EGMR Urteil vom 12. Jänner 2016, Bsw 55495/08 – *Genner gegen Österreich*

Fundstelle: ZIIR 2016, 364 (*Thiele*)

Die Verurteilung eines Mitarbeiters von "Asyl in Not" wegen übler Nachrede (weil er am Tag nach dem Tod der Innenministerin Liese Prokop auf der Website des Vereins unter anderem geschrieben hatte "Die gute Meldung zum Jahresbeginn: Liese Prokop, Bundesministerin für Folter und Deportation, ist tot" und "Liese Prokop war eine Schreibtischtäterin, wie es viele gab in der grausamen Geschichte dieses Landes; völlig abgestumpft, gleichgültig gegen die Folgen ihrer Gesetze und Erlässe, ein willfähriges Werkzeug einer rassistisch verseuchten Beamtenschaft. Kein anständiger Mensch weint ihr eine Träne nach.") stellt nach einstimmiger Ansicht des EGMR keine Verletzung von Art 10 EMRK dar.

Leitsatz verfasst von Hon.-Prof. Dr. *Clemens Thiele*, LL.M.

In the case of Genner v. Austria,

The European Court of Human Rights (Fourth Section)

sitting as a Chamber composed of: András Sajó, *President,* Vincent A. De Gaetano, Nona Tsotsoria, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek, Egidijus Kūris, Gabriele Kucsko-Stadlmayer, *judges,* and Fatoş Aracı, *Deputy Section Registrar,* having deliberated in private on 1 December 2015, Delivers the following

JUDGMENT

which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 55495/08) 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 Michael Genner (“the applicant”), on 7 November 2008.

2. The applicant was represented by Mr W.L. Weh, a lawyer practising in Bregenz. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that his conviction for defamation had violated his rights under Article 10 of the Convention.

4. On 4 September 2013 the complaint concerning the alleged violation of Article 10 was communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Vienna.

6. At the time of the events the applicant worked for the association "Asyl in Not", which offers legal and social support to asylum seekers and refugees.

7. In 2005, an amendment to a number of laws concerning the status of foreigners and of asylum seekers and concerning relevant proceedings (*Fremdenrechtspaket 2005*) was drafted and adopted by Parliament. The amendments entered into force on 1 January 2006.

8. On 31 December 2006 the then Federal Minister for Interior Affairs, L.P., died unexpectedly of an aneurysm at the age of 55.

9. On 1 January 2007 the applicant published a statement on the association's website entitled "One less. What's coming now?" (*"Eine weniger. Was kommt danach?"*). It continued: "The good news for the New Year: L.P., Minister for torture and deportation, is dead." *("Die gute Meldung zum Jahresbeginn: L.P., Bundesministerin für Folter und Deportation, ist tot"*) After referring to some specific individual stories of asylum seekers, the text stated further that "Mrs P. was a desk war criminal just like many others there have been in the atrocious history of this country: completely desensitised, indifferent to the consequences of their laws and regulations, the compliant instrument of a bureaucracy contaminated with racism. No decent human is shedding tears over her death." (*"L.P. war eine Schreibtischtäterin, wie es viele gab in der grausamen Geschichte dieses Landes; völlig abgestumpft, gleichgültig gegen die Folgen ihrer Gesetze und Erlässe, ein willfähiges Werkzeug einer rassistisch verseuchten Beamtenschaft. Kein anständiger Mensch weint ihr eine Träne nach*."). The applicant concluded the text by suggesting that their goal for the New Year was to fight for a new minister who would make good the damage done by L.P. so that Austria could return to being a country welcoming asylum seekers and a place where human rights were respected.

10. G.P., the late Minister's husband, filed a private prosecution (*Privatanklage*) for defamation against the applicant and the association.

11. On 19 September 2007 the Vienna Regional Court (*Landesgericht für Strafsachen Wien*) convicted the applicant of defamation in respect of the above-quoted passages of the statement and sentenced him to a fine in the amount of EUR 1,200. Half of the fine was suspended for three years. It dismissed G.P.'s request for recognition of the association's liability for its employee's actions.

12. The court found that the average reader would understand the relevant passages of the statement to mean that L.P. had ordered or tolerated the torture pending expulsion or the deportation of detainees and had violated human rights. The word "torture", in particular, implied the intentional infliction of physical or psychological suffering. An average reader would also place the word "deportation" (*Deportation*) in the context of the historical events under the national-socialist regime which forcefully deported segregated groups of people to ghettos and camps to subject them to forced labour or extermination. The statement in question suggested that L.P. exercised her political function in a particularly despicable way, that she was indifferent to officials' criminal abuse of authority in relation to asylum seekers and that her actions were motivated by racist, sadistic, xenophobic and national-socialist attitudes. The publication of the statement had triggered considerable reaction from the media and the public. The applicant had been criticised as tactless and disrespectful. In response thereto, on 9 January 2007, the applicant published in a daily newspaper a reply in which he stated that his comments had been directed solely towards L.P. and he apologised to her family members, who were not responsible for the late Minister's inhumane policies.

13. The Regional Court acknowledged that a criminal charge of defamation was at odds with the right to freedom of expression as guaranteed by the Convention. It found that the voicing of opinions by refugee associations criticising politicians and their legislative projects represented an

important corrective element and that the limits of acceptable criticism were particularly widely drawn in the context of the present case. However, in the court's opinion, the published statement overstepped the limits of acceptable criticism. The legislative background to the amendment of the laws governing foreigners and asylum seekers and the fact that criticism was allowed to be shocking, still could not justify positioning L.P. in a national-socialist and racist context and suggesting that she had tolerated the intentional physical ill-treatment of detainees pending expulsion or "deportations". Such accusations against the then only recently passed away L.P – together with the acclamation of her death and the call on "decent" people not to mourn her passing – clearly went beyond the limits of acceptable criticism in a democratic society. Moreover, the allegations made by the applicant had not been proven to be true, nor had he shown any journalistic diligence in that regard.

14. The applicant filed an appeal on points of law and fact, and also appealed against the sentence.

15. On 7 May 2008 the Vienna Court of Appeal (*Oberlandesgericht Wien*) dismissed his appeal. Referring to the reasoning of the first-instance court, it conceded that the word "deportation" nowadays had acquired the additional meaning of "expulsion or removal" and was not only used in the context of the national-socialist regime, but also in the context of the forced expulsion of foreigners. However, the context of the word in which it had been used ("a desk war criminal just like many others there have been in the atrocious history of this country") acted as a reminder of the national-socialist history of the country. Therefore, even though the statements at issue were political value judgments ("*politische Wertungen*"), the applicant had not produced any proof of a factual basis for his allegations. The applicant had further argued that, following the case-law of the European Court of Human Rights and of the domestic courts with regard to Article 10, the impugned statement was covered by freedom of expression. The Court of Appeal, however, found that even such case-law did not provide carte blanche for the applicant to make comparisons with the national-socialist regime without any factual basis.

16. That decision was served on the applicant's counsel on 3 June 2008.

17. On 7 November 2008 the applicant lodged a request for the renewal of the criminal proceedings ("*Erneuerung des Strafverfahrens*") pursuant to Article 363a of the Code of Criminal Procedure with the aim of having the proceedings re-opened and the conviction set aside.

18. On 14 October 2009 the Supreme Court dismissed the request. It stated that the admittedly broad limits of tolerable criticism in the political discourse did not cover excessive value judgments without any factual basis. Statements made in even heated political conflicts needed to respect a minimum of decency and moderation. In the present case the Supreme Court found that the evaluation by the courts had rightly led to the conclusion that the text in question justified the limitation of the applicant's right to freedom of expression. The value judgment suggesting criminal behaviour on the part of L.P. had no factual basis. The courts had not misjudged the considerable public interest in the discussion concerning migration and asylum policy. However, the applicant's statements had not contributed to that public discussion, since they were directed at defaming and discrediting the late Minister. The court further noted that the sanction imposed was, in view of the disrespectful statements and their temporal proximity to L.P.'s death, appropriate and even moderate.

19. The Supreme Court's decision was served on the applicant's counsel on 10 November 2009.

II. RELEVANT DOMESTIC LAW

20. Article 111 of the Criminal Code (*Strafgesetzbuch)* defines defamation as follows:

> "1. As it may be perceived by a third party, anyone who makes an accusation against another of having a contemptible character or attitude, or of behaving contrary to honour or morality, and of such a nature as to male him contemptible or otherwise lower him in public esteem, shall be liable to imprisonment not exceeding six months or a fine (...)

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

21. Article 117 (5) of the Criminal Code (*Strafgesetzbuch*), as in force until 1 January 2010,) read:

"In the case of an offence under Sections 111, 113 or 115 of this Criminal Code committed against a deceased or missing person, his or her spouse or close relatives or siblings shall be entitled to ask for prosecution."

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicant complained that the Austrian courts' judgments had violated his right to freedom of expression. He relied on Article 10 of the Convention, which reads:

"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."

23. The Government contested that argument.

A. Admissibility

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

B. Merits

25. The Court notes that it is common ground between the parties that the Vienna Regional Court's judgment of 19 September 2007, upheld by the Court of Appeal, constituted an interference with the applicant's right to freedom of expression as guaranteed by Article 10 § 1 of the Convention.

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

1. The parties' submission

27. The Government submitted that the interference had been in accordance with the law, had pursued a legitimate aim and had been necessary in a democratic society. The judgments of the Austrian Courts had likewise pursued a legitimate aim, namely the protection of the rights and reputation of others. Moreover, the interference had been proportionate to its aim and the reasons adduced had been relevant and sufficient. The conviction had been based on Article 111 taken in conjunction with Article 117 (5) of the Criminal Code.

28. Regarding the necessity of the interference, the Government argued that in cases which require a balancing of the respective interests under Articles 8 and 10 of the Convention, the domestic courts enjoyed a certain margin of appreciation. In the instant case the domestic courts had classified the statements in question as a value judgment lacking a sufficient basis in fact. In doing so, the domestic courts had interpreted the wording of the impugned statement in its overall context. They had also taken into account that the limits of acceptable criticism were drawn more widely with regard to politicians and that it had been the applicant's intention to contribute to a general debate on a subject of public interest, namely the rights and the protection of asylum seekers and the development of the law in this field. They had also considered the recent events and developments in the Austrian asylum and aliens' law relied on by the applicant in support of his allegations and had carefully weighed up the applicant's arguments. Moreover, they had taken account of the wording used by the applicant and the fact that the statement had been made immediately after the minister's death. Against this background, they concluded that the impugned passages amounted to an unjustified personal attack on the late minister herself. Lastly, the sanction imposed on him had been moderate, as an amount of only EUR 1,200 had been set by way of fine suspended on probation.

29. In the applicant's view the interference had neither been in accordance with the law nor had it pursued a legitimate aim. A deceased minister would no longer have any interest in pursuing a political career, and the interest of her surviving husband were not of the same kind or intensity since he was not a politician and did not wish to pursue a political career. The contents of the applicant's statement did not, essentially, concern the person of the deceased minister but rather the policy for which she had to be held liable. This was made clear by the reference to bureaucracy contaminated by racism. This value judgment had a factual basis, namely the constantly deteriorating situation of foreigners and asylum seekers in Austria. In the applicant's view, the deceased minister had represented an extremist position within Austrian society, especially in the eyes of people who fought for human rights, as she had combined cruelty with bonhomie and charm, as was often the case with Austrians who committed war crimes during World War II. Austrian society had closely observed the criminal proceedings against the applicant and had clearly understood that he was merely showing commitment and concern for a good cause. Even if the statement might have been drafted in a more cautious way, the applicant had nevertheless not exceeded the boundaries of legitimate political criticism.

2. The Court's assessment

(a) The principles established by the Court's case-law

30. According to the Court's well-established case-law, the test of necessity in a democratic society requires the Court to determine whether the interference complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30; *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV; *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05 § 44, 4 June 2009). In assessing whether a need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation.

31. The Court reiterates that, in matters of freedom of expression, its task in exercising its supervisory jurisdiction is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether they were "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the

relevant facts (see, among many other authorities, *Cojocaru v. Romania*, no. 32104/06, § 21, 10 February 2015).

32. There is no doubt that Article 10 § 2 enables the reputation of others – that is to say, of all individuals – to be protected; but in such cases the requirements of such protection have to be weighed against the interests of an open discussion of political issues (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103). The right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life. An attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway, no. 28070/06, § 64, 9 April 2009; Axel Springer AG v. Germany [GC], no. 39954/08, § 83, 7 February 2012*). The domestic authorities are therefore faced with the difficult task of balancing two conflicting values, namely freedom of expression on the one hand and the right to respect for reputation on the other (*Braun v. Poland*, no. 30162/10, § 44, 4 November 2014).

33. The margin of appreciation left to the national authorities in assessing whether such a "need" exists and what measures should be adopted to deal with it is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. Where the balancing exercise 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 *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012).

34. The Court has already had occasion to lay down the relevant principles which must guide its assessment in this area. It has thus identified a number of criteria in the context of balancing the competing rights (see *Von Hannover (no. 2)*, cited above, §§ 109-13, and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90-95, 7 February 2012). The relevant criteria thus defined are: 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 the publication, and, where appropriate, the circumstances in which the statement was made (see *Print Zeitungsverlag GmbH v. Austria*, no. 26547/07, § 33, 10 October 2013 and *mutatis mutandis Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, 10 November 2015).

35. Dealing appropriately with the dead out of respect for the feelings of the deceased's relatives falls within the scope of Article 8 (see with further references *Hadri-Vionnet v. Switzerland*, no. 55525/00, § 51, 14 February 2008, *Editions Plon v. France*, cited above § 46 and *Putistin v. Ukraine*, no. 16882/03, § 33, 21 November 2013). On the other hand, there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest (*Brasilier v. France*, no. 71343/01, § 41, 11 April 2006). Therefore, the limits of acceptable criticism are drawn more widely as regards a politician than they are as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (see, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; see *Couderc and Hachette Filipacchi Associés v. France, cited above*, § 117).

36. Nevertheless the Court has also found that, regardless of the forcefulness of political struggles, it is legitimate to try to ensure that they abide by a minimum degree of moderation and propriety, especially as the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention (*Lindon, Otchakovsky-Laurens and July v. France*, cited above, § 57). Moreover, a clear distinction must be made between criticism and insult. If the sole intent of a particular form of expression is to insult a person, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention (*mutatis mutandis Kincses v. Hungary*, no. 66232/10, § 33, 27 January 2015).

37. In its case-law the Court has distinguished between statements of fact and value judgments. The classification of a statement as fact or as a value-judgment is a matter which first and foremost falls within the margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 36, Series A no. 313). However the Court can change this classification under its supervisory role (see *Kharmalov v Russia, no. 27447/07, § 31, 8 October 2015; Pinto Pinheiro Marques v. Portugal, no. 26671/09, § 43, 22 January 2015).*

38. In previous cases the Court has emphasised that the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (*Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II). 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 v. Austria*, no. 39394/98, § 40, ECHR 2003-XI).

39. As regards value judgments which have been found by the national courts to be of a defamatory character, the Court has assessed the national court's findings on the question of whether the language used in the statement was of an excessive or dispassionate nature, whether an intention of defaming or stigmatising the opponent was disclosed, and if the statement was built on a sufficient factual basis (see *Lindon, Otchakovsky-Laurens and July v. France*, cited above, § 56-57 and *Kincses v. Hungary*, cited above, § 33). The Court further considers that the use of the term "Nazi" does not automatically justify a conviction for defamation on the ground of the special stigma attached to it (see *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 43, ECHR 2003-XI, concerning the term "neo-fascist" see *Karman v. Russia*, no. 29372/02, § 39, 14 December 2006.

(b) Application of the above principles in the present case

40. The Court observes that the interference with the applicant's freedom of expression was based on Articles 111 and 117 (5) of the Criminal Code. That law is formulated with sufficient precision to enable a citizen to regulate his conduct and the applicant does not provide any reasonable argument against this assumption. Accordingly, the interference is "prescribed by law".

41. The Court further agrees with the government that the interference did pursue the aim of the protection of "the reputation or rights of others", namely those of L.P. and the close members of her family – in particular her husband – which constitutes a legitimate aim within the meaning of paragraph 2 of Article 10 (see, *Editions Plon v. France*, cited above, § 34).

42. The Court, like the parties, considers that the applicant's statement concerned an issue of public interest and may be seen as a contribution to a political debate of public interest, namely that concerning the situation of asylum seekers and foreigners under the then new 2005 Immigration Police Act (*Fremdenpolizeigesetz 2005*) and the 2005 Asylum Act (*Asylgesetz 2005*). This intention is shown by the reporting of specific individual stories of asylum seekers.

43. The Court notes that the domestic courts classified the statement under consideration as a value judgment. The Court will proceed on the assumption that this classification is correct.

44. It is furthermore undisputed that L.P., as former Federal Minister for the Interior, had been a public figure and was still remembered by people at the time of publication of the impugned statement. However, the press release was issued on the day after her unexpected death, a fact that intensified the impact of the words used. The applicant's statement was published within the immediate period of her family's grief and was likely to cause considerable damage to the late Minister's reputation (see *Lindon, Otchakovsky-Laurens and July v. France*, cited above, § 46).

45. The Court observes that the timing of the impugned statement is a relevant circumstance in the present case and therefore has to be taken into consideration when balancing the conflicting rights under Article 8 and 10. The statement was an expression of satisfaction with the sudden death of L.P., the applicant made the day after she had passed away. To express insult on the day after the death of the insulted person contradicts elementary decency and respect to human beings (see

Editions Plon v. France, cited above, § 47; see also *Leroy v. France*, no. 36109/03, § 45, 2 October 2008) and is an attack on the core of personality rights.

46. As regards the contents of the applicant's statement, the Court considers that the applicant did not discuss the subject matter in a general and substantial manner but immediately launched a personal attack on the late Minister. He first of all expressed satisfaction about her death, suggesting that no decent human should feel grief about her passing away, and then continuing by comparing her to high-ranking Nazi officials who had committed atrocities and war crimes during the Second World War by calling her a desk war criminal ("*Schreibtischtäterin*"). It is true that in the statement published on 9 January 2007 in the newspaper "Der Standard" the applicant apologised to the family of L.P. for his statement, but even before this Court he insisted that the comparison of L.P. to Nazi war criminals had been correct and justified. The Court, however, considers that, even if regarded as value judgements, such serious and particularly offensive comparisons immediately after L.P.s death demand a particularly solid factual basis. In this respect the Court considers that the applicant did not make any distinction between the person of L.P. and the politics she stood for from his point of view.

47. The applicant argued that L.P. had shown disreputable character traits in the course of the political negotiations concerning several provisions of the 2005 Asylum law which constituted clear violations of the individual rights granted by the Federal Constitution and the Convention. However, the Court observes that the Vienna Court of Appeal carefully examined this argument and came to the conclusion that the Constitutional Court had confirmed the compatibility of almost all these legal provisions with the rights enshrined in both the Convention and the Federal Constitution. The applicant further argued that a factual basis for L.P.'s alleged motives was apparent in a TV interview she gave after the conviction of four police officers who had been found guilty of the torture of a person being detained pending expulsion. The Vienna Court of Appeal evaluated this argument and found that L.P.'s unwillingness to apologise in the Republic's name did not go to show that L.P. had ordered or at least tolerated the torture. Further evidence submitted by the applicant was of a general kind regarding the political situation in Austria as a whole and therefore did not provide a sufficient factual basis for the personal accusations against L.P. Lastly, the applicant submitted copies of press interviews with the heads of other NGOs and newspaper articles in order to show that his opinion that the situation of asylum seekers in Austria was constantly deteriorating was shared by others. Having examined these documents, the Court cannot identify a factual basis for the motives of L.P. as alleged by the applicant within these same documents.

48. Therefore, the Court considers that the reasons given by the court were relevant and sufficient.

49. As regards the "proportionality" of the sanction, the Court notes that the applicant was ordered to pay a fine of EUR 1,200, half of the fine being suspended on probation. That amount appears moderate taking into account the nature of the applicant's statement and the circumstances in which it was made and disseminated. Therefore, the penalty imposed cannot be found disproportionate.

50. It follows that there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint admissible;
2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 12 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Anmerkung[*]

I. Das Problem

Der Privatankläger war der Ehemann der am Silvestertag des Jahres 2006 verstorbenen Innenministerin *Liese Prokop*. Der später Angeklagte veröffentlichte bereits am 1. 1. 2007 auf seiner in Wien abrufbaren Internet-Website Folgendes: „Die gute Meldung zum Jahresbeginn: *Liese Prokop* , Bundesministerin für Folter und Deportation, ist tot“, sowie „Frau P. war eine Schreibtischtäterin, wie es viele gab in der grausamen Geschichte dieses Landes: völlig abgestumpft, gleichgültig gegen die Folgen ihrer Gesetze und Erlässe, ein willfähriges Werkzeug einer rassistisch verseuchten Beamtenschaft. Kein anständiger Mensch weint ihr eine Träne nach“. Die Strafgerichte verurteilten den Angeklagten wegen des Vergehens der üblen Nachrede nach § 111 Abs 1 und Abs 2 StGB zu einer zum Teil bedingt nachgesehenen Geldstrafe. Gegen das bestätigende Urteil des OLG Wien als Berufungsgericht richtete der Verurteilte unter Behauptung einer Verletzung in den Grundrechten auf Freiheit der Meinungsäußerung nach Art 10 MRK und auf ein faires Verfahren nach Art 6 Abs 1 sowie Art 6 Abs 3 lit b MRK den Antrag auf Erneuerung des Strafverfahrens nach § 363a StPO per analogiam iVm § 41 Abs 1 MedienG.

Der OGH musste sich einmal mehr mit dem Verhältnis zwischen der Meinungsäußerungsfreiheit und dem auch postmortal geschütztem Individualrechtsgut der Ehre auseinandersetzen. Das Höchstgericht erachtete weder das Grundrecht auf Freiheit der Meinungsäußerung noch auf ein faires Verfahren als verletzt.[1] Die befasst gewesenen Unterinstanzen hätten zu Recht eine Deckung der inkriminierten Textstellen durch das Grundrecht auf Meinungsäußerungsfreiheit verneint. Nach dem Bedeutungsinhalt der inkriminierten Äußerungen wurde damit dem Medienkonsumenten der Eindruck vermittelt, die Bundesministerin für Inneres *Liese Prokop* hätte Folter und Deportation von Schubhäftlingen tatsächlich angeordnet bzw toleriert und ihre politische Funktion in unvergleichlich verwerflicher und verabscheuenswürdiger Art und Weise aus rassistischen, ausländerfeindlichen und sadistischen Motiven (mit Affinität zu nationalsozialistischem Gedankengut) ausgeübt, wodurch sie als "beispiellose Verbrecherin" dargestellt wurde. Dieser – ohnehin zu Gunsten des Angeklagten als Werturteil und nicht als Tatsachenbehauptung beurteilte – Vorwurf eines massiven gerichtlich strafbaren Verhaltens entbehrt indes jeglichen Tatsachensubstrats. Indem der Erneuerungswerber – in Verkennung des zuvor dargestellten Erfordernisses einer (hinreichenden) Sachverhaltsbasis für ein Werturteil – mit eigenständigen und spekulativen Erwägungen zu einer vom Antragsteller bloß geäußerten politischen Kritik und politischen Bewertung der Amtstätigkeit der Bundesministerin die dazu konträren, zuvor bezeichneten Urteilsfeststellungen zum Bedeutungsinhalt der inkriminierten Textstellen in Frage stellte, verfehlte er den Bezugspunkt des geltend gemachten Rechtsbehelfs

Der von Österreichs Strafjustiz Verurteilte beschwerte sich schließlich noch wegen Verletzung von Art 10 EMRK beim Menschenrechtsgerichtshof in Straßburg. Herr *Genner* rechtfertigte im Straßburger Verfahren seine Äußerungen damit, dass er nicht die Person *Liese Prokops*, sondern deren Asylpolitik kritisiert hätte, dass seine Wortwahl zwar derb, die Kritik selbst aber durchaus in einer pluralistischen, offenen Gesellschaft legitim gewesen wäre.

Der EGMR hatte daher letztlich den (postmortalen) Ehrenschutz einer prominenten Politikerin gegen die Meinungsfreiheit eines in Asylsachen tätigen Proponenten abzuwägen.

II. Die Entscheidung des Gerichts

Herrn *Genners* Verurteilung vor österreichischen Gerichten hatte auch in Straßburg Bestand. Der EGMR wies die Beschwerde, wonach die Republik Österreich den Beleidiger zu Unrecht in seiner

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[1] OGH 14.10.2009, 15 Os 171/08y, jusIT 2010/7, 10 (zust *Thiele*) = RZ 2010/EÜ 110 = JBl 2010, 533.

Meinungsfreiheit eingeschränkt habe, als nicht berechtigt ab. Die EGMR-Richter wogen das Recht auf Meinungsfreiheit gegen die Persönlichkeitsrechte der verstorbenen Ministerin und ihres Ehemannes ab und kamen zum Schluss, dass *Genner* zu weit gegangen war. Vor allem der Zeitpunkt seiner Aussage nur einen Tag nach dem plötzlichen Tod Prokops spielte hier eine Rolle. Das einstimmige Votum betonte, dass der Beschwerdeführer die Äußerungen unmittelbar nach dem unerwarteten Tod der Ministerin veröffentlicht hatte. Sie fiel also in die schmerzlichste Trauerperiode der Familie der Verstorbenen. Darüber hinaus hätte die Parallele zu totalitären Regimen und ihren menschenverachtenden Methoden besonders herabsetzend und beleidigend gewirkt. In Anbetracht dieser Umstände waren die Gründe, die von den österreichischen Gerichten für die Verurteilung gegeben wurde, hinreichend um den Eingriff in die Meinungsfreiheit zu rechtfertigen. Dabei war gleichwohl zu berücksichtigen, dass die über den Beschwerdeführer verhängte Geldstrafe eher moderat ausgefallen ist.

III. Kritische Würdigung und Ausblick

Der Persönlichkeitsschutz von Politikern wäre insofern zwar eingeschränkt, als die Grenzen der zulässigen Kritik bei ihnen weiter gezogen würden als bei Privatpersonen, die Grenze aber dort zu ziehen war, wo unabhängig von den zur Debatte gestellten rein politischen Verhaltensweisen ein persönlich vorwerfbares unehrenhaftes Verhalten behauptet wurde und bei Abwägung der Interessen ein nicht mehr vertretbarer Wertungsexzess vorlag.[2]
Damit fand auch im gegenständlichen Fall die Zulässigkeit politischer Kritik, die durch das Grundrecht auf freie Meinungsäußerung weithin privilegiert ist, ihre Grenze im (durch entsprechendes Tatsachensubstrat nicht gedeckten) Vorwurf einer vorsätzlichen strafbaren Handlung durch die Amtstätigkeit der verstorbenen Innenministerin.
Ausblick: Auch wenn Kritik verletzen, schockieren oder verstören darf,[3] und in einer demokratischen Gesellschaft dem Bürger durchaus ein gewisses Maß an Provokation zuzubilligen ist, gaben die vom Kontext einer politischen Diskussion losgelösten und die in Art 10 Abs 2 MRK angesprochenen Pflichten und Verantwortungen („duties and responsibilities“) gänzlich negierenden, eingangs zitierten Textstellen den Gerichten maßgebende und ausreichende Gründe für die in der Verurteilung des Websitebetreibers gelegene Beschränkung des Rechts auf freie Meinungsäußerung.

IV. Zusammenfassung

Posthume Beleidigungen können auch im Internet erfolgen. Beleidigungen oder üble Nachreden durch Behauptungen auf Websites, die als Medien im Sinne des § 1 MedienG gelten, stellen sog. „Medieninhaltsdelikte“ dar, die zu Entschädigungs- und Strafansprüchen der Betroffenen führen. Dabei ist zwar stets das Grundrecht auf freie Meinungsäußerung nach Art 10 MRK zu berücksichtigen, das jedoch keineswegs derbe Schmähungen oder pietätlose Hasstiraden entschuldigt.

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[2] Vgl OGH 22.8.1995, 6 Ob 18/94 (*Politischer Ziehvater des Rechtsextremismus*) = MR 1995, 177 = JUS Z/1936 = ecolex 1996, 155; OGH 15.1.2009, 6 Ob 218/08i (*Eurofighter-Werbekampagne*) = MR 2009, 78 (*Windhager*).

[3] StRsp EGMR 7. 12.1976, 5493/72 (*Handyside gegen Vereinigtes Königreich*) = EuGRZ 1977, 38, 42 = Serie A, Nr 2.