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

FORMER THIRD SECTION

**CASE OF DICHAND AND OTHERS v. AUSTRIA**

*(Application no. 29271/95)*

JUDGMENT

STRASBOURG

26 February 2002

**FINAL**

*26/05/2002*

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 Dichand and Others v. Austria,**

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 9 January 2001 and 30 January 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in an application (no. 29271/95) against the Republic of Austria lodged on 28 September 1995 with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Hans Dichand, Krone-Verlag GmbH & Co KG, a limited partnership registered under Austrian law, and Krone-Verlag GmbH, a limited company registered under Austrian law.

2. The applicants were represented before the Court by Mr T. Höhne, a lawyer practising in Vienna (Austria). The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicants alleged that an injunction prohibiting them from repeating certain statements they had published in a periodical ("Neue Kronen-Zeitung"), and ordering them to retract these statements, violated their right to freedom of expression, contrary to Article 10 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third 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 of the Rules of Court.

6. By a decision of 9 January 2001 the Chamber declared the application admissible.

7. On 1 November 2001 the Court effected a change in the composition of its Sections, but the present case remained with the former Chamber of Section III which had declared the application admissible.

8. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the applicant, but not the Government, submitted additional observations on the merits. In addition, third-party comments were received from the Mr Michael Graff, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3). The applicants replied to those comments (Rule 61 § 5).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant, an Austrian citizen born in 1921 and residing in Vienna, is the chief editor and publisher of the newspaper "Neue Kronen-Zeitung". The second applicant, a limited partnership (*Kommanditgesellschaft*) is the owner of this newspaper. The third applicant is a limited company, the general partner (*Komplementär*) of the second applicant. The second and third applicants have their places of business in Vienna.

10. The applicants belong to a large media group which at the relevant time was in strong competition with another media group represented by Mr Michael Graff, a lawyer practising in Vienna. Besides his profession as a lawyer, Mr Graff was 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 the Chairman of the Parliament's Legislative Committee (*Justizausschuß*). From 1989 to July 1995 he represented the applicants' competitor in several proceedings concerning unfair competition against companies belonging to the applicants' media group.

11. In 1989 several Austrian laws were amended by the Extended Pecuniary Limits Amendment Act (*Erweiterte Wertgrenzen-Novelle*). The Government Bill (*Regierungsvorlage*) had also provided for an amendment to Section 359 § 1 of the Enforcement Act (*Exekutionsordnung*), a section

which is of particular relevance for the enforcement of injunctions. The Government Bill had envisaged raising the fines that could be imposed for non-compliance with injunctions from ATS 50,000 per enforcement order to ATS 80,000 per enforcement order.

12. Under the chairmanship of Mr Graff, the Legislative Committee dealing with the Government Bill proposed a different version, namely that a maximum fine of AS 80,000 could be imposed for each request for enforcement (*Exekutionsantrag*) instead of for each enforcement order issued by the Enforcement Court. In its report of June 1989, the Legislative Committee pointed out that the fine had to be multiplied by the number of requests for enforcement, if only one decision combining several requests was taken. This proposal was adopted by Parliament on 29 June 1989 and published as Article XI of the Extended Pecuniary Limits Amendment Act, Federal Law Gazette 1989/343 (*Erweiterte Wertgrenzen-Novelle 1989, BGBl. 1989/343*).

13. Four years later, in June 1993, the following article written by the first applicant under the pseudonym "Cato" was published in the "Neue Kronen-Zeitung":

> "Moral 93
>
> Before Roland Dumas became the French Minister for Foreign Affairs, he was one of Europe's most famous and most successful lawyers. He administered the gigantic estate of Picasso; he represented Kreisky and an Austrian Minister for Foreign Affairs when the latter found himself in a bad situation. Dumas took it for granted that he had to give up his law firm when he became a member of the government. In every democracy of the world this course of action is followed. Only Mr Graff, who is obviously thick-skinned, does not intend to comply with these moral concepts.
>
> It so happened that at the time when Mr Graff was presiding Parliament's Legislative Committee, a law was amended which brought about big advantages for the newspaper publishers whom Mr Graff represented as a lawyer. In order to ensure that in such cases no suspicion, not even one that has no objective justification, can arise, there exists the wise rule of incompatibility; a lawyer is not allowed to take part in the adoption of laws which lead to advantages for his clients.
>
> Also the Austrian People's Party thought that way and they decided to appeal to Mr Graff's conscience. In vain! It is very telling for the present situation of the Austrian People's Party that it cannot convince Mr Graff. The other parties will be only too pleased, when it becomes so flagrantly evident how powerless the Austrian People's Party is vis-a-vis one of their officials who has his own moral concepts. Mr Graff was even allowed to present his disreputable attitude on our monopoly-television. Mr Graff thought that it would be a sign of fear to the 'Kronen Zeitung' if he had to resign from the Legislative Committee.
>
> The People's Party does not have to fear the 'Krone' but its voters, who will continue turning away from it if the party shows itself incapable of establishing order within its own ranks; how could one then possibly trust that it would succeed in doing this in the State ... Cato."

<German>

*"Moral 93*

*Roland Dumas war, bevor er Frankreich's Außenminister wurde, einer der bekanntesten und erfolgreichsten Rechtsanwälte Europas. Er verwaltete zum Beispiel das gigantische Erbe Picassos, vertrat Kreisky und einen österreichischen Außenminister, als dieser in eine arge Affäre geraten war. Für Dumas war es ganz selbstverständlich, daß er sein Rechtsanwaltsbüro aufgeben mußte, als er in die Regierung eintrat. Überall in der Welt wird dies in Demokratien so gehalten. Nur der offenbar mit einer Büffelhaut ausgestattete Rechtsanwalt Dr. Graff denkt nicht daran, sich nach solchen Moralbegriffen zu richten.*

*So kam es, während er im Justizausschuß des Parlaments den Vorsitz hatte, zur Veränderung eines Gesetzes, wodurch der Zeitungsverlag, den Graff rechtsanwaltlich vertritt, große Vorteile hatte. Damit in solchen Fällen nicht ein bestimmter Verdacht entstehen kann, der keineswegs begründet sein muß, gibt es eben die weise Regel der Unvereinbarkeit; ein Anwalt darf nicht an der Entstehung von Gesetzen beteiligt sein, die seinen Mandanten Vorteile bringen.*

*Das dachte man auch in der ÖVP, und man entschloß sich, Graff ins Gewissen zu reden. Vergeblich! Es sagt einiges über den Zustand der ÖVP aus, daß sie sich gegen Graff nicht durchsetzen konnte. Den anderen Parteien kann es nur recht sein, wenn sich in so brutaler Offenheit zeigt, wie ohnmächtig die Volkspartei gegenüber einem Funktionär ist, der seine eigene Moral hat. Sogar in unserem Monopol-Fernsehen durfte er seine anrüchige Haltung vertreten. Graff meinte, es würde nur Angst vor der 'Kronen Zeitung' signalisieren, berufe man ihn im Justizausschuß ab.*

*Nicht vor der 'Krone' braucht die ÖVP Angst zu haben, sondern vor ihren Wählern, die sich weiter von ihr abwenden werden, wenn sie sich als unfähig erweist, in der eigenen Partei Ordnung zu machen; wie sollte man da das Vertrauen haben, es könne ihr im Staat gelingen ... Cato."*

14. On 7 June 1993 Mr Graff brought injunction proceedings under Section 1330 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) against the three applicants before the Vienna Commercial Court (*Handelsgericht*). He requested that the applicants be prohibited from stating or repeating that he "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, (M.G. had never been a member of the government), and/or that he has taken part in the adoption of laws which have brought about advantages for his clients, and/or that he has been allowed to present his disreputable opinion on television". He also requested that the statement be retracted and that this retraction be published in the "Neue Kronen-Zeitung".

15. On 9 July 1993 the Vienna Commercial Court issued a preliminary injunction (*einstweilige Verfügung*) against the applicants prohibiting them from reiterating the impugned statements. The applicants' appeal against this decision was to no avail.

16. On 9 September 1994 the Vienna Commercial Court granted a permanent injunction. It ordered the applicants not to repeat the impugned statements and to retract the statements in one edition of the "Neue Kronen-Zeitung". It found that the applicants' statements amounted to an insult and therefore fell to be considered not only under Section 1330 § 2 of the Austrian Civil Code, but also under the first paragraph of Section 1330. In that case the onus of proof shifted to the applicants who had to prove the truth of the impugned statements. The court pointed out that all the statements contained in the article were statements of fact which the applicants had failed to prove.

17. The court found that the statement contained in the first paragraph of the newspaper article was an insult, within the meaning of Section 1330 § 1 of the Civil Code, because Mr Graff was accused of ignoring or neglecting moral, democratic standards and had therefore acted immorally. This statement contained the implicit allegation that Mr Graff had become a member of the government. However, the allegation was untrue because Mr Graff had never been a member of the government.

18. The court further considered that the statement in the second paragraph of the newspaper article expressed the suspicion that Mr Graff had abused his position as a Member of Parliament. The proposed evidence that should prove the truth of this allegation, namely the amendment of Section 359 § 1 of the Enforcement Act, was insufficient because the applicants had not even contended before the court that the amendment served the exclusive interest of Mr Graff's client. In fact this amendment had an objective basis, concerned both competing media groups and had no distorting effect on competition.

19. In respect of the third statement according to which Mr Graff's attitude was disreputable, the court found that this statement again contained the allegation that Mr Graff had acted immorally because he had exercised two incompatible activities. The court therefore concluded that the applicants could not successfully rely on Article 10 of the Convention, because the interference with the applicants' rights under this provision was justified in order to protect Mr Graff's good reputation, which could be prejudiced by such untruthful statements.

20. On 20 October 1994 the applicants appealed. They submitted that the Commercial Court had not sufficiently taken into account a written statement by E.S., an employee of the second applicant, which the applicants had submitted. According to this written statement, Mr Graff had requested the amendment to the Enforcement Act in order to impose a fine for each request for execution, thus exploiting one of the applicants' weak points. The applicants were the owners of several monthly magazines. Unlike daily newspapers, these magazines were therefore usually on the market longer. If one of the applicants' magazines, for instance, had violated the Unfair Competition Act (*Bundesgesetz gegen den unlauteren*

*Wettbewerb*), Mr Graff, as the legal representative of the competitors, had immediately obtained a preliminary injunction and had filed almost daily requests for enforcement. He had counted on the fact that the applicants could, in the long run, not afford to pay the fines, or that they could not afford the cost of withdrawing the relevant issue of the monthly magazine from distribution. Under the previous legal situation, several requests for enforcement would be combined in one decision, and the applicants had only had to pay one fine of AS 50,000 for them. Under Section 359 § 1 of the Enforcement Act in its amended form, however, the fines were multiplied by the number of requests and, consequently, increased dramatically.

21. Furthermore, the applicants complained that the Commercial Court had failed to take sufficient account of a written statement by their lawyer, S.R., and had refused to hear this person as a witness. He would have given evidence of a telephone conversation on 12 June 1989 between himself and Mr Graff in which the latter had complained that his requests for enforcement had not been successful and had not reaped the expected fines. He continued that this would require changes in the pecuniary limits and the system of fines. The applicants also submitted that the impugned article constituted a criticism of Mr Graff's behaviour as a politician and was therefore protected by the freedom of expression guaranteed by Article 10 of the Convention.

22. On 15 December 1994 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicants' appeal. It found that the Commercial Court had correctly taken the necessary evidence and assessed the relevant facts. The applicants had not even argued before the Commercial Court that Mr Graff had been a member of the government or that the amendment of the Enforcement Act had served the exclusive interests of Mr Graff's client. Instead they had merely argued that Mr Graff, in his function as Chairman of the Legislative Committee, had been involved in the making of laws which created advantages for his client. The applicants therefore should have proved that Mr Graff had been a member of the government and that he had manipulated the enactment of laws to the exclusive advantage of his client. The evidence proposed by the applicants, however, had been insufficient to prove such allegations. Moreover, the contested statements were not value judgments, but (political) criticism based on alleged facts. Such criticism was only acceptable if the underlying facts were true. Since the applicants had failed to prove the truth of these facts, they could not rely on Article 10 of the Convention.

23. On 9 March 1995 the Supreme Court rejected as inadmissible the applicants' extraordinary appeal on points of law (*außerordentliche Revision*). Referring to its previous case-law, the court pointed out that disparagement by means of untrue statements, even if made in the course of

political debate, went beyond acceptable (political) criticism and could not be justified by a weighing of interests or by invoking the right to freedom of expression. This decision was served on the applicants on 10 April 1995.

## II. RELEVANT DOMESTIC LAW

24. Section 1330 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides as follows:

> "(1) Everyone who has suffered material damage or loss of profit because of an insult may claim compensation.
>
> (2) The same applies if anyone disseminates statements of fact which jeopardise another person's credit, gain or livelihood and if the untruth of the statement was known or must have been known to him. In such a case the retraction of the statement and the publication thereof may also be requested ...."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicants complain under Article 10 of the Convention that the injunction prohibiting them from making certain statements with regard to Mr Graff violated their right to freedom of expression. The relevant part of Article 10 of the Convention reads as follows:

> "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....
>
> 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 ... for the protection of the reputation or rights of others...."

### A. Whether there was an interference

26. The Court notes that it was common ground between the parties that the injunction issued by the Austrian courts constituted an interference with the applicants' freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

## B. Whether the interference was justified

27. 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 of Article 10 and is "necessary in a democratic society" for achieving such an aim or aims.

### *1. "Prescribed by law"*

28. The applicants submit that the injunction at issue was not prescribed by law. The interference was not foreseeable because the detailed, casuistic and confusing case-law of the Austrian courts on Section 1330 of the Civil Code leads to unpredictable results. In the present case, the Austrian courts qualified the statements in the impugned article as statements of fact although, in accordance with the case-law of the European Court of Human Rights, they should have qualified them as value judgments.

29. The Government for their part asserted that Section 1330 of the Austrian Civil Code formed the legal basis for the injunctions. This provision and the case-law developed by the Austrian courts was sufficiently accessible and rendered the application of that provision foreseeable.

30. Having regard to its case-law as to the requirements of clarity and foreseeability (Markt Intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, p. 18, § 30; Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133 p. 20, § 29), and to the fact that considerable domestic case-law exists on that issue, the Court considers that the injunction was prescribed by law within the meaning of Article 10 § 2 of the Convention. The mere fact that the case-law of the Austrian courts or part of it on these issues was, in the applicants' view, not in conformity with the Court's case-law may be criticised but does not affect the issue of "forseeability". Accordingly, the Court is satisfied that the interference was "prescribed by law".

### *2. Legitimate aim*

31. The applicants submit that the interference at issue did not pursue a legitimate aim as required by paragraph 2 of Article 10. Given that Mr Graff was a politician in respect of whom the limits of acceptable criticism are wider when acting in his public capacity, together with the fact that the article at issue did not concern Mr Graff's private life, the injunction did not pursue the interests of the protection of the reputation or rights of others, within the meaning of paragraph 2 of Article 10.

32. In the Government's view, there existed a legitimate aim, namely the protection of the reputation and rights of others.

33. The Court agrees with the Government and finds that the measure at issue pursued a legitimate aim, namely the protection of the reputation and rights of others, i.e. of Mr Graff. In the Court's view the applicants' arguments concern more the question whether the interference at issue was "necessary in a democratic society", a matter which the Court will examine below. The interference complained of, thus, had an aim that was legitimate under paragraph 2 of Article 10.

### 3. *"Necessary in a democratic society"*

#### (a) Arguments before the Court

##### *(i) The applicant*

34. The applicants submit that the injunction was not necessary in a democratic society. The impugned article was not intended to inform the public in detail of the specific offices held by Mr Graff, but to explain that, in the author's view, certain political functions were incompatible with professional activities outside politics. Although Mr Graff as chairman of Parliament's Legislative Committee did not *de jure* exercise any public powers, he had a decisive political influence on the making of laws. Since the party of which Mr Graff was a member was represented in the Government, his position was comparable to that of the former French Minister of Foreign Affairs. The criticism of Mr Graff's attitude, although harsh and polemical, did not constitute a gratuitous personal attack. Rather it constituted an objectively understandable evaluation of Mr Graff's attitude and the use of expressions like "immoral" or "disreputable" in that context were therefore appropriate.

##### *(ii) The Government*

35. The Government argued that the interference was proportionate to the legitimate aim and that the reasons invoked by the domestic courts were sufficient and relevant. In their view, the allegations in the impugned article, namely that Mr Graff held a government post, that the amendment of a law was enacted exclusively in the interests of one of Mr Graff's clients and that he had an immoral attitude, constituted statements of fact which were untrue, defamatory and unnecessarily harsh. These statements went far beyond the limits of acceptable criticism even if the plaintiff, as a politician, had to show a higher degree of tolerance to criticism. In the injunction proceedings the applicants had been given the opportunity to prove the truth of their statements, but failed to convince the national courts that the circumstances on which they had been based were essentially correct, although there was no reason to doubt the applicants' good faith in this respect. Moreover, the injunction was a proportionate measure, account

being taken of the fact that it was based on a decision by a civil court, and not a criminal conviction, and that it was not formulated in broad terms but confined to particular articles which were clearly defined in the judgment.

*(iii) Mr Michael Graff*

36. In his comments submitted under Article 36 § 2 of the Convention and Rule 61 § 3 of the Rules of Court, Mr Graff observed that although Article 10 § 2 mentioned the protection of the rights of others as one of the legitimate aims, this element has not been given sufficient attention in the Court's case-law.

There is no doubt that it must be admissible to a very large extent to express publicly a value judgment and that a politician must tolerate criticism to a greater extent than ordinary members of society. However, at the same time he must not be left without protection if, by means of untrue statements of fact, he is wrongly accused. The same applies if a value judgment is based on incorrect facts. Thus, the Austrian Supreme Court held that "a right to freedom of expression on the basis of wrong or unproven statements of fact did not exist".

The reproaches against him were based on an untrue statement of facts. It was untrue that the amendment to the Extended Pecuniary Limits Amendment Act created major advantages for his then client. It was obvious that any change in the legal provisions on enforcement of injunctions affected all competitors on the market including his client, in that it considerably increased fines for breaches of injunctions under the Unfair Competition Act. Although it was correct to require that a practising lawyer should give up his cabinet if he becomes a member of the Government, he had never been a member of the Government. Therefore, it had been clearly misleading when reference was made to Mr Dumas in the article who had given up his legal practice when becoming a Government minister.

Mr Graff concluded that the interference with the applicants' freedom of expression had been justified.

**(b) The Court's assessment**

*(i) The relevant principles*

37. According to the Court's case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. 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. Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. This freedom is subject to the exceptions set out in Article 10 § 2, which must however be

construed strictly (see Lehideux and Isorni v. France judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2886, § 52, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

38. 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. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not however unlimited, but goes hand in hand with a 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. The Court's task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their margin of appreciation. In so doing, 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 based their decisions on an acceptable assessment of the relevant facts (see *Jerusalem v. Austria*, no. 26958/95, § 33, 27.2.2001, with further references).

39. The Court further recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debates on questions of public interest (see *Sürek v. Turkey (No. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). Moreover, the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as 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 display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues (see Lingens v. Austria judgment of 8 June 1986, Series A no. 103, p. 26, § 42; Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 26, § 59).

40. The press plays an essential role 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 (De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports* 1997-I, pp. 233-234, § 37). Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play

its vital role of "public watchdog" (Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 28, § 63; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III).

41. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 25, § 57). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

42. In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, 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 (Lingens v. Austria judgment, op. cit., p. 28, § 46; Oberschlick v. Austria judgment of 23 May 1991, Series A, no. 204, p. 27, § 63).

43. However, even 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 (Jerusalem v. Austria, op. cit., § 43, with further references).

*(ii) Application of the aforementioned principles to the instant case*

44. In the present case the Court is called upon to examine the applicants' complaint that the injunction issued by the Austrian courts which obliged them to retract certain statements regarding Mr Graff and not to repeat them in the future interfered with their freedom of expression, in violation of Article 10 of the Convention.

45. The injunction against the applicants relate to the following three elements in the impugned article: (i) 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 (M.G. had never been a member of the government), and/or (ii) that he has taken part in the adoption of laws which have brought about advantages for his clients, and/or (iii) that he has been allowed to present his disreputable opinion on television". The Court will consider these elements in turn.

46. As regards the first element, the Court finds that the applicants' statement as quoted verbatim below did not explicitly state that Mr Graff was a member of the Austrian government. Moreover, this cannot justifiably be read into the context either. The impugned statement has been extracted from one paragraph which is closely followed by a second

paragraph, in the first sentence of which Mr Graff's exact function is spelled out explicitly.

47. The first paragraph is illustrating a general moral principle with a concrete example, *in casu* that of a French lawyer and later Minister, Roland Dumas, who was said to have behaved in an exemplary manner when "he took it for granted that he had to give up his law firm when he became a member of the [French] government." In the next sentences it is stated that:

> "In every democracy of the world this course of action is followed. Only Mr M.G., who is obviously thick-skinned, does not intend to comply with these moral concept."

48. The next paragraph describes in detail and accurately with reference to Mr Graff's public function the factual background for the concluding remark about him in the last sentence of the first paragraph. It reads:

> "It so happened that at the time when M.G. was presiding Parliament's Legislative Committee, a law was amended which brought about big advantages for the newspaper publishers whom M.G. represented as a lawyer. In order to ensure that in such cases no suspicion, not even one that has no objective justification can arise, there exists the wise rule of incompatibility; a lawyer is not allowed to take part in the adoption of laws which lead to advantages for his clients."

49. In these circumstances, the Court cannot endorse the Austrian courts' conclusion that the interference with the applicants' rights was justified because the applicants had published an incorrect statement of fact.

50. As regards the second element, namely the statement that Mr Graff had, as chairman of the Legislative Committee, participated in the passing of an amendment which had brought about big advantages for one of his clients, the Court notes 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 applicant. 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. In these circumstances, the Court finds that there was sufficient factual basis for the value judgment (the second element) in the article. The latter represents, in the Court's opinion, a fair comment on an issue of general public interest. The same applies to the third element.

51. In any event, the Court does not find that the restriction imposed in the present case on freedom of expression was necessary in a democratic society: Mr Graff was a politician of importance, and the fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises.

52. It is 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 protects information or ideas that offend, shock or disturb (the Handyside v. the United Kingdom judgment of

7 December 1976, Series A no. 24, p. 23, § 49). On balance, the Court finds

that the Austrian courts overstepped the margin of appreciation afforded to Member States and, in this respect, the measure at issue was disproportionate to the aim pursued.

53. The Court concludes, therefore, that there has been a breach of Article 10 of the Convention.

## II. 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. Damage

55. The applicants claimed 103,750.11 Austrian schillings [ATS] (7,539.81 euros [EUR]) corresponding to the costs awarded to Mr Graff by the Austrian courts.

56. The Government did not comment on this claim.

57. Having regard to the direct link between this item and the violation of Article 10 found by the Court, the applicants are entitled to recover the full amount of 7,539.81 EUR, and the Court therefore awards this sum.

### B. Costs and expenses

58. The applicants claimed 205,094.84 ATS (14,904.82 EUR) for their costs and expenses in Austria. These items are to be taken into account as they were incurred to prevent or redress the breach found by the Court. The amount, on which the Government did not comment, appears reasonable to the Court and is therefore awarded in full.

59. For their costs and expenses before the Convention institutions, the applicants claimed 109,808.40 ATS (7,980.09 EUR).

60. The Government does not comment on the claim.

Having regard to the fact that no hearing has been held before it in the present case the Court considers this claim excessive. On the basis of the evidence in its possession, the observations of the participants in the proceedings and its own case-law, the Court considers it equitable to award 5,800 EUR under this head.

### C. Interest payable pending the proceedings before the national courts and the Convention institutions

61. The applicants claimed that interest at a rate of 4% per annum should be added to their claim for costs awarded to the opposing party in the domestic proceedings from the date on which the Vienna Court of Appeal gave its judgment, i.e. 15 December 1994.

62. The Court finds that some pecuniary loss must have been occasioned by reason of the period that elapsed from the time when the above costs were incurred until the Court's award (see, for example, Darby v. Sweden judgment of 23 October 1990, Series A no. 187, p. 14, § 38; Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 38, § 80 (d); *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 83, ECHR 1999-III). Deciding on an equitable basis and having regard to the statutory rate of interest in Austria, it awards the applicants 1,850 EUR with respect to their claim under this head.

### D. Default interest

63. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following global amounts:
      (i) 7,539.81 EUR (seven thousand five hundred thirty nine euros and eighty one cents) in respect of pecuniary damage;
      (ii) 20,704.82 EUR (twenty thousand seven hundred and four euros and eighty two cents) in respect of costs and expenses;
      (iii) 1,850 EUR (one thousand eight hundred and fifty euros) for additional interest;
   (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| S. DOLLÉ | J.-P. COSTA |
|---|---|
| Registrar | President |