



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

1959 · 50 · 2009

28 May 2009

FIRST SECTION

Application no. 51151/06
by Ulrich KÜCHL
against Austria
lodged on 12 December 2006

STATEMENT OF FACTS

THE FACTS

The applicant, Mr Ulrich Küchl, is an Austrian national who lives in Eisgarn. He is represented before the Court by Ms M. Windhager, a lawyer practising in Vienna.

A. The circumstances of the case

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

1. The background of the case

The applicant was provost of the Eisgarn monastery and principal (*Regens*) of the St Pölten seminary (*St. Pöltener Priesterseminar*) where future Roman Catholic priests are trained. The seminary became the subject of public debate after police carried out a house search and discovered that one of the seminarians had downloaded child pornography on his computer.

On 12 July 2004 the weekly news magazine “profil” published an article entitled “Go on!” (*Trau dich doch*), with the sub-heading “Porn scandal. Photographic evidence of sexual antics between priests and their students has thrown the diocese of St Pölten into disarray. First the principal and now the deputy principal have resigned. High-ranking dignitaries expect Kurt Krenn [i.e. the bishop of the diocese] to be removed from office.” (*Pornoaffäre. Fotobeweise von Sexspielen zwischen Priestern und deren*

Schülern stürzen die Diözese St. Pölten ins Chaos. Nach dem Regens tritt auch der Subregens zurück. Höchste Würdenträger erwarten die Entmachtung von Kurt Krenn.)

The article stated that the applicant had had sexual relations with seminarians; with one of them he also went on a two-week vacation during which they shared an apartment in a hotel. A photograph was also published showing the applicant hugging one of the seminarian's with his left arm, holding the seminarian's wrist with his left hand and holding his right hand on his crotch. This picture was taken at a private birthday party and the applicant looked into the camera, apparently aware that he was being photographed.

2. *The proceedings under the Media Act*

On 6 August 2004 the applicant initiated proceedings under sections 6 et seq. of the Media Act (*Mediengesetz*) and requested compensation for defamation (*üble Nachrede*) and the violation of his intimate sphere (*höchstpersönlicher Lebensbereich*) caused by the publication of the photo and the impugned article, especially the following passages:

“Porn scandal. Photographic evidence of sexual antics between priests and their students has thrown the diocese of St Pölten into disarray.”, “A painful truth: Krenn’s principal engaged in sex with subordinates, also Krenn’s private secretary and legal adviser ...” (*Diese Wahrheit ist schmerzlich: Krenns Regens beim Sex mit Untergebenen, Krenns Sekretär und Rechtsberater ebenfalls ...*), “Photos showing, among others, seminarians from St Pölten in kinky situations, in some cases with their superiors ... and because they were doing it with the boss and his deputy too, it was all quite normal and they felt perfectly safe ...” (*Fotos auf denen auch St. Pöltner Jungpriester in perversen Situationen, teils mit ihren Vorgesetzten zu sehen sind. ... und weil sie es auch mit dem Chef und seinem Stellvertreter getrieben haben, war alles so normal, und man sich ganz sicher gefühlt ...*); and “In June of the previous year principal Ulrich Kuechl allegedly performed a kind of ‘sacrament of marriage’ between H. and Polish priest A. in a St Pölten restaurant.” (*Im Juni des Vorjahres soll Regens Ulrich Küchl in einem St. Pöltner Lokal H. und dem polnischen Priester A. eine Art ‘Sakrament der Ehe’ erteilt haben. ...*).

The newspaper editor replied that the contents of the article were true; it also argued that in the light of the Roman Catholic Church’s position of condemning homosexuality, and the fact that the applicant was responsible for the training of future priests in the seminary, there was a public interest in knowing about the facts published in the article and a direct connection with public life. The article was thus lawful under the freedom of opinion guaranteed in Article 10 of the Convention.

After having held several hearings in which witnesses were also heard, on 12 September 2005 the Vienna Regional Criminal Court dismissed the applicant’s request under the Media Act in conjunction with the Criminal Code. It found as established that the applicant had had consenting homosexual relationships with several seminarians, also having spent a vacation with a seminarian during which they shared an apartment in a hotel, and having performed a kind of ‘sacrament of marriage’ between two seminarians. A large percentage of readers of the news magazine that had published the incriminating article and the photo would only read the news magazine in a cursory manner and also consult other media to form their opinion. Such readers would obtain the information that there had been

homosexual contacts between the applicant and seminarians and also among seminarians, and that there existed photos to support this. The published photo showed that the applicant and the seminarian were more than friends and had homosexual contacts. The article clarified that such contacts had been entered into without coercion.

The court thus held that the facts contained in the article were in essence true, namely that the applicant and some seminarians did have a homosexual relationship and had been on vacation together, and that it could not be excluded that there had been a ceremony which for an outside observer could be taken as the blessing of a relationship between the two seminarians. Due to the strong role model status of the Roman Catholic Church, the public has a great interest about what is going on within the Roman Catholic Church. The public was very interested in what was going on in the seminary, especially since pictures containing child pornography had been downloaded from the internet; the circumstances how it could have come to this were also subject of public interest and in direct connection with public life. The applicant, being the head of the seminary, is a public person in this function. Even though the incriminated picture had been taken in the private home of the applicant, there was a connection to the applicant's public life. Thus even though the article constitutes the *actus reus* of defamation, the newspaper editor had proved that they are essentially true, thus no claim to compensation of publication of the judgment was given.

The applicant lodged an appeal on points of law and fact (*Berufung wegen Nichtigkeit und Schuld*) to the Vienna Court of Appeal (*Oberlandesgericht*). The Court of Appeal, after holding a hearing, turned down the appeal in its judgment of 24 May 2006. The Court of Appeal upheld the judgment of the Regional Criminal Court, holding that the said court had not erred in fact or in law and had rightly held that the newspaper editor had managed to prove that the contents of the article were true; as regards the complaint on the performance of a sort of sacrament of marriage, the Court of Appeal found that it had not been proven that this allegation was true, however this allegation only touched upon a minor part of the article and thus would not render the judgment void. Furthermore it held that when writing about photographic evidence of seminarians in "kinky situations", the editor had also proved that this was true; the average reader of the magazine would understand the term "kinky" to be deviant from what is considered normal, among which also a photo of priests and seminarians wearing clerical clothing in a sexual pose, especially as these persons belong to a group of people who publicly speak out against homosexuality and denounce homosexual contacts as sin. The applicant's argument that the occurrences mentioned in the article concerned his private life and were not in connection with public life, was rejected by the Court of Appeal. It held that the Roman Catholic Church, to which most Austrians adhere, has the status of a body of public law due to Austria's ratification of a treaty with the Holy See on its recognition (*Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich*). Therefore acts of dignitaries of the Roman Catholic Church, which are in apparent contradiction to the principles of the organisation, can be of public interest, especially when happening in a training institution. Therefore since the article was true and

there was public interest in the article, the Regional Criminal Court had rightly rejected the applicant's request for compensation and publication of the judgment. The judgment was served on the applicant's counsel on 12 June 2006.

The Court of Appeal upheld this decision on 24 May 2006 (served on the applicant's counsel on 12 June 2006). It held that acts could not be seen as strictly belonging to the private life of the applicant. In the contrary, as provost and principal of a seminary he represented the principles and beliefs of the Catholic Church, which is subject to public law. Therefore, the applicant's acts, which were manifestly in contradiction to these principles and beliefs, were of interest to the public. The Court thus held that in this case the right to inform the public prevailed over the applicant's right to privacy.

3. *Civil proceedings*

In parallel to the aforementioned proceedings the applicant also instituted civil proceedings and requested an interim injunction to prevent the newspaper from publishing the article and the photograph. In a final judgment of 15 December 2005 the Supreme Court partly quashed the previous decisions and granted the interim injunction with regard to the publication of the picture. It held that the applicant was not a public figure and the picture of the applicant was of no general interest to the public. Moreover, the photograph did not contain any informative value that could not have been written in the article.

B. Relevant domestic law

Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim damages from him. In this context "defamation" has been defined in Article 111 of the Criminal Code (*Strafgesetzbuch*), as follows:

"(1) Anybody who, in such a way that it may be noticed by a third person, attributes to another a contemptible characteristic or sentiment or accuses him of behaviour contrary to honour or morality and such as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine ...

(2) Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public, shall be liable to imprisonment not exceeding one year or a fine ...

(3) The person making the statement shall not be punished if it is proved to be true. In the case of the offence defined in paragraph 1 he shall also not be liable if circumstances are established which gave him sufficient reason to believe that the statement was true."

Section 6 of the Media Act provides as follows:

"(1) Where a medium publishes statements which constitute the actus reus of disparagement, insult, derision or defamation the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered ..."

(2) The right referred to in paragraph 1 above shall not apply where ...

2. in the case of defamation

(a) the publication is true or

...

(3) Where the publication concerns the strictly personal sphere, a claim under s.1 shall only be excluded on the grounds set forth in ... s. 2(2)(a) ..., but in the case of s.2(2)(a) not where the published facts directly relate to public life.

Section 7 of the Media Act provides a claim for damages in cases of interference with the strictly personal sphere of an individual's life. It reads as follows:

“(1) If the strictly personal sphere of an individual's life is discussed or portrayed in the media in a way liable to publicly undermine the individual concerned, he or she shall have the right to claim compensation for the damage sustained from the media proprietor (publisher). ...

(2) The right referred to in paragraph 1 above shall not apply where:

(i) ...

(ii) the statements published are true and are directly related to public life;

(iii) ... “

COMPLAINTS

1. The applicant complains under Article 8 of the Convention about a violation of his right to respect for his private life, in that the courts failed to protect him against a defamatory newspaper article which displayed his private life in public and against the publication of his picture.

The applicant claims that the newspaper editor had not succeeded in proving that the article was true, as the article implied that he engaged in perverted sexual practices and that photos of him engaging in these practices existed.

The applicant argues that he is not a public person and that his public relations work for the bishop and the Church also did not render him a public person. There was thus no public interest in media coverage identifying him and in having the photos of him published. The applicant thus claims that the State had failed to protect his rights under Article 8 of the Convention, as his rights under Article 8 of the Convention prevailed over the newspaper editor's rights under Article 10 of the Convention.

2. The applicant complains under Article 6 of the Convention that the courts had erred in the assessment of the evidence before it, as the applicant maintains that the photo does not show his hand on the seminarian's crotch but that his hand was accidentally before it, not on it.

3. Lastly the applicant complains of a violation of Article 13 of the Convention, arguing that there is no possibility of an appeal to the Supreme Court.

QUESTION TO THE PARTIES

Has there been a violation of the applicant's right to respect for his private life, contrary to Article 8 of the Convention?