



















34. The Court notes at the outset that the present case is one concerned with competing fundamental rights. The applicant's right to freedom of peaceful assembly and his right to freedom of expression have to be balanced against the association's right to protection against disruption of its assembly and the cemetery-goers' right to protection of their freedom to manifest their religion.

35. As regards the right to freedom of peaceful assembly as guaranteed by Article 11, the Court reiterates that it comprises negative and positive obligations on the part of the Contracting State.

36. On the one hand, the State is compelled to abstain from interfering with that right, which also extends to a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 86, and *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, § 32, Series A no. 139). If every probability of tension and heated exchange between opposing groups during a demonstration was to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 107).

37. On the other hand, States may be required under Article 11 to take positive measures in order to protect a lawful demonstration against counter-demonstrations (see *Plattform "Ärzte für das Leben"*, cited above, § 34).

38. Notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of freedom of assembly and association enshrined in Article 11 (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 85). In this connection, it must be borne in mind that there is little scope under Article 10 § 2 for restrictions on political speech or on debate on questions of public interest (*ibid.*, § 88; see also *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 30, ECHR 2003-XI).

39. Turning finally to Article 9 of the Convention, the Court has held that, while those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism, the responsibility of the State may be engaged where religious beliefs are opposed or denied in a manner which inhibits those who hold such beliefs from exercising their freedom to hold or express them. In such cases the State may be called upon to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs (see *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 47, Series A no. 295-A).

40. In the present case, the Salzburg Federal Police Authority and the Salzburg Public Security Authority considered the prohibition of the

applicant's assembly necessary in order to prevent disturbances of the Comradeship IV commemoration meeting, which was considered a popular ceremony not requiring authorisation under the Assembly Act. They had particular regard to the experience of previous protest campaigns by other organisers against the gathering of Comradeship IV, which had provoked vehement discussions, had disturbed other visitors to the cemetery and had made police intervention necessary.

41. The Constitutional Court dismissed this approach as being too narrow. It observed that the prohibition of the intended meeting would not be justified if its sole purpose were the protection of the Comradeship IV commemoration ceremony. It went on to say that the prohibition was nevertheless justified or even required by the State's positive obligation under Article 9 to protect persons manifesting their religion against deliberate disturbance by others. In arriving at that conclusion, the Constitutional Court had particular regard to the fact that All Saints' Day was an important religious holiday on which the population traditionally went to cemeteries to commemorate the dead and that disturbances caused by disputes between members of the assembly organised by the applicant and members of Comradeship IV were likely to occur in the light of the experience of previous years.

42. The Court notes that the domestic authorities had regard to the various competing Convention rights. Its task is to examine whether they achieved a fair balance between them.

43. The applicant's assembly was clearly intended as a counter-demonstration to protest against the gathering of Comradeship IV, an association which undisputedly consists mainly of former members of the SS. The applicant emphasises that the main purpose of his assembly was to remind the public of the crimes committed by the SS and to commemorate the Salzburg Jews murdered by them. The coincidence in time and venue with the commemoration ceremony of Comradeship IV was an essential part of the message he wanted to convey.

44. In the Court's view, the unconditional prohibition of a counter-demonstration is a very far-reaching measure which would require particular justification, all the more so as the applicant, being a member of parliament, essentially wished to protest against the gathering of Comradeship IV and, thus, to express an opinion on an issue of public interest (see, *mutatis mutandis*, *Jerusalem v. Austria*, no. 26958/95, § 36, ECHR 2001-II). The Court finds it striking that the domestic authorities attached no weight to this aspect of the case.

45. It is undisputed that the aim of protecting the gathering of Comradeship IV does not provide sufficient justification for the contested prohibition. This has been clearly pointed out by the Constitutional Court. The Court fully agrees with that position.

46. Therefore, it remains to be examined whether the prohibition was justified to protect the cemetery-goers' right to manifest their religion. The Constitutional Court relied on the solemn nature of All Saints' Day, traditionally dedicated to the commemoration of the dead, and on the disturbances experienced in previous years as a result of disputes between members of Comradeship IV and members of counter-demonstrations.

47. However, the Court notes a number of factors which indicate that the prohibition in issue was disproportionate to the aim pursued. First and foremost, the assembly was in no way directed against the cemetery-goers' beliefs or the manifestation of them. Moreover, the applicant expected only a small number of participants. They envisaged peaceful and silent means of expressing their opinion, namely the carrying of commemorative messages, and had explicitly ruled out the use of chanting or banners. Thus, the intended assembly in itself could not have hurt the feelings of cemetery-goers. Moreover, while the authorities feared that, as in previous years, heated debates might arise, it was not alleged that any violent incidents had occurred on previous occasions.

48. In these circumstances, the Court is not convinced by the Government's argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors.

49. Instead, the domestic authorities imposed an unconditional prohibition on the applicant's assembly. The Court therefore finds that they gave too little weight to the applicant's interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV, while giving too much weight to the interest of cemetery-goers in being protected against some rather limited disturbances.

50. Having regard to these factors, and notwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the Austrian authorities failed to strike a fair balance between the competing interests.

51. Consequently, there has been a violation of Article 11 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLES 9, 10 AND 14 OF THE CONVENTION

52. The applicant also relied on Articles 9, 10 and 14 of the Convention.

53. Having regard to the above considerations, the Court finds that no separate examination is warranted under these Articles.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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. Costs and expenses

55. The applicant, stating that he did not wish to claim any damages, claimed a total amount of 7,577.86 euros (EUR) inclusive of value-added tax (VAT) for costs and expenses, comprising EUR 2,378.88 incurred in the domestic proceedings, namely the proceedings before the Constitutional Court, and EUR 5,198.98 incurred in the Convention proceedings.

56. The Government did not comment on the claim relating to the domestic proceedings, but contended that the claim in respect of costs incurred in the Convention proceedings was excessive.

57. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and are reasonable as to quantum (see, for instance, *Feldek v. Slovakia*, no. 29032/95, § 104, ECHR 2001-VIII).

58. As regards the costs of the domestic proceedings, the Court finds that they were necessarily incurred and are reasonable as to quantum. It therefore awards them in full, namely EUR 2,378.88.

59. The costs of the Convention proceedings were also necessarily incurred. Having regard to the sums awarded in comparable cases (see, for instance, *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, no. 58547/00, § 59, 27 October 2005) and making an assessment on an equitable basis, the Court awards the applicant EUR 3,500.

60. In sum, the Court awards the applicant EUR 5,878.88, inclusive of VAT, under the head of costs and expenses.

#### B. Default interest

61. 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. *Holds* by six votes to one that there has been a violation of Article 11 of the Convention;
2. *Holds* unanimously that it is not necessary to examine separately the applicant's complaints under Articles 9, 10 and 14 of the Convention;
3. *Holds* by six votes to one
  - (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 5,878.88 (five thousand eight hundred and seventy-eight euros eighty-eight cents) 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 29 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen  
Registrar

Christos Rozakis  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Loucaides is annexed to this judgment.

C.L.R.  
S.N.

## DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the finding that there has been a violation of Article 11 of the Convention in this case. I find the judgment of the Austrian Constitutional Court in all respects reasonable and in line with the provisions of Article 11. In particular I find that the Constitutional Court was right in finding that the prohibition of the assembly in issue was necessary for the protection of the rights and freedoms of others, namely all those persons visiting the cemetery in order to commemorate the dead on All Saints' Day. As was rightly observed by the same court, that day is an important religious holiday and the commemoration of the dead is protected by Article 9 of the Convention, which contains a positive obligation for the State to protect persons manifesting their religion against deliberate disturbance by others.

The applicant sought authorisation for a meeting to be organised by him in Salzburg cemetery in front of the war memorial. The meeting would coincide in place and time with the gathering of Comradeship IV in memory of the SS soldiers killed in the Second World War, and its purpose would be to commemorate the Salzburg Jews killed by the SS during the same war.

The applicant expected about six participants, who would carry commemorative messages in their hands and attached to their clothes. He stated that no other means of expression (such as chanting or banners) which might offend piety or public order would be used. However, there was undisputed evidence that another member of the same party organising the meeting had refused to give an undertaking that the proposed meeting in memory of the murdered Salzburg Jews would not disrupt the gathering of Comradeship IV. Furthermore, in the past few years a number of organisations had organised protest campaigns with the aim of disrupting Comradeship IV's commemoration ceremony. These protests had led to vehement discussions with members of Comradeship IV and other visitors to the cemetery and had required intervention by the police. In the circumstances, the Constitutional Court was right in finding that the authorities had correctly assumed that the prohibition of the assembly being organised by the applicant was necessary to protect the general public against potential disturbances.

I would like also to add the following: the gathering of Comradeship IV in memory of the SS soldiers killed in the Second World War was regarded by the authorities as not requiring any authorisation because it qualified as a "popular ceremony" within the meaning of section 5 of the Assembly Act. The Constitutional Court expressed doubts regarding the correctness of this finding. I share these doubts and I would even go so far as to say that personally I do not see how such a finding can legally be justified. Be that as it may, the fact remains that Comradeship IV was a registered association and for more than forty years had commemorated SS soldiers killed in the

Second World War by gathering on All Saints' Day and laying a wreath in front of the war memorial at Salzburg municipal cemetery. If the applicant's aim was to contest the legality of this provocative gathering, the proper way to do so was indisputably through legal means or peaceful demonstrations against the authorities who allowed the gatherings, and certainly not through a confrontation in a cemetery on All Saints' Day. In substance, the assembly planned by the applicant was a political meeting whose objectives may have been understandable (see paragraph 43 of the judgment), but I fail to see how the time and place of such meeting showed any respect for the rights of others in the cemetery (not belonging to Comradeship IV). The time and place of the proposed demonstration or gathering were not appropriate. A cemetery is a sacred place and is not, in my opinion, the proper place, especially on All Saints' Day, for political demonstrations, however respectable they may be, when other people are present in the cemetery and have a right to peaceful commemoration of the dead. This, I believe, becomes even more evident when there is undisputed evidence, as in this case, of a real danger of such disturbances in the cemetery as to require intervention by the police.

All civilised people agree that the Nazis and their SS were a horrible part of the history of mankind. The Holocaust and other abhorrent crimes against the Jews and other peoples received the condemnation of the whole world and millions of people died in order to save humanity from this scourge. However, I repeat that there is a time and place for any political demonstration or gathering entailing disturbances at the expense of the rights of others.

Finally, I feel the need to deal with the major points of the reasoning of the majority, which are as follows:

- (a) “[T]he assembly was in no way directed against the cemetery-goers’ beliefs or the manifestation of them” (paragraph 47 of the judgment)

The assembly would have had the inevitable result of interfering with the rights of the cemetery-goers, and that should have been known by those participating in it. Even though it was not their principal aim, the result would have been the same.

- (b) “Moreover, the applicant expected only a small number of participants. They envisaged peaceful and silent means of expressing their opinion, namely the carrying of commemorative messages, and had explicitly ruled out the use of chanting or banners. Thus, the intended assembly in itself could not have hurt the feelings of cemetery-goers” (paragraph 47)

The participants would have formed an organised group of persons sharing the same objective of confrontation with Comradeship IV. Therefore, the small number of members of this group would not have changed the fact that a certain disturbance would inevitably be caused at the expense of the rights of the others in the cemetery. Here, the majority ignore

the fact that one of the members of the party organising this assembly “refused to give an undertaking that the proposed meeting in memory of the murdered Salzburg Jews would not disrupt th[e] gathering [of Comradeship IV]” (see paragraph 11 of the judgment). Furthermore, commemorative messages are not silent means of expressing an opinion, for they speak for themselves, and even though the message conveyed would have been just and fair, it would still have been a kind of provocation.

- (c) “[W]hile the authorities feared that, as in previous years, heated debates might arise, it was not alleged that any violent incidents had occurred on previous occasions” (paragraph 47)

The majority accept the possibility of heated debates – and in any event there was undisputed evidence that these had occurred in previous years. However, it seems that they consider that such debates would not amount to a disturbance as long as there were no “violent incidents”. I find no difficulty in disagreeing with that. In any event, one cannot reasonably exclude the possibility that heated debates might develop into violent incidents. It is also useful to note that, according to the facts, the past incidents “had disturbed other visitors to the cemetery and had made police intervention necessary” (paragraph 40 of the judgment).

- (d) “[T]he Court is not convinced by the Government’s argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant’s right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery’s visitors” (paragraph 48)

The majority find that an arrangement consisting in allowing both meetings while taking preventive measures such as ensuring police presence in order to keep the two assemblies separated would have been a solution. However, I do not see how (i) the police presence for the purpose in question would not in itself have upset the peace required for the protection of the rights of the cemetery visitors, and (ii) the police presence could have prevented heated debates. It could possibly have prevented violent incidents, but even the effort to do so would have entailed sufficient disturbance in the cemetery.

- (e) “The Court therefore finds that they gave too little weight to the applicant’s interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV, while giving too much weight to the interest of cemetery-goers in being protected against some rather limited disturbances” (paragraph 49)

The facts before the Court do not, in my view, support such a conclusion, especially the finding to the effect that the disturbances would have been “rather limited”. In any event, limited or not, disturbances in the cemetery



on All Saints' Day would have been sufficient to justify the application of the limitation regarding the "protection of the rights and freedoms of others" in the circumstances of the present case.

**(f) "[N]otwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the Austrian authorities failed to strike a fair balance between the competing interests" (paragraph 50)**

Although I personally am reluctant to invoke the "margin of appreciation" save in exceptional cases, the reference to this concept by the majority in the context of the present case does not appear to have been pertinent, as I believe that they have substituted their own assessment of the circumstances of the case for that of the Constitutional Court and left nothing to the latter's margin of appreciation.

For all the above reasons, I find that there has been no violation of Article 11 of the Convention in this case.