



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

FORMER THIRD SECTION

**CASE OF UNABHÄNGIGE INITIATIVE  
INFORMATIONSVIELFALT v. AUSTRIA**

*(Application no. 28525/95)*

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.



**In the case of Unabhängige Initiative Informationsvielfalt v. Austria,**

The European Court of Human Rights (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 12 September 2000 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. 28525/95) against the Republic of Austria lodged 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 association registered in Austria, Unabhängige Initiative Informationsvielfalt (“the applicant”), on 21 July 1995.

2. The applicant was represented before the Court by Mr T. Prader, a lawyer practising in Vienna (Austria). The Austrian Government (“the Government”) were represented by their Agent, Mr H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that an injunction prohibiting it from repeating certain statements it had published in a periodical violated its 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.

6. By a decision of 12 September 2000 the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

7. On 1 November 2001 the Court changed the composition of its Sections, but this case remained with the Chamber constituted within the former Third Section.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a registered association (*Verein*) in Vienna and the publisher of a periodical called *TATblatt*. In the 9 December 1992 issue of *TATblatt*, the following leaflet was published:

“*Querformat*, a (new) wall-newspaper against the trend towards the right wing ...”

“Racism has a name and address

The FPÖ [Austrian Freedom Party] 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.

We have gathered a small selection of Vienna FPÖ officials, FPÖ offices and of course Jörg Haider in order to facilitate a little the unbureaucratic exchange of opinions.

They will surely enjoy your phone calls, letters and parcels: ...”

The above text was followed by a list of addresses and telephone numbers of members and offices of the Austrian Freedom Party (FPÖ).

10. Between 25 January and 1 February 1993 an opinion poll (*Volksbegehren*) under the heading “Austria first” (“*Österreich zuerst*”) took place which had been initiated by the FPÖ several months before. The opinion poll, on the issue of immigration, consisted of twelve proposals, partly to amend legislation and partly to change administrative practices. It proposed, *inter alia*, the following:

- to amend the Federal Constitution by a provision stating that Austria was not a country of immigration;
- to stop immigration until a satisfactory solution to illegal immigration was found;
- to oblige all foreign workers to carry an identity card at their place of work, showing that they had a valid work permit;
- to increase the police force and create a separate border police;

- to limit the percentage of pupils whose mother tongue was not German to 30 % and, if the percentage were higher, to create separate classes for foreigners;
- to deny foreigners the right to vote; and
- to require the immediate expulsion of and residence prohibition on foreign offenders.

11. On 11 February 1993 Mr Jörg Haider, leader of the FPÖ and at that time a member of Parliament, brought civil proceedings for an injunction under Article 1330 of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*) against the applicant before the Vienna Commercial Court (*Handelsgericht*). He requested that the applicant be prohibited from repeating the statement according to which he had incited people to “racist agitation” (“*rassistische Hetze*”) and any similar statements. He further requested that the applicant be prohibited from inviting people to “send small gifts in response to their racist agitation”, together with the publication of the names, telephone numbers and addresses of members of the plaintiff's political party.

12. The applicant 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 words “racist agitation” were not a statement of fact but a value judgment, and were meant as a critical comment of the opinion poll “Austria first” which the plaintiff had initiated and which was directed against “immigration without control”.

13. On 14 April 1994 the Vienna Commercial Court granted the injunction. It found that the impugned statement about “racist agitation” was not a value judgment, but a statement of fact. Such a statement contained a reproach of a criminal offence, namely “incitement to hatred” (*Verhetzung*) under Article 283 of the Austrian Criminal Code (*Strafgesetzbuch*), and not only damaged the plaintiff's reputation (*Rufschädigung*) but also amounted to an insult (*Ehrenbeleidigung*). In order to avoid the injunction, the applicant therefore needed to prove the truth of its statement. However, it had failed to do so. Even accepting that the plaintiff was, more or less, a right-wing politician, there was no evidence that he had attempted to incite hatred (*verhetzen*) against aliens or had attacked their human dignity.

14. As regards the invitation to “send small gifts”, the court observed that a part of the applicant's readership was, for political reasons, prepared to use violence and anarchistic methods. In this respect the court noted that in the 9 December 1992 issue of *TATblatt* a letter to the editor had been published which read as follows:

“... we organised in the night of 29 to 30 November our first action against Haider's referendum and have smashed several windows of the FPÖ headquarters in Salzburg. This was only the beginning. ...”

15. According to another letter to the editor published in the 20 January 1993 issue of *TATblatt*, an FPÖ party office in Vienna had been “visited”,

the words “racism stinks” had been sprayed on the walls, windows smashed and butter acid thrown into the office. The Commercial Court then quoted further letters of this kind which had appeared in various issues of *TATblatt*. The court found that against this background the invitation to “send small gifts” constituted an attack on the plaintiff's personality rights (*Persönlichkeitsrechte*) which had to be respected. Accordingly, the court granted the injunction in this respect also.

16. On 29 August 1994 the applicant appealed against the injunction.

17. On 26 January 1995 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the appeal. It confirmed the Commercial Court's view that the statement according to which the plaintiff had incited people to “racist agitation” was a statement of fact which the applicant had failed to prove. In this respect the court found as follows:

“But since – as we have already outlined in dealing with the complaint concerning the facts – the meaning of the term 'racist agitation' could be established on the basis of general experience, and since the defendant has failed to submit any concrete allegations to the effect that the plaintiff had shown conduct corresponding to what is generally known as 'racism' and 'agitation', the court of first instance – without there being a mistake of law – rightly concluded that the defendant was unable to prove the truth of its allegations. ...”

18. As regards the applicant's argument that this statement was covered by its right to freedom of expression, the Court of Appeal found that the interests of the applicant and the plaintiff had to be balanced against each other. However, the applicant's statement could not be justified by referring to freedom of expression, because the statement went beyond the limits of acceptable criticism by reproaching the plaintiff with a criminal offence. Moreover, the impugned statement was untrue and therefore not protected by Article 10 of the Convention. The Court of Appeal confirmed the decision of the Commercial Court in respect of both statements.

19. On 13 March 1995 the applicant introduced an extraordinary appeal on points of law (*außerordentliche Revision*) against the Court of Appeal's decision in so far as it concerned the prohibition to repeat the statement that the plaintiff had incited people to “racist agitation”.

20. On 6 April 1995 the Supreme Court (*Oberster Gerichtshof*) declared the extraordinary appeal inadmissible as it found that the qualification of the statement at issue as a statement of fact was in accordance with its previous case-law.

## II. RELEVANT DOMESTIC LAW

21. Article 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

22. The applicant complained under Article 10 of the Convention that the injunction issued by the Austrian courts, in so far as they had ordered the applicant not to repeat the statement that the plaintiff in the above proceedings had incited people to “racist agitation”, violated its right to freedom of expression.

23. 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 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 ... public safety, for the prevention of disorder or crime ... for the protection of the reputation or rights of others ...”

#### **A. Scope of the case and existence of an interference**

24. The Court notes at the outset that the injunction issued against the applicant concerned, on the one hand, the invitation to “send small gifts” and, on the other hand, the statement that the plaintiff in the injunction proceedings had incited people to “racist agitation”.

25. The applicant does not complain about the first part of the injunction, namely the prohibition to repeat its invitation to “send small gifts” and it did not complain in the domestic proceedings before the Supreme Court about the injunction in this respect. The Court finds that this part of the leaflet can be distinguished from the criticism of Mr Haider for “racist agitation” and examined separately. Consequently, the Court will limit its examination in the present case to the question whether this second part of the injunction is a justified interference with the applicant's freedom of expression.

26. In so far as this part of the injunction is concerned, the Court finds that there has been an interference with the applicant's rights under Article 10 and this is not in dispute between the parties.

### **B. Justification for the interference**

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” and legitimate aim*

28. The Court notes that it was common ground between the parties that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others, within the meaning of Article 10 § 2 of the Convention. The Court endorses this assessment.

#### *2. “Necessary in a democratic society”*

##### **(a) Arguments before the Court**

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

29. The applicant submitted that the injunction issued by the Austrian courts was not necessary in a democratic society. In particular, the Austrian courts wrongly qualified the impugned statement as a statement of fact, when it was a political value judgment criticising the plaintiff in the injunction proceedings and contributing to a political debate on a question of general importance. It was in the public interest to point out the dangerousness of a politician like Mr Haider who had proposed contemptible measures in an opinion poll against immigration (“*Österreich zuerst*” – “Austria first”). As a value judgment and not a statement of fact, its truth did not require proof. To require proof of a value judgment would itself be a violation of Article 10 of the Convention.

30. As regards the proportionality of the measure, the applicant submitted that it was immaterial that the decision emanated from civil rather than criminal proceedings, because in both cases it was prevented from repeating the statement in the future.

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

31. The Government contend that the interference was necessary in a democratic society in the interests of the aforementioned aims. The applicant's statement went far beyond the limits of acceptable criticism, even taking into consideration the fact that the plaintiff as a politician had to

show a greater degree of tolerance to criticism. The reproach of “racist agitation” was a particularly serious one as it amounted to a reproach of criminal behaviour, that is, having committed the offence of incitement to hatred under Article 283 of the Austrian Criminal Code, and also fell within the ambit of the National Socialism Prohibition Act. Thus, there was a pressing social need to prevent the careless use of such grave allegations as much as possible while taking due account of the requirements of freedom of expression.

32. In the Government's view the impugned statement about “racist agitation” was a statement of fact and the applicant had an opportunity to prove its truth, but had failed to do so. That it is in principle possible to prove the truth of the reproach made by the applicant can also be seen from the fact that “racist agitation”, if made in public, might constitute the offence of incitement to hatred under Article 283 of the Criminal Code and that, in criminal proceedings, the well-foundedness of such a charge by proving certain facts had to be established. To allege that it would be impossible to prove the truth of the reproach of “racist agitation” would lead to the unacceptable conclusion that convictions under Article 283 of the Criminal Code were arbitrary. However, even if the reproach of “racist agitation” expressed a value judgment, the interference was proportionate. In this respect the Government refer to *Wabl v. Austria* (no. 24773/94, 21 March 2000).

33. Lastly, the Government submitted that the injunction was not a disproportionate measure, considering that it was taken by a civil court and was not a criminal conviction, and that it was not formulated in broad terms but confined to particular statements which were clearly defined in the judgment.

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

*(i) The relevant principles*

34. 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).

35. 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 power 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, ECHR 2001-II, with further references).

36. The Court also reiterates 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 *Süreş 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 July 1986, Series A no. 103, p. 26, § 42, and *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, p. 26, § 59).

37. 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 (see *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 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” (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 28, § 63, and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III).

38. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick*, cited above, p. 25, § 57). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria (no. 1)*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

39. 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 (see *Lingens*, cited above, p. 28, § 46, and *Oberschlick*, cited above, p. 27, § 63).

40. 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 (see *Jerusalem*, cited above, § 43, with further references).

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

41. The Court finds that the impugned statement should be seen in the political context in which it was made, namely as a reaction to an opinion poll “Austria first” initiated by Mr Haider and the Austrian Freedom Party, which took place between 25 January and 1 February 1993 against “immigration without control”. The applicant's criticism of Mr Haider's policy must be considered against this background.

42. The Government argued that the reproach of “racist agitation” was a particularly serious one, as it amounted to a reproach of criminal behaviour, and there was thus a pressing social need to prevent the careless use of such serious allegations.

43. The Court can accept this argument in principle as it has repeatedly attached particular importance to the duties and responsibilities of those who avail themselves of their right to freedom of expression, and in particular, of journalists (see *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 23, § 31, and *Prager and Oberschlick*, cited above, p. 18, § 37). However, in the circumstances of the present case, the Court finds no indication of such deliberate carelessness on the part of the applicant. It rather appears that the applicant's statement, which may certainly be considered polemical, did not on that account constitute a gratuitous personal attack as it was made in a particular political situation in which it contributed to a discussion on subject matters of general interest such as immigration, its control and the legal status of aliens in Austria. Thus, the impugned statement was part of the political discussion initially

provoked by Mr Haider and other members of the FPÖ themselves by initiating the above-mentioned opinion poll on these issues.

44. As regards the qualification of the impugned statement by the Austrian courts, the Court observes that they did not accept the applicant's argument that the statement at issue was a value judgment, but considered it to be a statement of fact, the truth of which had to be proved.

45. The Government argue that the impugned statement about “racist agitation” was a statement of fact and, in order to avoid an injunction, the existence of these facts had to be proved. To demonstrate that such proof is possible, they refer to the offence of “incitement to hatred” under Article 283 of the Criminal Code, which also requires that in criminal proceedings the well-foundedness of that charge be proved.

46. However, the Court is not persuaded by this argument. The degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of a value judgment. In the Court's opinion, the applicant published what may be considered to have been fair comment on a matter of public interest, that is a value judgment, and the Court disagrees with the qualification of that statement by the Austrian courts. The Court would also point out that it has previously considered similar statements to be value judgments, the truth of which is not susceptible to proof (see *Lingens*, cited above, p. 28, § 46, or *Wabl*, cited above, § 36).

47. Such an opinion may, however, be excessive, in particular in the absence of any factual basis. However, in the light of the above considerations, that was not so in this instance (see *De Haes and Gijssels*, cited above, p. 236, § 47, and *Jerusalem*, cited above, § 43).

48. In sum, the Court cannot find that there were sufficient reasons to prevent the applicant from repeating the critical statement in question. The Court therefore finds that the Austrian courts overstepped the margin of appreciation afforded to Member States, and that the injunction against the applicant was disproportionate to the aim pursued.

49. Accordingly there has been a breach of Article 10 of the Convention

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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**

51. The applicant sought 106,128 Austrian schillings (ATS) (7,712.62 euros (EUR)), corresponding to the costs awarded to the opposing party by the Austrian courts. The Government did not comment on this claim.

52. Having regard to the direct link between this item and the violation of Article 10 found by the Court, the applicant is in principle entitled to compensation under this head. The Court observes, however, that only a part of the injunction against the applicant is at issue in the Convention proceedings (see paragraph 25 above), while the sums claimed by the applicant relate to the domestic proceedings in their entirety.

Thus, making an assessment on an equitable basis, the Court awards the applicant the sum of EUR 4,400.

### **B. Costs and expenses**

53. The applicant claimed ATS 140,589 (EUR 10,217.22) for its costs and expenses incurred in Austria. The Government did not comment on this claim.

54. Although the applicant is in principle entitled to compensation under this head, the Court observes that this amount relates to the entire domestic proceedings while in the Convention proceedings only a part of the injunction is at issue (see paragraph 25 above).

Making an assessment on an equitable basis, the Court awards the applicant the sum of EUR 5,000.

55. For its costs and expenses before the Convention institutions, the applicant claimed ATS 76,665.60 (EUR 5,571.50). The Government did not comment on this claim.

56. The Court finds this claim reasonable and, consequently, awards the full amount.

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

57. The applicant claimed that interest at a rate of 4% per annum should be added to its claim for costs awarded to the opposing party and the costs incurred in the domestic proceedings from the date on which the judgment of the Supreme Court became final, that is, 2 May 1995.

58. The Court finds that some pecuniary loss must have been occasioned by reason of the period that elapsed from the time when the various 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; *The Observer and The Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 38, § 80 (d); and *Bladet Tromsø and Stensaas*, cited

above, § 83). Deciding on an equitable basis and having regard to the statutory rate of interest in Austria, it awards the applicant EUR 1,850 under this head.

**D. Default interest**

59. 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 applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 4,400 (four thousand four hundred euros) in respect of pecuniary damage;
    - (ii) EUR 10,571.50 (ten thousand five hundred and seventy-one euros fifty cents) in respect of costs and expenses;
    - (iii) EUR 1,850 (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 applicant's 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  
Registrar

J.-P. COSTA  
President