

EUROPEAN COURT OF HUMAN RIGHTS

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Press release issued by the Registrar

CHAMBER JUDGMENTS CONCERNING Austria

The European Court of Human Rights has today notified in writing the following three Chamber judgments, none of which is final¹. (All three are available only in English.)

SECTION 3

(1) *Dichand and others v. Austria* (application no. 29271/95) ***Violation Article 10***

The applicants are: Hans Dichand, an Austrian citizen born in 1921 and living in Vienna, who is editor-in-chief and publisher of the newspaper, the “Neue Kronen-Zeitung”; Krone-Verlag GmbH & Co KG, a limited partnership based in Vienna which owns the newspaper; and, Krone-Verlag GmbH, a limited company also based in Vienna.

The applicants belong to a large media group, which, at the relevant time, was in strong competition with another media group represented by Michael Graff, a lawyer practising in Vienna. Mr Graff was also, from 1982 to 1987, Secretary General of the Austrian People’s Party (*Österreichische Volkspartei*) and, from 1983 to 1995, a Member of Parliament for that party. Between 1987 and 1995 he was Chair of the Parliament’s Legislative Committee (*Justizausschuß*) and, from 1989 to July 1995, he represented the applicants’ competitor in several proceedings concerning unfair competition against companies belonging to the applicants’ media group.

In June 1993 Mr Dichand wrote an article in the “Neue Kronen-Zeitung” about Mr Graff, which included the following three statements: that Mr Graff: “does not intend to comply with moral concepts existing in democracies all over the world, namely that one has to give up one’s law firm if one becomes a member of the government”; that “he has taken part in the adoption of laws which have brought about advantages for his clients”; and, “that he has been allowed to present his disreputable opinion on television”.

Mr Graff brought injunction proceedings against the applicants and, on 9 September 1994, a permanent injunction was granted. Finding that the statements in question were facts which had not been proven, the court ordered the applicants to retract the statements and not to repeat them in the future. The applicants appealed unsuccessfully.

¹ Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its Protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

They complained that the injunction violated Article 10 (freedom of expression) of the European Convention on Human Rights.

The European Court of Human Rights considered the three statements in the impugned article in turn.

The Court found that the applicants' first statement did not explicitly state that Mr Graff was a member of the Austrian government. Moreover, this could not justifiably be read into the context. The impugned statement had been extracted from one paragraph closely followed by a second paragraph, which explained both Mr Graff's precise function and, in detail and accurately, the factual background for the concluding remark about him. The Court could not, therefore, endorse the Austrian courts' conclusion that the interference with the applicants' rights was justified because they had published an incorrect statement of fact.

Regarding the second statement, the Court noted that the test applied by the Commercial Court in the domestic proceedings - that the applicants had to prove that the amendment to the Enforcement Act exclusively served the interests of Mr Graff's clients - imposed an excessive burden on the applicants. The impugned statements did not imply that the amendment served the interests of Mr Graff's clients exclusively, only that it brought about considerable advantages for them. The Court therefore found that the value judgment in the article had an adequate factual basis and represented a fair comment on an issue of general public interest. The same applied to the third statement.

In any event, the Court did not find that the restriction imposed was necessary in a democratic society; Mr Graff was a politician of importance, and the fact that a politician was in a situation where his business and political activities overlapped might give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arose. It was true that the applicants, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that Article 10 also protected information or ideas that offended, shocked or disturbed.

Finding that the measure at issue was disproportionate to the aim pursued, the Court concluded, unanimously, that there had been a breach of Article 10 of the Convention and awarded the applicant 7,539.81 euros (EUR) for pecuniary damage, EUR 20,704.82 for costs and expenses and EUR 1,850 for additional interest.

(2) *Unabhängige Initiative Informationsvielfalt v. Austria* (no.28525/95)

Violation Article 10

Unabhängige Initiative Informationsvielfalt is an association registered in Austria and the publisher of the periodical, "TATblatt."

Between 25 January and 1 February 1993 an opinion poll under the heading "Austria first" ("*Österreich zuerst*") took place, which had been initiated by the FPÖ (Austrian Freedom Party) several months before. Its proposals included: stopping immigration until a satisfactory solution to illegal immigration had been found; obliging all foreign workers to carry an identity card at work; limiting the percentage of pupils whose mother tongue was not German to 30 % and, if the percentage were higher, creating separate classes for foreigners; and, denying foreigners the right to vote.

In the 9 December 1992 issue of the “TATblatt”, a leaflet had been published, including the following statement: “Racism has a name and address...The FPÖ and its party officials are certainly interested in your opinion! So, let’s call them and tell them what we think of them and their policy. Or let’s send them small gifts in response to their racist agitation.” The text was followed by a list of addresses and telephone numbers of FPÖ members and offices.

On 11 February 1993 FPÖ leader Jörg Haider brought civil proceedings for an injunction against the applicant association, concerning the references to “racist agitation”, sending gifts and the publication of the telephone numbers and addresses. The applicant association submitted that it had never identified itself with the leaflet at issue and had merely published it out of journalistic interest and in order to inform the public. Moreover, the expression “racist agitation” was not a statement of fact, but a value judgment, meant as a critical comment on the opinion poll.

On 14 April 1994 the Vienna Commercial Court granted the injunction, finding that the statements were presented as facts and, as such, had to be proved. The applicant association appealed unsuccessfully regarding the part of the injunction concerning the phrase “racial agitation”.

The European Court of Human Rights found that the impugned statement should be seen in the political context in which it was made, namely as a reaction to the opinion poll “Austria first”. The Court was not persuaded that the impugned statement about “racist agitation” was a statement of fact; it could be considered fair comment on a matter of public interest, that is, a value judgment, the truth of which was not susceptible to proof. In sum, the Court could not find that there were sufficient reasons to prevent the applicant from repeating the critical statement in question.

Finding that the injunction against the applicant was disproportionate to the aim pursued, the Court held, unanimously, that there had been a breach of Article 10 and awarded the applicant EUR 4,400 for pecuniary damage, EUR 10,571.50 for costs and expenses and EUR 1,850 for additional interest.

(3) *Krone Verlag GmbH & Co. KG v. Austria* (no. 34315/96) ***Violation Article 10***
Krone Verlag GmbH & Co. KG, a limited partnership, is the publisher of a newspaper (*Kronenzeitung*), based in Vienna.

Between March and 29 June 1995, the applicant company published, in its Carinthian regional edition (*Lokalausgabe*), articles on the financial situation of a Mr Posch who, at that time, was employed as a teacher while also a member of the Austrian National Assembly (*Nationalrat*) and the European Parliament. The articles, which were accompanied by photographs of Mr Posch, alleged that he received three salaries unlawfully as, according to Austrian law, he was not entitled to a teacher’s salary during his membership of the European Parliament.

On 18 August 1995 Mr Posch applied for an injunction under Section 78 of the Copyright Act (*Urheberrechtsgesetz*) against the applicant company. On 4 January 1996, Klagenfurt Regional Court granted a permanent injunction prohibiting the applicant company from publishing the plaintiff’s picture in connection with the article in question or similar articles. The court found that, as Mr Posch’s face was not generally known, his legitimate interests had been infringed by creating the possibility of identifying him. Whether or not the contents

of the articles were true or not was not taken into consideration. The applicant company appealed unsuccessfully.

The European Court of Human Rights observed that the applicant company had accused Mr Posch, a politician, of earning money illegally, which was, without doubt, a matter of public concern. The Court found that the Austrian courts failed to take into account the essential function the press fulfils in a democratic society and its duty to impart information and ideas on all matters of public interest. Moreover, it was of little importance whether a certain person (or his or her picture) was actually known to the public. What counted was whether that person has entered the public arena.

In view of Mr Posch's position as a politician, there was no doubt that he had entered the public arena and had to bear the consequences. There was, therefore, no valid reason why the applicant company should have been prevented from publishing his picture. The Court attached particular importance to the fact that the published photographs did not disclose any details of his private life. In addition, the curriculum vitae and picture of Mr Posch, still a member of the Austrian Parliament (national council), were included on the Austrian Parliament's internet site.

The interference with the applicant company's right to freedom of expression was therefore not "necessary in a democratic society". Accordingly, the Court held, unanimously, that there had been a violation of Article 10 and awarded the applicant EUR 4,318.16 for pecuniary damage and EUR 6,411.53 for costs and expenses.

The Court's judgments are accessible on its Internet site (<http://www.echr.coe.int>).

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The European Court of Human Rights was set up in Strasbourg in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. On 1 November 1998 a full-time Court was established, replacing the original two-tier system of a part-time Commission and Court.