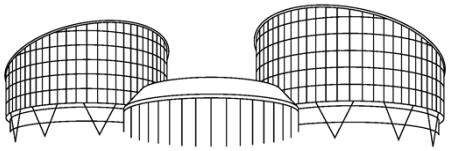

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MEDIENGRUPPE ÖSTERREICH GMBH v. AUSTRIA

(Application no. 37713/18)

JUDGMENT

Art 10 • Freedom of expression • Injunction prohibiting newspaper from publishing image with "convicted neo-Nazi" caption, 20 years after plaintiff's conviction, since expunged, given his loss of notoriety and no further criminal conduct • Legitimate and significant interest of convicted persons in no longer being confronted with their acts after their release, with a view to their reintegration in society • Supreme Court's balancing exercise of competing rights in conformity with Court's case-law criteria as established in *Österreichischer Rundfunk*

STRASBOURG

26 April 2022

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 Mediengruppe Österreich GmbH v. Austria,

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

Yonko Grozev, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*

and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 37713/18) 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 an Austrian limited liability company, Mediengruppe Österreich GmbH ("the applicant company"), on 10 July 2018;

the decision to give notice to the Austrian Government ("the Government") of the complaint concerning Article 10 of the Convention;

the parties' observations;

Having deliberated in private on 16 November 2021 and 8 March 2022,

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

INTRODUCTION

1. Within the context of reporting on the social circles of a presidential candidate during the 2016 run-off elections for the office of Federal President of Austria, the applicant company was ordered to refrain from publishing a photograph of the plaintiff in the event that he was called a convicted neo-Nazi in the accompanying text. His conviction and release from prison dated from many years before the publication of the photo (and accompanying article) in question. The conviction had meanwhile been deleted from his criminal record. The applicant company complained under Article 10 of a violation of its freedom to impart information.

THE FACTS

2. The applicant company has its seat in Vienna and was represented by Zöchbauer Frauenberger Rechtsanwälte, a law firm practising in Vienna.

3. The Government were represented by their Agent, Mr H. Tichy, Ambassador, Head of the International Law Department at the Federal Ministry for European and International Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant company is the media owner of the daily newspaper *Österreich*.

6. On 20 July 2016 *Österreich* reported on a meeting that took place in July 2016 between N.H., then a candidate for the office of Federal President of Austria, and the German daily newspaper *Bild*. The article stated that during that meeting N.H. had been confronted with a photograph from 1987 showing N.H.'s office manager (*Büroleiter*), R.S., together with the latter's brother, H.S., and G.K. at an event identified as being part of the "right-wing scene" (see paragraph 8 below). Statements made by N.H. in reaction to the political past of his office manager were reported.

7. The article in question appeared at a delicate point during the presidential elections in Austria. On 1 July 2016 the Constitutional Court had declared unconstitutional a run-off ballot between N.H., the candidate of the Freedom Party of Austria (*Freiheitliche Partei Österreich* or "FPÖ"), and A.V.d.B., an independent candidate supported by the Greens (*Die Grünen*), because of inconsistencies in the counting of the votes (see Constitutional Court judgment no. WI6/2016 of 1 July 2016). The difference in ballots cast for the two candidates amounted to only around 30,000 votes. A second (repeated) run-off ballot was planned for October 2016. Public interest in the two candidates and the election process was immense at the time.

8. The report printed in *Österreich*, which was illustrated by, *inter alia*, the above-mentioned photograph, read as follows:

> "Interview with *Bild*
>
> **Fuss about [N.]H. in Germany**
>
> **FP [Freedom Party] candidate's office manager [appears] in a photo with neo-Nazi [G.]K.**
>
> **Newspaper *Bild* caused an unpleasant situation for FPÖ candidate [N.]H.**
>
> **Berlin.** N.H., the candidate for Federal President designated by the Freedom Party, had intended to launch a charm offensive by means of [giving] several international interviews. The German newspaper *Bild* thwarted his plans, though.
>
> **[N.]H.'s staff member was present at the interview**
>
> Because after the talk, the *Bild* journalists showed a photograph to [N.]H. depicting convicted neo-Nazis G.K. and H.S. and the latter's brother, R.S. [H.S. and R.S.] carry batons (*Schlagstöcke*); [G.]K. gives the radical right-wing *Kühnen* salute [the "Nazi salute" with extended thumb, index and middle finger].
>
> The matter is piquant (*pikant*), because today R.S. works as the office manager of N.H. In this capacity, he was also present at the *Bild* interview, but initially the editors did not notice that at all.
>
> **[R.S.] was under 18 and does not have a criminal record**
>
> [N.]H. defends himself: 'Yes, this is [R.S.]. I know the photo. My staff member never did anything wrong. He has never been indicted or convicted. One should not ... R[.S.],

how long ago did that take place, 25, 30 years ago? ... use something like that against someone,' *Bild* quoted H. as saying.

Specifically, [the photograph] is of a meeting in 1987. R.S. was not yet eighteen years old. 'He does not have a criminal record, was never convicted or reported [to the police]', says a spokesperson of [N.]H. Rather, [R.]S. was perceived as a 'follower' (*Mitläufer*) of the right-wing scene of that time.

N.H. stands by his staff member. He does not only retain him as his office manager. If he is elected Federal President, he also wants to take [R.]S. with him to the Hofburg [the official residence and workplace of the Federal President of Austria] ..."

9. On 22 July 2016 H.S. brought proceedings under section 78 of the Copyright Act (see paragraph 19 below), requesting that the applicant company be prohibited from publishing pictures of him without his consent, in the event that any accompanying text stated that he was a convicted neo-Nazi and/or made statements of equivalent meaning. In addition, he lodged an application for the issuance of an interim injunction (*einstweilige Verfügung*) to that effect. Arguing that his conviction of twenty years earlier had long been expunged, he referred to Section 1 (2) of the Criminal Record Deletion Act (*Tilgungsgesetz*) (see paragraph 23 below) according to which all negative consequences that were connected to that conviction ceased to exist. He did not dispute that he had been convicted in 1995 under the National Socialist Prohibition Act (*Verbotsgesetz*, "the Prohibition Act"), but he had been released on parole in 1999. He argued that he had reintegrated in society, had founded a family and had taken a regular job. He stated that by spending several years in prison he had paid for his actions, which he had committed during a long-closed phase of his life. He had behaved well ever since, was no longer a public figure and was certainly not a person of interest within the context of the report. He did not even know N.H. Overall, he did not have to accept the statement that he was a convicted neo-Nazi.

10. In its submissions in reply (*Klagebeantwortung*), the applicant company argued that the criminal proceedings against H.S. had been subject to countless reports by domestic as well as international media in the 1990s. The impugned statement that he was a convicted neo-Nazi was undisputedly true. It furthermore submitted that the plaintiff was one of the most important (former) Austrian neo-Nazis and that the circumstances that had led to his conviction were of historical importance (*zeitgeschichtlich bedeutend*). Thus, the plaintiff was an "absolute person of contemporary history" (*absolute Person der Zeitgeschichte*). Furthermore, he had not ceased his respective political activities after his release from prison but was still active in the neo-Nazi scene. By way of proving that statement, the applicant company quoted a Wikipedia entry about H.S., as well as an article by the Documentation Archive of the Austrian Resistance (*Dokumentationsarchiv des Oesterreichischen Widerstandes*) according to which the plaintiff, H.S., had attended two public events with G.K**.** in 2009 – namely an event in Carinthia organised by the Freedom Party of Austria and an event in Leipzig

organized by *Die Freien Kräfte Leipzig*, where both H.S. and G.K. had allegedly given speeches on the Prohibition Act. There was a public interest in knowing about the political circles in which N.H., a presidential candidate, moved, and the impugned report had broached the issue of how the Freedom Party of Austria dealt with right-wing extremism. It was therefore covered by Article 10 of the Convention.

11. H.S. disputed the allegation that he had engaged in any activities in the neo-Nazi scene after his conviction. He argued that the event in Carinthia in 2009 had served the purpose of commemorating war veterans and had been attended by several members of different political parties. As regards the event in Leipzig in the same year, he denied that he had made the comments that had been mentioned in the articles quoted by the applicant company. He had only expressed his personal experiences, at an event organised by the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschland* or "NPD") – a recognised political party.

12. By a decision of 10 August 2016, the Vienna Commercial Court (*Handelsgericht Wien*) in provisional proceedings (*Provisorialverfahren*) dismissed H.S.'s application for the issuance of an interim injunction. The court essentially argued that the public interest in receiving information on N.H.'s circles including his staff members and the interest of the applicant company in publication outweighed the interest of H.S. in the observance of confidentiality. Moreover, the assertion made in the article in respect of H.S. – namely that he was a convicted neo-Nazi – was true.

13. By a decision of 28 September 2016, the Vienna Court of Appeal (*Oberlandesgericht Wien*) dismissed an appeal lodged by H.S., essentially endorsing the reasoning of the lower court.

14. However, following a further appeal by H.S., the Supreme Court (*Oberster Gerichtshof*), in a decision of 30 January 2017 (case no. 6 Ob 216/16g), prohibited the applicant company from "publishing pictures of [H.S.] without his consent, if at the same time he is called a convicted neo-Nazi in the accompanying report, and/or statements of equivalent meaning are made about him there", and gave the following reasoning:

> "The Supreme Court has already approved, in case no. 4 Ob 161/07s [see paragraph 20 below] in respect of another company (which is also a part of the defendant's media company), the prohibition of the publication of the plaintiff's [H.S.'s] image without his consent, if the accompanying text describes him as a neo-Nazi leader and does not state at the same time that he has already served his prison sentence and has behaved well since.
>
> In the case at hand, the defendant published an article in its periodical publication, *Österreich*, on 20 July 2016, in which the claimant [H.S.] is referred to as a 'convicted neo-Nazi'. A photograph accompanying this article shows the claimant next to the convicted G.K., among other persons. [This court cannot uphold] the lower-instance judgments holding that decision no. 4 Ob 161/07s had been complied with, despite the fact that the plaintiff was described [in the article] as a 'convicted neo-Nazi', but at the

> same time in the accompanying text it was stated that the neo-Nazi meeting depicted in the picture had taken place in 1987. The Supreme Court has clarified that any balancing of interests performed when assessing the legality of photojournalistic coverage concerning a convicted person after [his or her] release on parole must consider, among other things, the connection between the contents of the report [in question] and the [accompanying] picture, as well as the completeness and correctness of the accompanying text (decision no. 4 Ob 169/07t). The contents of the article impugned in this case, however, are not concerned with the claimant, but with his brother and with a candidate for the 2016 election of the Federal President; therefore, there was no objective justification at all for the reference to the previous 'conviction of the claimant as a neo-Nazi'."

15. Subsequently, in the main proceedings, the Vienna Commercial Court, by judgment of 21 April 2017, ordered the applicant company "to refrain, from now on, from publishing pictures of [H.S.] without his consent if at the same time he is called a convicted neo-Nazi in the [accompanying] report, and/or statements of equivalent meaning are made about him therein". At the same time, it dismissed the claim lodged by H.S. for 3,500 euros (EUR), plus interest and costs, by way of compensation for non-pecuniary damage and ordered the applicant company to reimburse H.S. for the costs of the proceedings.

16. In its reasoning, the court essentially noted, referring to the reasoning of the Supreme Court in the provisional proceedings (see paragraph 14 above), that "a balancing of the (clearly infringed) interests of the claimant against the public interest in the publication that gave rise to the [instant] proceedings ... apparently does not have to be carried out". The claim lodged by H.S. for compensation for non-pecuniary damage had to be dismissed, given the fact that a "particular injury – that is to say an injury exceeding the usual measure (*über das übliche Maß hinausgehende Kränkung*) – ... [could not] have occurred for the very reason that the facts in question are indisputably true".

17. The Vienna Court of Appeal did not grant the related appeal lodged by the applicant company, dismissing it by a judgment of 8 September 2017. It essentially stated that, according to the legal view held by the Supreme Court, there had been no objective justification for the reference to the 'conviction of the claimant as a neo-Nazi' in the impugned article because the contents of the article had not concerned the claimant but his brother and a candidate in the 2016 election for the Federal President. Therefore, it was unnecessary to balance the individual interests of the claimant against the public interest in being informed about the political environment in which the office manager of the presidential candidate moved. It ordered the applicant company to reimburse H.S. for the costs of the proceedings.

18. By a decision of 21 December 2017 (case no. 6 Ob 222/17s), the Supreme Court rejected an extraordinary appeal on points of law lodged by the applicant company. It referred to its reasoning in the provisional proceedings (see paragraph 14 above) and added, citing the case of

Österreichischer Rundfunk v. Austria (no. 35841/02, 7 December 2006), that there was no temporal connection between the photograph taken in 1987, H.S.'s criminal conviction in 1995, and the applicant company calling him a "convicted neo-Nazi" in the impugned article of 2016.

RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

19. Section 78 of the Copyright Act (*Urheberrechtsgesetz*) prohibits any public exhibition and/or dissemination of images where the "legitimate interests" of the person in question would be violated. It reads as follows in its relevant parts:

> "Protection of one's image.
>
> Section 78 (1) Images of persons shall neither be exhibited publicly, nor disseminated in any other manner by 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.
>
> (2) ..."

20. In assessing whether legitimate interests are violated, not only the picture alone has to be considered, but also the accompanying text in its overall context (see Supreme Court cases no. 4 Ob 169/07t and no. 6 Ob 52/20w). In its decision of 2 October 2007 (case no. 4 Ob 161/07s – see paragraph 14 above) regarding a different article published by the applicant company that had contained a photograph of H.S. with the accompanying caption "neo-Nazi leader", the Supreme Court held that the picture as such was connected with events of contemporary historical significance. However, the publication of photographs that, together with the accompanying text, recalled crimes committed long ago by the person depicted, would generally disproportionately impair his or her advancement owing to the "pillorying effect" (*Prangerwirkung*) that would arise therefrom. According to the Supreme Court, this applied all the more if the person concerned (in the instant case, H.S. in 2007), had already served his or her prison sentence and had been socially reintegrated for years, and for those reasons had a legitimate interest in the public not being reminded of his or her past. The Supreme Court found that the lower courts had taken into account the public interest in the publication of the photograph, as they had not generally prohibited it. A legitimate interest in such publication could not, however, justify creating the (incorrect) impression that H.S., who had been fully rehabilitated and was not (any longer) in the public eye, was still active as a "neo-Nazi leader".

21. Starting with its judgment of 23 September 1997 (case no. 4 Ob 184/97) the Supreme Court has consistently held that section 78 of the Copyright Act has to be interpreted in the light of section 7a of the Media

Act (*Mediengesetz*). This provision specifies in which cases the publication of images of victims, suspects or offenders is to be permitted by giving details of the criteria for the balancing of interests to be performed. Accordingly, the Austrian courts have to assess, by way of a first step, whether there is a public interest in publication and which legitimate interests of the person concerned run counter to publication. Subsequently, the legitimate interests of the person concerned must be balanced against the public interest, if any, in the publication of that person's image. Publication is permitted only if the public interest in publication is the overriding interest. Such (overriding) public interest in publication may exist, for instance, on account of the person's position in society or of some other connection of that person with public life.

22. Section 7a (2) of the Media Act provides that the legitimate interests of the person concerned will in any event be harmed if the publication of an article or photograph "may disproportionately prejudice the advancement of the person concerned".

23. Sections 1 to 3 of the Criminal Record Deletion Act (*Tilgungsgesetz*) read as follows in their relevant parts:

> **"Expunging of [criminal] convictions**
>
> Section 1(1) Save for cases where it is excluded ..., judicial convictions will be expunged (*getilgt*) *ex lege* at the expiry of the [applicable] period.
>
> (2) With the expunging of a conviction, all negative consequences that are connected by law to that conviction cease to exist, unless they consist of the loss of special rights on the basis of election, award or appointment.
>
> (3) ...
>
> (4) If a conviction has been expunged [from the criminal record], the convicted person will henceforth be deemed to be judicially innocent (*unbescholten*), unless this is countered by another, as yet unexpunged conviction. He/she is not obliged to mention the expunged conviction.
>
> (5) An expunged conviction may neither be noted in criminal-record information (*Strafregisterauskunft*) or in criminal-record certificates (*Strafregisterbescheinigung*) or be made evident in them in any way. ...
>
> (6) ...
>
> **Start of the period of expungement (*Tilgungsfrist*)**
>
> Section 2(1) The period of expungement shall start as soon as all prison sentences or financial penalties (*Freiheits- oder Geldstrafen*) ... have been executed, are deemed to have been executed, have been suspended (*nachgesehen*) or may no longer be executed.
>
> **...**
>
> **Period of expungement in the case of a single conviction**
>
> Section 3(1) If someone has been convicted only once, the period of expungement is ... fifteen years, if he or she has been sentenced to more than three years' imprisonment ... .
>
> ..."

24. Article 113 of the Criminal Code (*Strafgesetzbuch*) reads as follows:

> "Any person who accuses another of an offence for which that person has already served his or her sentence, for which the sentence has been conditionally or unconditionally suspended or waived, or in respect of which sentencing has been temporarily adjourned, in such a way that the [target of the] accusation is identifiable by a third person, is liable to imprisonment for up to three months or a fine not exceeding one hundred and eighty day-fines."

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicant company complained that the domestic courts' decisions had violated its right to freedom of expression, as provided in Article 10 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

26. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

27. The applicant company submitted that the public interest in being informed of the nature of the political milieu of the office manager of the presidential candidate N.H. prevailed in the instant case: that milieu included the most prominent Austrian (former) neo-Nazis, G.K., and his former deputy, H.S. The fact that the office manager of the presidential candidate had attended a public protest, wielding a baton, alongside those two subsequently convicted neo-Nazis bore witness to the political environment that surrounded N.H. himself. The applicant company argued that this spoke volumes as to the way in which the Freedom Party of Austria and N.H., who

had at the time also been the third president of the Austrian national assembly (*Nationalrat*), dealt with right-wing extremism. Such information was very valuable and could only be proved by publishing the photograph of 1987 and referring to H.S.'s conviction.

28. Turning to the criteria established in the Court's case-law regarding the balancing of respective rights under Article 10 and Article 8 of the Convention (see *Von Hannover (No. 2) v. Germany* [GC], nos. 40660/08 and 60641/08, ECHR 2012), the applicant company argued that the publication of the impugned article and photograph had reported on the criminal conviction of H.S. in a purely factual manner. Furthermore, it had reported truthfully on the fact that the German newspaper *Bild* had confronted the presidential candidate N.H. with the photo showing R.S. with H.S. and G.K.

29. Next, the applicant company submitted that the statement that H.S. was a convicted neo-Nazi had been true. Referring to the case of *Österreichischer Rundfunk v. Austria* (no. 35841/02, § 65, 7 December 2006; see also paragraph 53 below), the applicant company stated that the criminal proceedings against him and his conviction for acts punishable under the Prohibition Act on account of his activities as a leading member of the Extra-Parliamentary organisation Opposition True to the People (*Volkstreue Außerparlamentarische Opposition* – VAPO) formed an important part of contemporary judicial history. The applicant company did not make any submissions regarding H.S.'s conduct after his conviction in 1995; nor did it dispute the Government's submission that he had not been convicted since (see paragraphs 35-36 below).

30. As to the consequences of the article in question, the applicant company argued that it had had no repercussions for H.S. He had not asserted during the domestic proceedings that there had been such repercussions, and neither had any been identified by the national courts.

31. The applicant company argued that accusing someone of an expunged criminal act under Article 113 of the Criminal Code (see paragraph 24 above) did not form a basis for the claims under section 78 of the Copyright Act in the sense of sections 7 et seq. of the Media Act. In addition, the Court had already stated in the case of *Schwabe v. Austria* (28 August 1992, Series A no. 242 B) that a reference to previous criminal convictions was covered by Article 10 of the Convention in respect of politically significant matters. The applicant company did not make any submissions regarding the severity of sanctions imposed on it by the domestic courts.

(b) The Government

32. The Government conceded that the injunction against the applicant company had constituted an interference with its right to freedom of expression. This interference had been based on the law and had pursued a legitimate aim – namely the protection of the rights of others, in particular

H.S. They considered that the remaining question was whether the measure had also been necessary in a democratic society.

33. The article published by the applicant company had been about N.H. being confronted by the newspaper *Bild* with the political background of his office manager, and not with the political background of H.S., the office manager's brother and the plaintiff in the domestic proceedings giving rise to the present application. H.S. had featured in the report only in so far as he had also been depicted in the photograph dating from 1987 that had been printed. Likewise, the subject of the article published in the German newspaper *Bild* had been the political background of the office manager of N.H. and N.H.'s position in that regard. This had clearly been indicated by the title of the article: "What is your staff member doing there, Mr [N.]H.?" However, unlike in the article of the applicant company, H.S. had neither been mentioned by name nor referred to as a convicted neo-Nazi in the article of the German newspaper *Bild*.

34. In the present case, the picture in question had been neither published in the course of reporting on a crime, or of any other reporting concerning H.S. The contents of the applicant company's article had consisted of the position taken by a presidential candidate, N.H., in respect of his office manager, R.S., who some people considered to have a certain proximity to the "right-wing scene". Thus, the subject of the article had been of general public interest and had formed part of a political debate. In so far the Austrian courts only had a limited margin of appreciation to interfere with the applicant company's rights that were protected under Article 10 of the Convention.

35. H.S. had been convicted under the Prohibition Act by a final judgment in 1995 and had served a prison sentence until 1999; he had not thereafter been convicted of any other crime. As ruled by the Supreme Court in its decision of 30 January 2017 (see paragraph 14 above), the reference to the fact that the brother of the office manager of a presidential candidate had been convicted more than twenty years earlier had had no objective connection to the report on the political background of that office manager. There had thus been no objective justification for the reference because that reference had added nothing to a political debate or to a debate regarding the public interest, unlike the reporting on the political orientation of that presidential candidate's office manager and/or on the presidential candidate's position in respect of his office manager.

36. The interest of H.S. was quite obvious: the publication of pictures that, together with the accompanying text, recalled offences committed long before, would disproportionately prejudice his advancement, as he had already served his sentence, had been socially integrated for years and had thus had a legitimate interest in ensuring that the public was not reminded of offences that he had once committed. That applied all the more given the fact that the reference in question had been made entirely without any information to the effect that the corresponding conviction by a criminal court had taken

place more than twenty years before, the sentence had long since been served and expunged from his criminal record, and he had not been convicted for any crimes since. Any other interpretation would run contrary to the meaning and purpose of expunging a conviction from a person's criminal record: with few exceptions, all negative consequences arising by virtue of law from a conviction were erased upon expunged. Thereafter, the person concerned was deemed to have no record and was not obligated to disclose such an expunged conviction (see section 1 of the Criminal Record Deletion Act, quoted in paragraph 23 above).

37. The legal system of Austria attached great importance to the reintegration of convicted offenders into society and to their interest in a reformed, positive advancement after serving their sentences. Accusing someone of prior offences that had been served or waived was an offence in itself (see section 113 of the Criminal Code, quoted in paragraph 24 above).

38. The public had already been informed in great detail about the criminal proceedings conducted against H.S., his conviction in 1995 and his release in 1999; all those events had been the subject of extensive (photo)journalistic coverage. Without doubt, the crime committed by H.S. had been grave and of a political nature. More than two decades later, however, it could be assumed that, in the absence of any specific occasion and context, no public interest in information any longer existed to justify publishing a picture with the accompanying text "convicted neo-Nazi". Moreover, it had to be assumed that the notoriety that H.S. had definitely had at the time of his conviction had decreased quite considerably over more than two decades, during which he had not committed any other offences.

39. That conclusion could not be altered by the argument that the applicant company's article had been intended to portray the "milieu" in which R.S., the office manager of the presidential candidate, had moved in his past. The public interest in such information could have been satisfied sufficiently by, for instance, simply printing the picture dating from 1987 together with an explanation to the effect that it showed R.S. at a neo-Nazi meeting. The fact that all the people shown in the picture (wearing leather jackets and carrying batons and/or giving the *Kühnen* salute) were attributable to the neo-Nazi scene must in any case have been obvious to any reader of the article.

40. This was where the case at hand differed significantly from the facts on which the Court's judgment in the case of *Österreichischer Rundfunk* (cited above) had been based. At that time, it had been the temporal proximity between the release from prison of the applicant in that case and the report that had been relevant for the Court's decision.

41. Against this backdrop, the criterion of the completeness and correctness of the text accompanying the photograph, developed by the Court in its case-law, was gaining significance. However, this was precisely the requirement that the newspaper article of the applicant company had not met.

There had been no information in the newspaper article to the effect that H.S. had served his sentence long before and had behaved well ever since. In both of its decisions adopted in the case giving rise to this application (see paragraphs 14 and 18 above), the Austrian Supreme Court, referring to the Court's relevant case-law and making reference to its decision in case no. 4 Ob 161/07s (where it had – for the purpose of presenting the full facts – demanded such additional information from the newspaper publisher in a very similar case), had specifically pointed out that in the article in question, the applicant company had not had regard to that requirement.

42. In the Government's view, the interference had also been proportionate. The Austrian courts had prohibited the applicant company from publishing images of H.S. only if the text in question at the same time referred to him as a convicted neo-Nazi and/or statements of equivalent meaning would have been made about him. Thus, the domestic decisions had not constituted a general prohibition on any photojournalistic coverage whatsoever or a ban on publishing any pictures of H.S., and they had not provided a fine or prosecution under section 113 of the Criminal Code (see paragraph 24 above); equally, the claim for damages lodged by H.S. against the applicant company had been dismissed (see paragraphs 15-16 above).

43. The Government therefore considered that there had been no violation of Article 10 in the instant case.

2. The Court's assessment

44. The Court observes that the present case concerns proceedings under the Copyright Act brought by H.S. against the applicant company in respect of a newspaper report in which his picture had been shown. It did not address the reporting about him or the publication of the picture as such, but only the publication of that picture together with certain accompanying statements (see paragraph 9 above). The courts ordered the applicant company "to refrain, from now on, from publishing pictures of [H.S.] without his consent if at the same time he is called a convicted neo-Nazi in the text in question and/or statements of equivalent meaning are made about him there" (see paragraphs 15, 17 and 18 above). It is undisputed that the courts' judgments in these proceedings constituted an interference with the applicant company's 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, in particular those of H.S. The Court agrees with this assessment.

46. The parties' arguments thus concentrated on the necessity of the interference. The issue in the present case is whether the domestic courts ensured a fair balance between the protection of the applicant company's right to freedom of expression on the one hand, and the right to respect for private life of the opposing party on the other hand.

(a) General principles

47. The general principles regarding freedom of expression are well-established in the Court's case-law (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 88-89, ECHR 2015 (extracts), and the cases cited therein). Although the press must not overstep certain bounds, regarding in particular protection of reputation and rights of others, its task is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. 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" (ibid., § 89). In this regard, the Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see, for example, *Couderc and Hachette Filipacchi Associés*, cited above, § 96, and the cases cited therein). As regards the freedom of expression within the context of reporting and publishing photographs, the question of assessing the necessity of an interference with that freedom, and the state's margin of appreciation in that respect, the Court refers to its established case-law in the cases of *Couderc and Hachette Filipacchi Associés* (cited above, §§ 83-87 and §§ 90-93); *Von Hannover (No. 2)* (cited above, §§ 95-107); and *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 78-88, 7 February 2012).

48. The Court notes that applications such as the present one call for an examination of the fair balance to be struck between, on the one hand, the applicant company's right to freedom of expression and the public's freedom of information under Article 10, and, on the other hand, the respect for the private life and the right to protection of one's own image under Article 8 of the Convention of the person concerned. In examining this balance the Court must have regard, among other factors, to the state's positive obligations under Article 8 of the Convention (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91; and *Von Hannover (No.2)*, cited above, § 98), and to the principles established in its settled case-law regarding the essential role played by the press in a democratic society (see *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 55, ECHR 2000-I). This includes reporting and commenting on court proceedings and, more particularly, criminal proceedings (see *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, §§ 89 and 98, 28 June 2018).

49. With regard to persons who have been convicted, the Court has found - without explicitly distinguishing between the seriousness of the underlying criminal offences - that after a certain period of time has elapsed and, in particular, as their release from prison approaches, convicted persons have an interest in no longer being confronted with their acts, with a view to their reintegration in society. This may be especially true once a convicted person has been finally released. Likewise, the public interest as regards criminal

proceedings will vary in degree, as it may evolve during the course of the proceedings according to a number of factors, such as the circumstances of the case in question (ibid., § 100, referring to the cases of *Österreichischer Rundfunk*, cited above, § 68, and, *mutatis mutandis*, *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, §§ 90-91, ECHR 2006-VII).

50. The Court in its case-law has identified a number of criteria within the context of balancing the competing rights under Articles 8 and 10 of the Convention (see paragraph 48 above), in particular when the publication of photos was at stake. The relevant criteria include: the contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; the content, form and consequences of publication; and, where appropriate, the circumstances in which the photographs were taken (see *Von Hannover (No.2)*, cited above, §§ 108-113; *Von Hannover (No. 3)*, no. 8772/10, § 46, 19 September 2013; and *Axel Springer AG*, cited above, §§ 89-95). Where it examines an application lodged under Article 10, the Court will also examine the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers (see *Couderc and Hachette Filipacchi Associés*, § 93; and *Axel Springer AG*, §§ 90-95, both cited above).

51. The Court considers in each case whether the criteria thus defined may be transposed to the case in question, although certain criteria may have more or less relevance given the particular circumstances of the case (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 166, 27 June 2017).

52. Where the balancing exercise between the competing rights has been undertaken by the national authorities, in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG*, § 88; *Von Hannover (No. 2)*, § 107, both cited above, and, more recently, *Delfi AS v. Estonia* [GC], no. 64569/09, § 139, ECHR 2015).

53. In the case of *Österreichischer Rundfunk* (cited above, §§ 65-70), which concerned proceedings under the Copyright Act brought by H.S. against a different media company, the domestic courts had prohibited that media company from showing H.S.'s picture in connection with any report stating that he had been convicted under the Prohibition Act once the sentence had been executed or once he had been released on parole. The Court found a violation of Article 10 of the Convention, for the following reasons:

> "65. Mr S. who brought the proceedings at issue, is a well-known member of the neo-Nazi scene in Austria. The Court has already held in a similar case that a person expressing extremist views lays himself open to public scrutiny (see, *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 56, ECHR 2000-I). Moreover, Mr S. was convicted of crimes under the Prohibition Act in 1995 and was sentenced to a lengthy prison term for being a leading member of VAPO, an organisation aimed at destroying the Austrian constitutional order. In the domestic courts' assessment the proceedings

against Mr S. were among the most important ones under the Prohibition Act. At the time of his trial his picture was widely published.

66. Turning to the nature and subject matter of the news item broadcast by the applicant, the Court notes that it was a brief report dealing mainly with the release on parole of Mr. K. the leader of VAPO and the neo-Nazi scene in Austria. Mr S. was mentioned as another convicted member of VAPO who had also been released on parole a few weeks earlier. It is not contested by the Government that the news item concerned an issue of public interest. Consequently, it related to 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 media 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).

67. The Court notes that the injunction granted by the domestic courts was phrased in broad terms. It prohibited the applicant from showing Mr S.'s picture in connection with any text mentioning his conviction under the Prohibition Act once the sentence has been executed or once he had been released on parole.

68. While the court agrees that there may be good reasons to prohibit the publication of a picture of a convicted person after his release on parole a number of elements are to be taken into account when weighing the individual's interest not to have his physical appearance disclosed against the public interest in the publication of his picture. Elements that will be relevant are the degree of notoriety of the person concerned, the lapse of time since the conviction and the release, the nature of the crime, the connection between the contents of the report and the picture shown and the completeness and correctness of the accompanying text.

69. The domestic courts attached great weight to the time-element, in particular to the long lapse of time since Mr S.'s conviction, but did not pay any particular attention to the fact that only a few weeks had elapsed since his release. They did not take into account his notoriety and the political nature of the crime of which he had been convicted. Nor did they have regard to other important elements, namely that the facts mentioned in the news items were correct and complete and that the picture shown was related to the content of the report.

70. The latter elements distinguish the present case from a comparable case (*Österreichischer Rundfunk v. Austria* (dec.), no. 57597/00, 25 May 2004), which was declared inadmissible. In that case, the Court found no indication of a violation of Article 10 as regards the prohibition to publish a convict's picture after his release on parole. It had regard to the fact that the picture of B. who had been convicted under the Prohibition Act had been shown in a different context, namely in connection with the investigations in respect of a spectacular series of letter bomb attacks without mentioning that B. had been acquitted of any involvement in these attacks and without mentioning that he had served his sentence under the Prohibition Act and had been released on parole."

(b) Application to the instant case

54. In exercising its supervisory function, the Court's task is to review, in the light of the case as a whole, whether the decisions the domestic courts have taken pursuant to their power of appreciation have struck a fair balance between the rights at stake and ruled in accordance with the criteria established by it for that purpose (see paragraphs 50 and 53 above).

Accordingly, the Court will analyse in turn the elements identified as relevant in this regard in its case-law and the domestic courts' assessment thereof.

(i) Contribution to a debate of general interest

55. The Court finds that the overall subject of the article – namely the fact that the presidential candidate N.H. surrounded himself with an office manager, R.S., who – at least in the past – had contacts with persons who had aimed at destroying the Austrian constitutional order (see *Österreichischer Rundfunk,* cited above, § 65**),** must be considered as having been of particular public interest at the time of its publication. In this regard the Court notes (i) the delicate point at which the article appeared during the presidential election in 2016 after the Constitutional Court had ruled unconstitutional a run-off ballot between the two candidates for the highest office of the Republic and (ii) the particular public interest in the election process and the candidates at the time (see paragraph 7 above). Thus, the Court notes that there was little scope under Article 10 § 2 of the Convention to restrict the applicant company's right to report on N.H.'s election campaign (see paragraph 47 above).

56. While the news report in question (see paragraph 8 above) served, as such, that particular interest by covering N.H.'s political circles, it did not itself even allege that there was any direct link between the presidential candidate and H.S., or that H.S. had played any role in the election campaign. The only indirect connection between H.S. and N.H.'s election campaign that could be understood from the article was that R.S., who is H.S.'s brother and N.H.'s office manager, had attended a neo-Nazi event in 1987 together with H.S. and G.K. Both H.S. and G.K. had later undisputedly been criminally convicted under the Prohibition Act.

57. The Vienna Commercial Court and the Vienna Court of Appeal hence argued that they did not need to conduct a balancing exercise between the competing rights at stake in the instant case (see paragraphs 16 and 17 above), as H.S. was not the subject of the article, and publishing the photo by mentioning that he was a convicted neo-Nazi therefore did not contribute to a debate of general interest. The Supreme Court contrasted the instant case with the Court's findings in the similar case of *Österreichischer Rundfunk* (cited above) and held that there was no temporal connection between the 1987 photograph, H.S.'s criminal conviction in 1995, and the incriminated article which was published in 2016 (see paragraph 18 above). It also referred to its reasoning in the provisional proceedings where it had found that the article impugned in the instant case had not concerned H.S. but only his brother, R.S. There had thus been no objective justification for the reference to H.S.'s conviction (see paragraph 14 above). Considering that the applicant company did not – either in the domestic proceedings (see paragraph 10 above) or in its submissions to the Court (see paragraph 27 above) – allege a direct link between N.H. and H.S., the Court can accept the domestic courts'

conclusion that publishing H.S.'s photograph in a report on N.H.'s political milieu with an incomplete accompanying text (see paragraph 63 below) did not contribute to the debate on the election, despite the particular public interest in the report as such (see paragraph 55 above).

(ii) Degree of notoriety of the person affected and subject of the news report

58. The Court reiterates that in its 2006 judgment *Österreichischer Rundfunk* (cited above, § 65), it has found that the plaintiff in the proceedings giving rise to that case, H.S., who was also the plaintiff in the instant proceedings, was a "well-known member of the neo-Nazi scene in Austria". The proceedings against him were among the most important ones conducted under the Prohibition Act. At the time of his trial his picture had been widely published (ibid.). The Court notes moreover that VAPO (see paragraph 29 above), of which H.S. used to be a leading member before his conviction in 1995, aimed at nothing less than destroying the Austrian constitutional order (*Österreichischer Rundfunk,* cited above, §§ 5, 11 and 65). The Court has already held in similar cases that a person expressing extremist views lays himself open to public scrutiny (ibid., § 65; and *News Verlags GmbH & Co.KG,* cited above, §§ 54-56). This must apply all the more to persons who did not only express extremist views but who committed severe crimes such as those under the Prohibition Act that run counter to the letter and the spirit of the Convention (see, in this context, *mutatis mutandis*, *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005 and the cases cited therein, and, more recently, *Pastörs v. Germany*, no. 55225/14, § 39, 3 October 2019). The Court attaches particular importance to the essential function the press fulfils in a democratic society when reporting on crimes of that kind (see paragraph 48 above).

59. At the same time, the Court notes that at the time the report was published, more than twenty years had passed since H.S.'s conviction and some seventeen years since his release (see paragraphs 9 and 38 above, and paragraph 68 below; compare and contrast *Österreichischer Rundfunk*, cited above, § 69). There is no indication in the parties' submissions or in the documents submitted that H.S. sought the limelight after his release (compare and contrast *M.L. and W.W. v. Germany,* cited above, § 106, where the applicants returned to the limelight after making several attempts to have their criminal proceedings reopened and after addressing the press on the subject). For these reasons, the Court attaches weight to the fact that the applicant company – while alleging that H.S.'s conviction and the circumstances that had led to it were of historical importance and that H.S. had not ceased his political activities in the neo-Nazi scene after his release from prison in 1999 (see paragraph 10 above and paragraph 61 below) – did not even argue that H.S. was still a person of public interest and notoriety at the time of the publication of the photograph in 2016. In its submissions to the domestic courts it only referred to a Wikipedia entry and another article concerning

alleged events in 2009, the content of which were disputed by H.S. (paragraphs 10-11 above). It neither specified H.S.'s conduct at these events, nor elaborated on its submission that H.S. was an "absolute person of contemporary history" (ibid.). This is all the more remarkable as H.S. had previously initiated proceedings against the applicant company in a similar context because of a different publication (see paragraphs 14 and 20 above). In that case, the Supreme Court had already found in 2007 that H.S. had been fully reintegrated into society after his release (see the Supreme Court's judgment from 2 October 2007, 4 Ob 161/07s, ibid.). In the absence of such specification, the civil courts did not examine further the degree of notoriety of H.S. at the time of the publication. While the Court supports in general the applicant company's view that proceedings against neo-Nazis form an important part of judicial history in Austria (see paragraph 29 above), it cannot be automatically concluded in the instant case that H.S.'s notoriety as an individual remained the same over the years (see paragraphs 38 above and 68 below).

60. As regards the subject matter of the report, the Court has stated above that it did not relate to the criminal proceedings against H.S. or H.S.'s role in the election campaign (see paragraphs 57-58 above).

(iii) Prior conduct of the person concerned

61. According to the Supreme Court's findings (see paragraphs 14 and 20 above), which remained undisputed by the applicant company, H.S. was reintegrated in society after his release and did not have any further criminal convictions after that of 1995. The applicant company, as the defendant in the civil proceedings, did not make any submissions regarding H.S.'s conduct after his conviction other than those dealt with in paragraph 59 above. For the reasons outlined above (ibid.) the domestic civil courts were not obliged to go beyond those submissions and to assess in more detail H.S.'s conduct between his release in 1999 and the publication in 2016.

(iv) Method of obtaining the information and its veracity

62. It was undisputed during the domestic proceedings and before the Court that the statement made by the applicant company in connection with H.S., namely that he was a (former) convicted neo-Nazi, was true. Incidentally, this was one of the reasons why the domestic courts dismissed his claims for damages (see paragraphs 16 above). The information itself can be considered common knowledge and is easily obtainable through an internet search typing in H.S.'s full name.

63**.** However, with regard to the publication of a picture of a convicted person after his or her release on parole, the Court has found not only the correctness of the accompanying text to be a relevant element when weighing the individual's interest in not having his or her physical appearance disclosed

against the public's interest in the publication of his or her picture, but also the completeness of that text (see *Österreichischer Rundfunk*, cited above, § 68). In the instant case, the applicant company's report referred to H.S. as a convicted neo-Nazi without providing further details. It did not inform the reader of the fact that the conviction referred to dated back to 1995, that H.S. had served his sentence and that he had not been convicted of a crime since. The information that the conviction had in the meantime been expunged from his criminal record (see paragraph 9 above) could have been ascertained by the applicant company by consulting the Criminal Record Deletion Act (see paragraph 23 above). Against this backdrop, the Court finds that the information provided by the applicant company in the text accompanying the photograph was true but not complete in respect of an essential point (compare and contrast *Österreichischer Rundfunk*, cited above, § 69, where the Court found that the facts mentioned in the news items had been correct and complete and that the picture shown had related to the content of the report).

(v) Content, form and consequences of the publication of the article

64. The Court has examined the content and form of the news report (together with the accompanying photograph) when considering its contribution to a debate of general interest (see paragraph 57 above).

65. As to its consequences, the Court notes that H.S. as the plaintiff in the domestic proceedings did not allege that there had been any tangible consequences arising from the publication in question. As stated above, the domestic courts, for that reason, did not grant him the damages claimed (see paragraphs 15-16 and 62 above).

(vi) Severity of the sanction imposed

66. In the instant case, the restriction imposed on the applicant company was of a very limited scope: The applicant company was not sanctioned for the report or for the publication of the photograph either in civil or in criminal proceedings (compare and contrast *Schwabe,* § 30, cited above, where the applicant had been criminally convicted of defamation). Neither was it ordered to refrain completely in the future from publishing H.S.'s image without his consent (compare and contrast *Mosley v. the United Kingdom*, no. 48009/08, 10 May 2011), or even from reporting on his trial in 1995. The applicant company was only prohibited from publishing H.S.'s picture if it was accompanied by the statement that he was a "convicted neo-Nazi" (compare and contrast *Österreichischer Rundfunk,* cited above, § 15, where the national courts had ordered the applicant in that case to refrain from publishing H.S.'s picture without his consent if it was accompanied by "any text stating that he had been convicted under the Prohibition Act once the sentence had been executed or he had been released on parole"). The

applicant company had to reimburse H.S. for the costs of the domestic proceedings, but there was no compensation awarded and no fine imposed (see paragraphs 15-17 above).

67. The Court furthermore takes note of the fact that in its reasoning the Supreme Court referred to its judgment in previous proceedings (case no. 4 Ob 161/07s – see paragraphs 14, 20 and 59 above). As stated above, in that case the applicant company was ordered to refrain from publishing H.S.'s image without his consent, (only) if the accompanying text described him as a neo-Nazi leader and did not state at the same time that he had already served his prison sentence and had behaved well since. The Court concludes from the Supreme Court's findings (see paragraphs 14 and 18 above) and in line with the Government's submissions (see paragraph 42 above) that in the instant case the applicant company had not met the criteria established by the Supreme Court in its previous judgment (see paragraph 20 above) and by the Court (see paragraph 53 above).

(vii) The lapse of time between the conviction, the release and the publication of the article in question

68. In the case of *Österreichischer Rundfunk* (cited above, § 68), the Court has held that another element to be taken into account within the context of the publication of an image of a convicted person after his or her release was the time that had lapsed since the conviction and the release. In that case (ibid., § 69), the Court found a violation of Article 10, as the domestic courts had not taken into account, among other things (see paragraph 63 above), that only a short time had passed since H.S.'s release at the time of the publication of the article that was the subject of that case (see paragraph 53 above).

69. The instant case can be distinguished from the case of *Österreichischer Rundfunk* (cited above, § 69) in respect of that point, as in the meantime, over twenty years had passed between H.S.'s criminal conviction in 1995 and the publication of the article at issue, and some seventeen years since his release in 1999 (see paragraph 59 above). The Court notes that the Supreme Court, referring to the Court's case-law, explicitly pointed out this lack of temporal connection (see paragraph 18 above).

70. Within this context, the Court considers it important to take into account the fact that H.S.'s conviction under the Prohibition Act had already been deleted from his criminal record at the time of the publication in question (see paragraph 36 above). While is does not lose sight of the severe political nature of the crime committed by H.S. before 1995 and of the danger with regard to attacks on democracy if journalists are hindered from reporting on the crimes of neo-Nazis (see paragraph 58 above *in fine*), these considerations have to be weighed against the importance of the reintegration into society of persons who have been released from prison after serving their sentence, and their legitimate and very significant interest after a certain period of time in

no longer being confronted with their conviction (see paragraph 49 above). This is what H.S. essentially argued in the domestic proceedings (see paragraph 9 above).

(c) Conclusion

71. The Court reiterates that the member States have a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under that provision is necessary (see paragraph 47 above). In the instant case, while the Vienna Commercial Court and the Vienna Court of Appeal concluded from the Supreme Court's reasoning in the provisional proceedings (see paragraph 14 above) that a balancing of interests did not have to be carried out (see paragraphs 16 and 17 above), the Supreme Court did in fact balance the competing interests at stake and, by doing so, examined the case on the basis of the criteria that were established by the Court's own judgment in the case of *Österreichischer Rundfunk* (cited above), which had also concerned H.S. The Supreme Court noted that the article had not concerned H.S., but only his brother, R.S., and that the text accompanying H.S.'s photograph had lacked the information that he had meanwhile served his sentence and had behaved well since (see paragraphs 14 and 18 above). Thus, in contrast with the facts underlying the above mentioned judgment, in the present case the published picture was not related to the content of the report, and the accompanying text was correct but not complete (see paragraphs 57 and 63 above). The Supreme Court further noted, citing the case of *Österreichischer Rundfunk,* that there was no temporal connection between the photograph taken in 1987, H.S.'s criminal conviction in 1995, and the applicant company calling him a "convicted neo-Nazi" in the impugned article of 2016 (see paragraph 18 above). As regards the notoriety of H.S., the Court has already noted that the applicant company did not substantiate its submissions in this regard. Within this context, there was no reason for the civil courts to carry out a detailed examination of whether H.S. was still a person of public interest and notoriety (see paragraph**s** 59 and 61 above). The Court further notes that the applicant company's allegation that H.S. was still active in the right-wing scene was not supported by any evidence other than two reports referring to his participation in events in 2009, while it did not dispute the fact that H.S. had not been convicted again after his release in 1999 (ibid.). On the basis of these facts, the Court can accept that the domestic courts, for the purpose of the civil claim, did not assess the question of H.S.'s conduct between 1999 and 2016 in more detail (ibid.)

72. As stated above, the Court is mindful of the essential role played by the press in protecting democracy, which includes, notably, reporting on presidential candidates, their social and political environment and, in this context, on certain crimes (see paragraphs 48 and 58 above). However, having analysed the relevant elements (see paragraph 54 above), the Court

notes that the domestic courts did not generally prevent the applicant company from reporting on H.S. and on the serious crimes once committed by him but only prohibited it to publish H.S.'s picture if at the same time he was called a convicted neo-Nazi in the accompanying report (see paragraphs 14-15 above). In its reasoning the Supreme Court emphasized that in a context as the present one the connection between the contents of the report and the picture as well as the completeness and correctness of the accompanying text had to be, among other things, considered (ibid.). The content of the article published by the applicant company did not concern H.S. (see paragraph 60 above) and the information given by the applicant company was not complete (see paragraph 63 above). Therefore, the Court cannot but conclude that in the specific circumstances of the case the reasons adduced by the domestic courts were undertaken in conformity with the criteria laid down in the Court's case-law and were "relevant and sufficient" to justify the interference. It sees no strong reasons to substitute the domestic courts' views with its own (see the case-law quoted in paragraph 52 above). It follows that the interference was "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

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

FOR THESE REASONS, THE COURT

1. *Declare*s, unanimously, the application admissible;

2. *Holds*, by four votes to three, that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 26 April 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Yonko Grozev
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Guerra Martins, joined by Judges Vehabović and Motoc, is annexed to this judgment.

Y.G.R.
I.F.

DISSENTING OPINION OF JUDGE GUERRA MARTINS, JOINED BY JUDGES VEHABOVIĆ AND MOTOC

With all due respect to my colleagues, I am unable to subscribe to their view that Article 10 has not been violated.

1. The main legal issue in this case is to assess whether the decisions of the domestic courts struck a fair balance between the competing rights at stake – the freedom of expression and the public's freedom of information under Article 10, the right to respect for one's private life and the right to protection of one's own image under Article 8 of the Convention – and ruled in accordance with the criteria established by the Court for that purpose.

2. It is not unusual that in cases raising issues of conflicts of rights, where a fair balance must be struck between two different rights, it may be difficult to draw a clear dividing line between violation and non-violation because it depends on the weight that each person gives to each individual criterion and to all of them together.

3. As for striking a balance between the freedom of expression and the right to respect for one's private life, the Court already has well-established criteria for doing so. It goes without saying that I do not wish to depart from those criteria.

4. Accordingly, I can accept the reasoning of the majority concerning some of the criteria (for example, the part of the judgment on how well-known the person affected by the news was). In my opinion, however, the majority underestimated other criteria (for instance, the contribution to a debate of general interest, and the veracity of the information), and also overestimated others (for example, the lapse of time between the conviction, the release and the publication of the information).

5. In short, my main divergence with the majority concerns the assessment of the first criterion, relating to the contribution to a debate of general interest. I cannot accept the domestic courts' conclusion that publishing H.S.'s photo in a report on N.H.'s political milieu did not contribute to a debate of general interest, i.e., the debate on the election.

6. In my view, given that the article drew attention to the Neo-Nazi past of someone who might still be close to a presidential candidate – even if it is highly unlikely – the public has the right to have access to that information. In principle, an elector with access to all the relevant information is better-placed and freer to choose between two or more candidates than an elector who lacks that information. This assertion is even more valid in the context of the election in question, which had been disputed and was subject to a decision of the Constitutional Court declaring the first election void. The run-off ballot thus had to be repeated.

7. To put it differently, while for the majority "publishing H.S.'s photograph in a report on N.H.'s political milieu with an incomplete accompanying text ... did not contribute to the debate on the election, despite

the particular public interest in the report as such"; for me, on the one hand, the particular context of those elections justified the broadest possible diffusion of information by the media on the candidates and their *entourage*, and, on the other hand, that context meant that it was quite important for the public to know who might be supporting each candidate.

8. In my opinion, democracy has to protect itself from certain political parties and persons who want to destroy it. Membership of a Neo-Nazi party is such a serious threat to democracy that the mere suspicion that a presidential candidate might have such individuals among his/her supporters is ample justification for publishing the photograph in question.

9. I would take the view that the domestic courts did not have regard to the importance of the media in protecting democracy, particularly where the Neo-Nazi ideology is concerned. The courts attached greater importance, for instance, to the lapse of time between the conviction, the release and the publication of the article than to the information itself.

10. For me, by contrast, the Neo-Nazi past of a person who might could still have a slight connection to a politician standing for president in a democratic country – even if that connection is minimal – is important even if there is a long lapse of time between his/her Neo-Nazi past and the election.

11. Additionally, I cannot follow the majority as regards the scant importance which it attached to the veracity of the facts, concentrating much more on the fact that the news was not complete. For me, on the contrary, the veracity of the facts is crucial. The omission of some aspects does not undermine such veracity.

12. To conclude, my divergencies with the majority have led me to conclude that there was a violation of Article 10 of the Convention.