CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF PFEIFER v. AUSTRIA

(Application no. 12556/03)

JUDGMENT

STRASBOURG

15 November 2007

FINAL

15/02/2008

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 Pfeifer v. Austria,

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

Mr L. LOUCAIDES, *President,*
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges,*
Mr H. SCHÄFFER, ad hoc *judge,*
and Mr S. NIELSEN, *Section Registrar,*

Having deliberated in private on 18 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 12556/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Karl Pfeifer ("the applicant"), on 7 April 2003.

2. The applicant was represented by Lansky, Ganzger and Partners, lawyers practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that the Austrian courts had failed to protect his reputation against defamatory allegations made in a magazine.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mrs E. Steiner, the judge elected in respect of Austria, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr H. Schäffer to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 4 November 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is a freelance journalist who lives in Vienna. From 1992 to 1995 he was the editor of the official magazine of the Vienna Jewish community.

A. Background

7. In the beginning of 1995 the Academy of the Austrian Freedom Party (*Freiheitliche Partei Österreichs*) published an article in its yearbook, written by P., a professor of political sciences at Münster University. The article was entitled "Internationalism against nationalism: an eternal mortal enmity?" and alleged that the Jews had declared war on Germany in 1933. Moreover, it trivialised the crimes of the Nazi regime.

8. In February 1995 the applicant published a commentary on this article in the magazine of the Vienna Jewish community. It was entitled "Freedom Party's 1995 yearbook with (neo-)Nazi tones". He criticised P. in harsh terms for using Nazi terminology and disseminating ideas which were typical of the "Third Reich". More specifically, he accused P. of reviving the old Nazi lie of a worldwide Jewish conspiracy and of confounding the roles of perpetrators and victims.

9. Subsequently, P. brought defamation proceedings under Article 111 of the Criminal Code (*Strafgesetzbuch*) against the applicant. The Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) acquitted the applicant. Its judgment was upheld on 4 May 1998 by the Vienna Court of Appeal (*Oberlandesgericht*), which found that the applicant's criticism constituted a value judgment which had a sufficient factual basis in the numerous quotations from P.'s article. Having regard to the publication of P.'s article in the yearbook of a political party and given the highly sensitive topic, the applicant's criticism, though harsh, was not excessive.

10. Two years later, in April 2000, the Vienna Public Prosecutor's Office brought proceedings against P. on charges under the National Socialism Prohibition Act ("the Prohibition Act" – *Verbotsgesetz*). Relying on numerous quotations from P.'s article in the Freedom Party's 1995 yearbook, the public prosecutor argued that the article constituted a national-socialist activity within the meaning of section 3g of the Prohibition Act. Shortly before the date scheduled for the trial, P. committed suicide.

11. On 8 June 2000 the weekly *Zur Zeit*, a right-wing magazine whose chief editor M. was the former Chairperson of the Freedom Party's Academy, published a two-and-a-half-page article with the headline "The deadly terror of virtue" ("*Tödlicher Tugendterror*"). It referred to the

applicant's criticism of P.'s article in 1995 and alleged that the applicant's comment had unleashed a manhunt which had eventually resulted in the death of the victim. It referred to the applicant and a number of other persons, mostly politicians of the Austrian Socialist Party or the Green Party and also a number of journalists, a historian and a professor of political sciences, as members of a "hunting society" which used the Prohibition Act as a tool to attack persons close to the Freedom Party and had ultimately chased one victim to his death. The article was accompanied by pictures of the members of the alleged "hunting society", including a picture of the applicant.

12. The applicant brought defamation proceedings under Section 6 of the Media Act (*Mediengesetz*) against the publishing company owning *Zur Zeit*.

13. On 20 March 2001 the Vienna Regional Criminal Court found that the article fulfilled the elements of defamation and ordered the defendant company to pay the applicant compensation under section 6 of the Media Act. In addition the defendant was ordered to publish the judgment.

14. The Regional Court noted that the impugned article accused the applicant of being morally responsible for P.'s death. Certain facts were undisputed, namely that the applicant had written a critical commentary on P.'s article, that P. had been charged under the Prohibition Act and that he had died before the opening of the trial. However, the allegation that the applicant was part of a "hunting society", that is, a group of persons persecuting P. and eventually causing his death, amounted to a statement of fact, the truth of which had not been established. In particular, the defendant company had not offered any proof for the causal link between the applicant's article and P.'s death. Even if the statement were to be treated as a value judgment, it was excessive as it presented a conclusion which went far beyond what could reasonably be based on the underlying facts. Thus, it transgressed the limits of criticism permitted by Article 10 of the Convention.

15. On 15 October 2001 the Vienna Court of Appeal set the judgment aside on an appeal by the defendant.

16. It found that the impugned article contained a value judgment which was, however, not excessive. The use of the term "hunting society" did not imply coordinated activities of a group of persons with the aim of destroying P.'s existence. Thus, the article could be understood as implying that the applicant's and other persons' activities had eventually caused P.'s death but it did not contain an accusation of their having foreseen or planned this outcome. The factual basis was sufficient to attribute some moral responsibility for P.'s death to the applicant and a number of other persons who had been active either by criticising P. in the media or by bringing actions against him in the courts. As regards the applicant, the article referred to his critical commentary on P.'s publication, thereby

enabling the reader to assess whether or not he shared the opinion expressed in the impugned article. Moreover, the reader was aware that the article was written from a political and ideological point of view and involved a certain degree of exaggeration. In sum, it remained within the limits of permissible criticism set by Article 10 of the Convention.

B. The proceedings at issue

17. Meanwhile, in February 2001 M. addressed a three-page letter to the subscribers to *Zur Zeit* asking them for financial support. As a reason for this request readers were told that the weekly *Zur Zeit* was under massive pressure from anti-fascists who, after having campaigned against Kurt Waldheim, Jörg Haider and other "undesirables", had now chosen *Zur Zeit* as their target. It alleged that the above-mentioned group was trying to damage *Zur Zeit* by means of disinformation in the media and by instituting a multitude of criminal proceedings and civil actions.

The relevant passage of this letter reads as follows:

> "Then there is the case of Karl Pfeifer v. *Zur Zeit*. The long-standing editor of the Jewish religious community's magazine, Karl Pfeifer, was identified following Professor P.'s [family name in full] death as a member of the hunting society that drove the conservative political scientist to his death. It was common knowledge that court proceedings were due to be opened against P. under the Nazi Prohibition Act on account of his statements in the Freedom Party's 1995 yearbook. The Jewish journalist Karl Pfeifer had condemned the statements for their Nazi tone and as a result had unleashed the judicial avalanche against P. When *Zur Zeit* dared to show that this was the cause of the suicide, Pfeifer lodged a complaint. The extremely complex, time-consuming and costly proceedings, naturally accompanied by a corresponding media campaign in the trendy left-wing rags, are still in progress."

18. On 15 March 2001 the applicant brought a further set of defamation proceedings under Article 111 of the Criminal Code against M. and under section 6 of the Media Act against the publishing company owning *Zur Zeit*.

19. On 4 September 2001 the Vienna Regional Criminal Court decided to adjourn the proceedings pending the Vienna Court of Appeal's judgment in the first set of defamation proceedings. Once the latter had given its judgment of 15 October 2001 (see paragraphs 15 and 16 above), the Regional Court resumed the proceedings.

20. On 31 January 2002 the Regional Court acquitted the defendants. It noted that the two sets of defamation proceedings related to very similar factual and legal issues. Again, as in the article "The deadly terror of virtue", the applicant was referred to as a member of a "hunting society" which had driven P. to commit suicide. Thus, it was alleged that there was a causal link between the applicant's criticism of P.'s article and the latter's death. The considerations which had led the Court of Appeal to acquit the defendants in the first set of proceedings also applied in the present case. The Regional Court followed the appellate court's view expressed in the

judgment of 15 October 2001 and found that the impugned letter contained a value judgment which relied on a sufficient factual basis. In this connection, it noted that addressees of the letter, even if they had not read the article "The deadly terror of virtue", were given a summary of its contents which enabled them to form an opinion about the pertinence of the allegation raised. The value judgment was not excessive, although the underlying facts were commented on from a strongly ideological point of view. It followed that the publication at issue was protected by Article 10 of the Convention.

21. On 1 August 2002 the Vienna Court of Appeal dismissed an appeal by the applicant, upholding the Regional Court's assessment that the two sets of proceedings were so closely linked that the principles and considerations set out in its previous judgment of 15 October 2001 applied.

22. The judgment was served on the applicant's counsel on 7 October 2002.

II. RELEVANT DOMESTIC LAW

23. Article 111 of the Criminal Code (*Strafgesetzbuch*), reads 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."

24. Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim damages from him. In this context "defamation" has to be read as defined in Article 111 of the Criminal Code.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that the Austrian courts had failed to protect his reputation against the allegations contained in Mr M.'s letter to the subscribers to *Zur Zeit*. He relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

26. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

28. The applicant asserted that the Austrian courts had wrongly qualified the impugned statement as a value judgment. In his view the accusation of being a "member of a hunting society" presupposed coordinated activities by several persons with the aim of driving Professor P. to his death, amounting to factual allegations which were not supported by any proof since the applicant, acting alone without any cooperation or coordination with others, had done no more than publish one article criticising views voiced by P. He had done so in 1995, years before P.'s prosecution under the Prohibition Act and eventual suicide. Clearly, there was no causal link between the applicant's article and P.'s suicide.

29. It had to be taken into account that P. had at the time brought proceedings against the applicant, which had remained unsuccessful since the courts had found that the applicant had remained within the limits of acceptable criticism. In fact, he had not accused P. of being a neo-Nazi or of

having committed offences under the Prohibition Act, but had only reproached him with employing Nazi tones.

30. Even if the statement were to be regarded as a value judgment it lacked a sufficient factual basis. Freedom of political speech reached its limits in a case such as the present one, where the applicant's opponents had damaged his reputation by making unfounded allegations.

31. The Government accepted that the State's obligations under Article 8 could extend to the adoption of measures designed to secure respect for private life in the sphere of relations between individuals. They went on to say that what was decisive in weighing the applicant's right to the protection of his private life against the right to freedom of expression was whether and to what extent the statement at issue had made a contribution to a debate of general interest. The impugned statement in the letter to subscribers to *Zur Zeit* and the related previous article had to be seen in the context of an ongoing political discussion between persons of different ideological convictions.

32. Referring to the Court's case-law under Article 10 of the Convention, the Government asserted that, given the interest in a free exchange of political opinions, including those that offend, shock or disturb, the Austrian courts could reasonably have considered that the statement referring to the applicant as a "member of a hunting society that eventually caused P.'s suicide" was a value judgment which had a sufficient factual basis. The applicant, though not a politician, had participated in a political debate and was therefore himself required to show a higher degree of tolerance towards criticism. In sum, the Austrian courts had not breached the applicant's rights under Article 8 in attaching greater weight to the freedom of expression than to the applicant's interest in the protection of his reputation.

2. The Court's assessment

33. As to the applicability of Article 8, the Court reiterates that "private life" extends to aspects relating to personal identity, such as a person's name or picture, and furthermore includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004-VI, with further references).

34. The Court has found the publication of a person's photo to fall within the scope of his or her private life even where the person concerned was a public figure (see *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002, and *Von Hannover*, cited above, § 53).

35. What is at issue in the present case is a publication affecting the applicant's reputation. It has already been accepted in the Convention organs' case-law that a person's right to protection of his or her reputation is encompassed by Article 8 as being part of the right to respect for private life. In *Chauvy and Others v. France* (no. 64915/01, § 70, ECHR 2004-VI), concerning a case brought under Article 10, the Court found that a person's reputation, which was affected by the publication of a book, was protected by Article 8 as part of the right to respect for private life and had to be balanced against the right to freedom of expression (this approach was followed in *Abeberry v. France* (dec.), no. 58729/00, 21 September 2004, and *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, § 67, 9 November 2006). In *White v. Sweden* (no. 42435/02, §§ 19 and 30, 19 September 2006), relating to a complaint under Article 8, the right to protection of one's reputation against allegedly defamatory statements in newspaper articles was considered to fall within the scope of "private life" (see also, *mutatis mutandis*, *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005, in which a complaint about the alleged failure to protect a person against a critical newspaper article was considered to fall within the scope of "private life" as protected by Article 8, while the question whether that Article embodied a right to protection of reputation and honour as such was left open in *Gunnarsson v. Iceland* (dec.), no. 4591/04, 20 October 2005). Finally, in *Fayed and the House of Fraser Holdings plc v. the United Kingdom* (no. 17101/90, Commission decision of 15 May 1992), the European Commission of Human Rights had found that the publication of certain findings in a report drawn up by the State authorities constituted an interference with the applicants' right to respect for their private life within the meaning of Article 8. The Court considers that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life". Article 8 therefore applies. This is not disputed by the parties.

36. The Court notes that the applicant did not complain of an action by the State but rather of the State's failure to protect his reputation against interference by third persons.

37. The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless,

similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Von Hannover*, cited above, § 57, with further references).

38. The main issue in the present case is whether the State, in the context of its positive obligations under Article 8, has achieved a fair balance between the applicant's right to protection of his reputation, which is an element of his "private life" and the other party's right to freedom of expression guaranteed by Article 10 of the Convention (ibid., § 58; see also *Chauvy and Others*, cited above, § 70).

39. The present case has to be seen against a background of an ongoing dispute which was fought out in the media and before the Austrian courts.

40. It had started with P.'s contribution in the 1995 yearbook of the Austrian Freedom Party and the applicant's commentary in the official magazine of the Vienna Jewish Community, criticising him for employing (neo-)Nazi tones. P.'s action for defamation against the applicant under Article 111 of the Criminal Code had remained unsuccessful, since the courts found that the applicant's criticism, though harsh, was a value judgment with a sufficient factual basis (see paragraph 9 above).

41. Following the institution of criminal proceedings by the Public Prosecutor against P. under the Prohibition Act in April 2000 on account of the article published in the 1995 yearbook, and P.'s suicide shortly before the trial, the struggle had continued with a publication in the weekly *Zur Zeit* in June 2000, which referred to the applicant and a number of other persons as members of a "hunting society" which had chased P. to his death. The applicant's action for defamation remained unsuccessful. While the first-instance court considered the statement to be a statement of fact, the truth of which had not been established, or alternatively, an excessive value judgment (see paragraphs 13 and 14 above), the appellate court treated it as a value judgment which was not excessive. In essence it found that the applicant's and other persons' actions concerning P. provided a sufficient factual basis for holding them morally responsible for P.'s death (see paragraphs 15 and 16 above).

42. In the proceedings which are now at issue, the domestic courts had to decide whether the statements in Mr M.'s letter to the subscribers to *Zur Zeit*, again accusing the applicant of being a "member of a hunting society" which had caused P. to commit suicide, fulfilled the elements of the offence of defamation. They followed the approach taken in the previous set of proceedings and considered the impugned statement to be a value judgment relying on a sufficient factual basis. In sum they considered that the statement, though made from a strongly ideological point of view, was not excessive (see paragraphs 20-21 above).

43. Having regard to the background of the case, the Court reiterates its case-law under Article 10 relating to the essential role the press plays in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many other authorities, *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 30, ECHR 2003-XI, and *Von Hannover*, cited above, § 58). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (ibid.).

44. In this context, the Court considers that the State's obligation under Article 8 to protect the applicant's reputation may arise where statements going beyond the limits of what is considered acceptable criticism under Article 10 are concerned. The Court will therefore examine whether or not the Austrian courts failed to protect the applicant against excessive criticism.

45. As regards the general principles relating to the freedom of the press in the context of political debate, the Court refers to the summary of its established case-law in the cases of *Feldek v. Slovakia* (no. 29032/95, §§ 72-74, ECHR 2001-VIII, with further references) and *Scharsach and News Verlagsgesellschaft* (cited above, § 30). It reiterates that there is little scope under Article 10 § 2 for restrictions on political speech or on debate on questions of public interest (see, among many other authorities, *Feldek*, cited above, § 74). Moreover, the Court notes that the applicant was himself a person in the public eye, whose criticism of P.'s publication had been framed in strong terms (see, *mutatis mutandis*, *Minelli*, cited above).

46. Much of the parties' argument in the present cases relates to the characterization of the text at issue as a statement of fact or as a value judgment. In this context, the Court reiterates its established case-law to the effect that, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see, for instance, *Feldek*, cited above, §§ 75-76; *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II; *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 236, § 47; and *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1276, § 33). As the Court has noted in previous cases, the difference lies in the degree of factual proof which has to be established (see *Scharsach and News Verlagsgesellschaft*, cited above, § 40).

47. The Court is not convinced by the domestic courts' assessment that the statements at issue are value judgments. The statement "Karl Pfeifer was identified following Professor P.'s death as a member of a hunting society that drove the political scientist to his death" clearly establishes a causal link between the applicant's and other persons' actions, and P.'s suicide in 2000. This was explicitly accepted by the domestic courts in the present proceedings (see paragraph 20 above). Whether or not an act has a causal link with another is not a matter of speculation, but is a fact susceptible of proof. Although it is undisputed that the applicant had written a critical commentary on P.'s article in 1995 and that, years later, in 2000, P. had been charged under the Prohibition Act in relation to this article and had committed suicide, the defendant had not offered any proof for the alleged causal link between the applicant's article and P.'s death. It is true that statements that shock or offend the public or a particular person are also protected by the right to freedom of expression under Article 10. However, the statement here at issue went beyond that, claiming that the applicant had caused Professor P.'s death by ultimately driving him to commit suicide. By writing this, Mr M.'s letter to the subscribers to *Zur Zeit* overstepped acceptable limits, because it in fact accused the applicant of acts tantamount to criminal behaviour.

48. Even if the statement were to be understood as a value judgment in so far as it implied that the applicant and others were morally responsible for P.'s death, the Court considers that it lacked a sufficient factual basis. The use of the term "member of a hunting society" implies that the applicant was acting in cooperation with others with the aim of persecuting and attacking P. There is no indication, however, that the applicant, who merely wrote one article at the very beginning of a series of events and did not take any further action thereafter, acted in such a manner or with such an intention. Furthermore, it needs to be taken into account that the article written by the applicant, for its part, did not transgress the limits of acceptable criticism.

49. In those circumstances the Court is not convinced that the reasons advanced by the domestic courts for protecting freedom of expression outweighed the right of the applicant to have his reputation safeguarded. The Court therefore considers that the domestic courts failed to strike a fair balance between the competing interests involved.

There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

51. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage. He argued that given his personal history (being Jewish, he had had to flee from Austria in 1938 and many of his family members had been killed by the Nazi regime), he had suffered particularly from the fact the courts had failed to protect him against the wrongful accusation that he had driven P. to his death in collaboration with others.

52. The Government considered that the finding of a violation would provide sufficient compensation for any non-pecuniary damage suffered by the applicant.

53. The Court accepts that the failure to protect the applicant's reputation against the accusations at issue must have caused him feelings of distress. Making an assessment on an equitable basis it awards the applicant EUR 5,000 as compensation for non-pecuniary damage.

B. Costs and expenses

54. The applicant also claimed EUR 6,572.72 for the costs and expenses incurred before the domestic courts and EUR 5,551.38 for those incurred before the Court. These sums included value-added tax (VAT).

55. The Government commented that the costs for two requests for adjournment should be deducted from the costs incurred in the domestic proceedings, since they had not served to prevent the alleged violation. Furthermore, they argued that the amount claimed for the Convention proceedings was excessive. Applying the fees due under domestic law, only an amount of EUR 3,205.62, including VAT, was to be reimbursed.

56. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

57. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 10,000, covering costs under all heads.

C. Default interest

58. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* by five votes to two that there has been a violation of Article 8 of the Convention;

3. *Holds* by five votes to two
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage and EUR 10,000 (ten thousand euros) in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Loukis LOUCAIDES
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:
(a) dissenting opinion of Mr Loucaides;
(b) dissenting opinion of Mr Schäffer.

L.L.
S.N.

DISSENTING OPINION OF JUDGE LOUCAIDES

I do not agree with the finding of the majority that there has been a violation of Article 8 in this case on account of the failure to protect the applicant against excessive defamatory criticism damaging to his reputation.

For the purposes of my opinion it is, I believe, useful to recount the basic facts of the case.

In the beginning of 1995 P. (a professor of political sciences) published an article in which he alleged that the Jews had declared war on Germany in 1933. He also trivialised the crimes of the Nazi regime. In February 1995 the applicant published a commentary on this article in which he criticised P. in harsh terms for using Nazi terminology and disseminating ideas which were typical of the "Third Reich". More specifically he accused P. of reviving the old Nazi lie of a worldwide Jewish conspiracy and of confounding the roles of perpetrators and victims. Subsequently P. brought defamation proceedings against the applicant, which failed because the courts found that the applicant's criticism constituted a value judgment with a sufficient factual basis derived from P.'s article.

In April 2000 P. was prosecuted on charges under the National Socialism Prohibition Act in respect of his article. Shortly before the date scheduled for his trial, P. committed suicide.

In June 2000 the weekly *Zur Zeit* published an article which referred to the applicant's criticism of P.'s article of 1995 and alleged that the applicant's comment had unleashed a manhunt which had eventually resulted in the death of the victim. It referred to the applicant and a number of other persons as members of a "hunting society" which had persecuted P., driving him eventually to his death. In February 2001 this statement was repeated in a letter to subscribers of *Zur Zeit*. The applicant brought defamation proceedings in respect of this article and in respect of the letter, which failed because the competent courts in Austria found that they contained a value judgment which was not excessive and which relied on a sufficient factual basis.

It appears that the defamation that the applicant was complaining about was the statement that he was a member of a "hunting society" which had driven P. to commit suicide, and that there was a causal link between the applicant's criticism of P.'s article and the latter's death.

Admittedly the impugned statement was expressed in an aggressive and hostile style. However, this is not enough to lead to the conclusion that it amounts to a violation of the applicant's right to respect for his reputation.

In deciding whether or not the impugned statement was so defamatory as to qualify as a violation of the right in question, it is important to understand its meaning and effect in the context of the above facts. I believe that the statement cannot reasonably be interpreted as meaning that the applicant killed P. or intentionally acted in such a way as to cause his death.

P. committed suicide, and therefore the statement in its worst possible meaning can only be taken as connecting P.'s decision to end his life with the criticism by the applicant and others and his prosecution. In other words, it can only be understood to mean that these incidents upset P. to the point of his committing suicide. To my mind this is a value judgment in the form of an opinion based on the sequence of events, and this opinion may be held to express a possibility which cannot be considered unreasonable. It is important to note that the impugned statement did not contain an accusation that the applicant, through his article, had planned to cause P. to commit suicide. And no intelligent person could possibly understand the statement as implying such an accusation. In so far as the impugned statement can reasonably be interpreted as meaning that the applicant's article and other similar criticisms or judicial proceedings by other persons against P. had led him to commit suicide without this having been the intention of any of these persons, I do not find any defamation of the applicant that could justify a finding of a violation of Article 8 of the Convention. As to the use of the term "hunting society", I agree with the Vienna Court of Appeal that this term does not necessarily mean a group of persons who coordinated their activities with the aim of destroying P.'s existence. In the context of the above facts it may reasonably be understood to mean several persons who through their acts – such as articles – had hurt P.'s feelings, and therefore could be grouped together in one category (that of the "hunting society"). The term "hunting", if taken literally, is excessive, but, in my opinion, it was used more as a figure of speech, in order to designate the unfriendly attitude of these persons towards P.

In sum, I agree with the final judgment of the domestic courts: I find that the impugned statement, which the applicant complained had injured his reputation, was an expression of an opinion, a "value judgment" based on a sequence of relevant events which provided a sufficient factual basis. In my view, the interpretation of this statement adopted by the applicant and the majority in this case is exaggerated and unrealistic. It seems to me that it offended the applicant but did not exceed the limits of freedom of expression guaranteed by Article 10 of the Convention. In this connection I must repeat the classic statement about freedom of speech, initiated in the *Handyside v. the United Kingdom* case (Series A no. 24, p. 23, § 49):

> "Freedom of expression constitutes one of the essential foundations of ... a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

Finally, I feel the need to express my great satisfaction at the clarity and firmness with which, for the first time, a judgment of this Court has made it clear that a person's right to protection of his or her reputation is protected by Article 8 as being part of the right to respect for private life, a position that I have always supported.

DISSENTING OPINION OF JUDGE SCHÄFFER

1. In my opinion the Austrian courts did not neglect or fail to protect the rights and freedoms of the applicant as provided by the Convention. I fully agree with the Court (majority)'s deliberations and its view that the protection of a person's reputation is encompassed within the scope and meaning of "private life" (Article 8 of the Convention). Moreover, it is important that this point is not disputed by the parties.

2. The question whether the Convention not only secures rights and freedoms to individuals but also imposes positive obligations on the member States can probably not be answered for all rights and freedoms in the same way; hence one cannot give a general dogmatic formula. But it cannot be neglected that an adequate interpretation of the Convention depends on a fair balance between different rights, and especially a balance between the protection of "private life" (including the reputation) of one person and the right to freedom of expression of others, a position which is already reflected and realised from the very beginning in the reservations to both of the rights as set out in the relevant provisions (Articles 8 and 10 contain the same values and nearly the same wording in their respective reservations, both referring to the "rights and freedoms of others").

3. Frequently we have to deal with bipolar (or even multi-polar) legal relationships which can be judged only by "practical concordance" (compare, for example, Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. 1995, RN 72 and 317 (in general), 393 and 400 (concerning freedom of information especially), and the recent jurisprudence of the Austrian Constitutional Court (öVfGH, 1 December 2006, B 551/06, referring to Article 10 of the Convention: "... *die konkurrierenden Grundrechtspositionen [sind] unter Berücksichtigung der in den Gesetzesvorbehalten angesprochenen Rechtsgüter gegeneinander abzuwägen und auf diese Weise die damit zusammenhängenden Interessen der Parteien zu einem angemessenen Ausgleich zu bringen*"). Hence, it is in the first place the task and duty of the domestic legislature to find a fair balance between the legally protected values and interests at stake, and secondly, the task of the domestic courts to ensure that this balance is observed and implemented in individual cases – in both cases, of course, in the light and spirit of the Convention.

4. This observation has the purpose of underlining that the European Court of Human Rights has to operate very carefully when ruling on positive State obligations. It has to find a fair and adequate balance between safeguarding the private life of one individual and the freedom of expression of another or others, which are both essential in a "democratic society" (as we conceive of it in Europe). And perhaps there is a slight difference between cases where the private-life guarantee is in conflict with works of art and cases where the protection of private life is competing with

the freedom of open political debate. Whereas works of art – even if they offend somebody – enrich culture and social life, free expression – even if it is shocking or provocative (within certain limits) – is indispensable for a democratic society.

5. In other words, where both values are at stake, the result of the Court's balancing exercise ought not to depend on which particular Article of the Convention has been relied on in the case before it. Freedom of expression does not automatically prevail over the rights of others if an applicant complains to the Court of an infringement of the right to freedom of information. And on the other hand, the protection of private life will not necessarily prevail over freedom of expression if the applicant complains to the Court of a violation of the right to respect for private life (for example, failure to protect his or her reputation). Of course, such balancing should always have regard to all the elements and standards which have already been developed in the Court's long-standing jurisprudence. But these criteria have to be applied sensitively, equitably and with respect and concern for the margin of appreciation afforded to the national authorities.

6. With that in mind, it is true that the present case has to be seen against the background of an ongoing dispute between exponents of different ideological positions and convictions which was fought out in the media and before the courts in Austria (see paragraph 39 of the judgment). All the problems in this case began with an article by P. (a professor, who later committed suicide), published in the 1995 Yearbook of the Austrian Freedom Party (FPÖ). It should be mentioned that one of the three co-editors of the Yearbook (M.) was the opponent of the applicant (Mr Pfeifer) in the subsequent defamation proceedings. As a co-editor he had an understandable motive for participating in the public discussion aroused by the above-mentioned publication, and uttering his opinion about the treatment of and comments concerning the now deceased author (P.).

7. In my opinion the same criteria have to apply to the freedom of expression of the applicant (Mr Pfeifer) as to the freedom of expression of the defendant (M.). And, indeed, the Austrian courts in both cases – referring to the Court's jurisprudence – were of the opinion that the expressions used constituted harsh, but not excessive criticism (case of P., Vienna Court of Appeal (Oberlandesgericht), judgment of 4 May 1998, quoted in paragraph 9 of the judgment; case of M., Vienna Court of Appeal, judgment of 15 October 2001, and Vienna Regional Court, judgment of 31 January 2002, quoted in paragraphs 15, 16 and 20 of the judgment). In both cases the Austrian courts held that the use of the words in question constituted "a value judgment which relied on a sufficient factual basis".

8. A necessary prerequisite for the description and explanation of a (social) condition or a (social) event, but also for a judgment on a particular concept – such as "*Jagdgesellschaft*" ("hunting society") in this precise case – is its specification or exact conceptual connection. It does not necessarily

follow from a concept that this concept empirically corresponds to anything. A phenomenon such as a "*Jagdgesellschaft*" should actually exist in the social environment and not merely as a language statement. Consequently "*Jagdgesellschaft*" does not denote a fact.

9. At any rate, in the German language the phrase "*Jagdgesellschaft*" (hunting society/hunting party) – as a language statement – does not necessarily mean an organised group of consciously active collaborators, it very often also refers to a spontaneous social phenomenon: parallel action or an agitated mass. Different factors and persons may be active in such a way that something like collaboration results, although one cannot attribute all the effects or concrete responsibility to a single person, and nevertheless there is some kind of social causality. It cannot be inferred from the fact of P.'s suicide that the suspected (insinuated) cause was actually the reason for his suicide. This statement of restricted possibility about the correlation between "cause" and "effect" is well known in social sciences. The reaction would perhaps also have taken place if the suspected cause had not been present (so-called counterfactuals).

10. To describe and to criticise such a situation – even using an insulting word as a value judgment – has been regarded as possible and (given a factual basis) not excessive in the framework of a democratic society on the basis of freedom of expression, especially in the exercise of journalistic freedom (compare *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1276, §§ 33-34, where the Court qualified the clear insult "*Trottel*" (idiot) as "part of the political discussion ... amount[ing] to an opinion whose truth is not susceptible of proof"). Such an assessment must be valid without bias for or against any particular ideology or political camp.

11. A person affected by criticism who himself or herself has previously gone to the public and expressed harsh criticism also, therefore, has to tolerate harsh counter-criticism. This applies to the present case, because the case has to take into account the whole context (and not only the applicant's complaint). I cannot agree with the majority's assessment that M.'s letter to the subscribers to the newspaper *Zur Zeit* "overstepped acceptable limits, because it in fact accused the applicant of acts tantamount to criminal behaviour" (see paragraph 47 of the judgment). The statement that a person had driven somebody else to commit suicide is indeed a severe reproach – which nevertheless should be possible in an open society; social pressure which induces somebody to commit suicide is blameworthy, but by no means a basis for a criminal charge or penalty. Therefore, it does not hold true that the harsh criticism had to be understood as an accusation of criminal behaviour. And if that is not true, the balancing of the values at stake in the majority's opinion is not correct or adequate (according to the Court's own principles).

12. If the content of a contribution to a debate of general interest (even if it is rejected by the majority of society) is confined to a value judgment about the conduct of a person in a public discussion, when that person actively and of his/her free will initiated or became involved in that discussion, the principle *volenti non fit injuria* applies. State authorities cannot be blamed in such a situation – as there is a sufficient factual basis – for placing greater emphasis on freedom of expression than on the individual's right to the protection of his or her reputation.

13. To sum up, I do not concur with the majority of the Court. The aforementioned considerations lead me to the conclusion that the domestic courts did not fail to protect the applicant's reputation against interference by third persons, and therefore, in my opinion, there has been no violation of the applicant's right to respect for his private life under Article 8 of the Convention.