**Summary and outcome**

In a case where the media was obliged not to publish a photo of an ex-convict [H.S.] with the text stating that he was convicted Neo-Nazi, the Chamber of the Fourth Section of the European Court of Human Rights ("ECtHR"/"Court") found no breach of Article 10 by a majority of votes (4:3). H.S. served his sentence and was freed sixteen years before the applicant published an article about it that included an old photograph of H.S. and a few right-wing politicians, at the time of ongoing presidential elections. The described publication ban was ordered by domestic courts because the contented article was not about H.S. and there was no direct link between him and the elections debate. The ECtHR agreed with domestic courts and stated that ex-convicts' rights under Article 8 of the European Convention on Human Rights ("ECHR") enhance with time, thus, suppressing freedom of expression.

**Facts**

The applicant runs the daily newspaper Österreich. On July 20, 2016 it published an article about the Austrian presidential candidate, N.H. The article mentioned a meeting between N.H and a journalist from Germany and the journalist showed the picture of several people, including R.S. who had been at a time N.H.’s office manager. One the photographed people was H.S. who had been “convicted in 1995 under the National Socialist Prohibition Act but he had been released on parole in 1999” [para. 9]. On 22 July 2016 (two days after the publication of the article) H.S. brought proceedings against the applicant under copyright law “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 to that effect. He claimed he served his imprisonment, reintegrated into society, established a family, and was not a public figure, and that he had never met N.H. (a presidential candidate). The applicant responded that H.S. was one of Austria's most prominent neo-Nazis, that his conviction was well-known, and “that the circumstances that had led to his conviction were of historical importance” [para. 9]. The applicant further contested that H.S. is no longer participating in Austrian politics, citing an article indicating H.S.'s attendance at two right-wing party public events in Austria and one in Germany in 2009. H.S. allegedly gave a speech at the latter.

The Vienna Commercial Court dismissed the interim measure request on August 10, 2016 and this decision was upheld by the Vienna Court of Appeal. However, the Supreme Court of Austria, on January 30, 2017, “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’” [para. 14]. The court argued that the contested article was not about H.S. but about N.H. (a presidential candidate) and R.S. (a brother of H.S.), and that there was no objective justification to represent H.S. as a convicted neo-Nazi along with his picture.

Regarding the main procedure, the first-instance court “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’” [para. 15]. No monetary award was rendered. A second-instance court and the Supreme Court upheld the mentioned decision. The applicant lodged the application before the ECtHR relying on Article 10 ECHR.

**Decision overview**

The ECtHR had to decide if Austrian courts violated the right protected by Article 10 ECHR.

The applicant alleged that the public had the right to be informed about a presidential candidate’s entourage that “included the most prominent Austrian (former) neo-Nazis, G.K., and his former deputy, H.S” [para. 27]. They also maintained that their article featured accurate information and that the publication had had no negative consequences for H.S. As a result, press freedom was violated. The Government objected, claiming that the article focused on others, notably the N.H.'s office manager, rather than H.S. As a result, assertions about H.S.'s Nazi past, as well as his picture, were not justified. The Government also claimed that H.S.'s conviction had been deleted from official documents and that the conviction had occurred twenty years before.

The ECtHR concentrated on the third leg of the tripartite test (necessity), because the first two were uncontested. It started from the general framework on the clash between Articles 8 and 10 established in the previous case-law. “With regard to persons who have been convicted, the Court has found […] that after a certain period of time has elapsed […] convicted persons have an interest in no longer being confronted with their acts, with a view to their reintegration in society” [para. 49]. Still, the court lefts the possibility that the public could legitimately be interested in criminal proceedings, but that will depend of the circumstances of each case.

H.S. was not a new face to the ECtHR since the court decided the case of [Österreichischer Rundfunk v. Austria (2006)](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-78381%22]}) about a similar domestic judgment protecting H.S.’s privacy. Namely, H.S. succeeded with the claim against a different media company, and “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” [para. 53]. The court found a violation of Article 10 in that case because domestic courts failed to consider all relevant factors. They focused mainly on the passage of time, relying on the long lapse of the time since H.S.’s conviction, but disregarded the fact “that only a few weeks had elapsed since his release”[para. 53].

After summarizing its past rulings and basic framework, the court shifted to the current case and applied seven principles (criteria).

(i) Contribution to a debate of general interest

The applicant missed to indicate a direct link between N.H. and H.S., so the Court accepted the domestic courts’ findings that “publishing H.S.’s photograph in a report on N.H.’s political milieu with an incomplete accompanying text […] [had] not contribute[d] to the debate on the election” [para. 58.].

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

The court made a distinction between the current case and the earlier Österreichischer Rundfunk v. Austria. In the latter case, the applicant was at the time well-known figure, but in the present case, there has been seventeen years since his release. Hence, while the H.S.’s conviction was of historical importance, his notoriety decreased over the time.

(iii) Prior conduct of the person concerned

After his release, H.S. has reintegrated into society and has not been convicted. Furthermore, H.S. had already filed a complaint against the applicant, demonstrating his desire to remain out of the public eye.

(iv) Method of obtaining the information and its veracity

The statements in the article were true, in that H.S. was convicted, but the ECtHR found that this was not the sole factor to consider. In particular, when publishing images of an ex-convict, it is critical to evaluate the completeness of the distributed content rather than merely its veracity. In the article, the applicant failed to offer more information about H.S., such as the fact that the conviction occurred in 1995, that H.S. was never charged with another crime, and that his conviction was expunged from official records. Thus, “the information provided by the applicant company in the text accompanying the photograph was true but not complete in respect of an essential point” [para. 63].

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

The ECtHR said little about this criterion because it focused on content and form in paragraphs concerning the first criterion.

Under this criterion the ECtHR did not say much as it examined content and form under the first criterion. In terms of consequences, the ECtHR noted that domestic courts determined that H.S. had suffered no actual consequences, and hence no award was rendered.

(vi) Severity of the sanction imposed

The sanction imposed to the applicant was modest in nature, there was no order prohibiting the publication of H.S.'s photo without his authorization, nor was the applicant sanctioned for publishing the photo. “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’” [para. 66]. Only the costs of the judicial proceedings were to be paid by the applicant.

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

The court first made a distinction between this case and the Österreichischer Rundfunk case, in which the ECtHR found violation “as the domestic courts had not taken into account […] 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” [para. 68]. On the contrary, in the present case, “over twenty years had passed between H.S.’s criminal conviction [...] and the publication of the article at issue, and some seventeen years since his release” [para. 68]. Both these facts were considered by Austrian Supreme Court. The ECtHR emphasized the value of the press reporting on previous convictions, but also the importance of reintegrating those who have served their sentences and their interest not to be confronted with earlier convictions.

In conclusion, the Court opined that the Supreme Court, as the last-instance domestic court, did examine all relevant elements when balancing the rights under Articles 8 and 10. There simply was no direct connection between a photo, H.S.’s conviction and the presidential election. Furthermore, the press right was narrowly limited because the applicant was not forbidden from reporting about H.S. and his previous behavior, including his conviction, but only from publishing H.S.'s picture if he was called a convicted neo-Nazi at the same time. As a result, Article 10 was not violated.

Judge Guerra Martins, who was joined by judges Vehabovi and Motoc, wrote the dissenting opinion. On some criteria, the judge agreed with the majority, while dissenting on others. Her major objection addressed the first criterion – contribution to the debate of general interest – and she contended that the Court's decision that the article did not contribute to a public debate (a debate about elections) was not persuasive. The elections were held again after the Austrian Constitutional Court pronounced the previous one void. As a result, this particular context gave a specific weight to the elections and the public had the right to be informed on every aspect of respective presidential candidates. She writes – “the Neo-Nazi past of a person who 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” [para. 10 of the dissenting opinion]. Lastly, she considered that veracity was critical in evaluating the content of the contested articles, and that “omission of some aspects d[id] not undermine such veracity” [para. 11 of the dissenting opinion].

**Decision direction**

The decision has a mixed outcome. The majority balanced competing factors under Article 8 and 10 such as the rights of a convict, the time lapsed between the conviction and the publication, and the veracity of the article to hold in favour of the defendant. However, as noted in the minority decision, the contribution of the article to the debate of general public (especially in case of elections) cannot be underestimated.