[AT] Ibiza scandal: recording was unlawful but its publication was justified

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On 23 January 2020, the *Österreichische Oberste Gerichtshof* (Austrian Supreme Court) decided in a preliminary procedure that, although the secret filming of the so-called 'Ibiza video' had been unlawful, the act of sharing and publishing it had been justified (Case no. 6 Ob 236/19b).

In July 2017, two Austrian politicians from the Freiheitliche Partei Österreichs (Austrian Freedom Party – FPÖ), Heinz-Christian Strache and Johann Gudenus, were secretly filmed at a meeting in Ibiza. An actress pretending to be the niece of a Russian oligarch and her companion were also at the meeting. The meeting had been arranged by the defendant, who asked the actress's companion to film it so he could then sell the footage for profit. Both politicians were deliberately given the impression that the conversation was private, out of the public eye, and that nobody was either watching or making video or audio recordings of it. During the discussion, which lasted between six and seven hours, the participants talked about matters including the privatisation of the ORF; the covert financing of the FPÖ in exchange for public contracts; and the hidden takeover of the Austrian Kronenzeitung newspaper by the supposedly rich foreigner in order to exercise control over the content of the newspaper, which would then favour the two politicians. A few minutes of the video footage were published on the Internet in May 2019 by two German media companies, Süddeutsche Zeitung and Spiegel Online.

In the preliminary proceedings, the plaintiff asked the court for an injunction prohibiting the publication of the footage. After the court of first instance issued the injunction, appeals against its decision were dismissed by the appeal court, which nevertheless allowed an appeal on a point of law to the Supreme Court.

The Supreme Court confirmed the lower-instance rulings with regard to the recordings, which had been made illegally. It concluded that the plaintiff's general right to privacy prevailed over the defendant's right to freedom of expression because the recordings had been made through deception and the plan to sell them did not, at that stage, contribute to a debate in the public interest. Passing them on to a very limited number of people in return for payment was also not yet in the public interest.

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The court recognised that, in the Haldimann case, the European Court of Human Rights had previously applied the guarantees laid down in Article 10 of the European Convention on Human Rights to the secret recording of a conversation because it had treated the making of the recording and its publication as a single act, and had therefore considered it a contribution to a debate in the public interest. However, the court viewed this case as different in so far as the hidden audio recording in the Haldimann case had been used to expose, in a pre-planned TV consumer protection programme, malpractice that had already been known about and documented. In the case at hand, however, an atypical conversation had been set up under false pretences in order to obtain incriminating, commercially exploitable recordings.

As regards the sharing and publication of the recordings, the court overturned the lower-instance decisions on the grounds that this had been justified. The publication of the recordings, which the defendant had made possible, had contributed greatly to a debate in the public interest. It had given the public an insight into the plaintiff's personal integrity and therefore his suitability to hold a high political office. The publication of the audio and video recordings was also the mildest way of achieving this purpose. Conclusions about the plaintiff's integrity and sense of responsibility could be drawn not only from the content of the conversation, which could have been published in the form of a transcript, but also from the fact that matters relating to the public administration had been the subject of an alcohol-fuelled discussion in a holiday resort.

Die Entscheidung des Obersten Gerichtshofs vom 23.01.2020 - Az.: 6 Ob 236/19b

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=False&SucheNachText=True&GZ=6Ob236%2f19b&VonDatum=&BisDatum=09.03.2020&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Position=1&SkipToDocumentPage=true&ResultFunctionToken=1f68af9d-ff21-44c6-89e5-9c53b47975af&Dokumentnummer=JJT_20200123_OGH0002_0060OB00236_19B0000_000

Decision of the Supreme Court of 23 January 2020 - case no. 6 Ob 236/19b

Pressemitteilung vom 09.03.2020 zur Entscheidung des Obersten Gerichtshofs vom 23.01.2020 - Az.: 6 Ob 236/19b

https://www.ogh.gv.at/entscheidungen/entscheidungen-ogh/ibiza-video-aufnahme-

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Press release of 9 March 2020 on the Supreme Court's decision of 23 January 2020 - case no. 6 Ob 236/19b

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