

THE FACTS

Whereas the facts presented by the Applicant may be summarised as follows:

1. The first Applicant is a German citizen living in A, and the second Applicant is a trade organisation (of which X is a member) with headquarters in B which, in view of the importance of the issues, supports X's application (Nebenintervenient). They are both represented by Dr. Y, a barrister in Vienna.

2. X is a wholesale newsagent in A where he is owner-manager of the firm "Pressevertrieb X". He supplies a considerable clientèle of shopkeepers and stallholders with various periodicals obtained from publishers. The nature of his business necessitates the prompt delivery of the periodicals to the retailers. To do this, X has built up an organisation comprising some 80 employees and several delivery vans.

In the Federal Republic of Germany, printed matter is not subject to censorship; its sale, distribution and advertisement are, however, restricted by the Act of 9th July 1953, BGBl. I. Seite 377 governing the circulation of publications liable to corrupt the young. This Act requires that such publications, including especially those of an indecent nature and such as glorify crime, war and race hatred, shall be entered in a list and their entry notified to the public (Section 1). The decision regarding their entry in the list rests with a branch of the Executive, the Federal Inspection Office in Bonn, whose members are appointed by the Federal Minister of the Interior and the Governments of the Länder and are not bound by instructions (Sections 8 et seq.). Administrative court procedure provides for appeal against a decision of the Inspection Office (Section 20).

As soon as the entry of the publication in this list has been notified, it may not be offered for sale or made accessible to any person under 18 (Section 3), nor may it be sold, distributed or lent either by dealers outside business premises or by door-to-door salesmen (Section 4). After notification of its entry in the list, advertising of the publication by displaying it in a shop window, inside a shop, or in any other generally accessible place, by poster, newspaper or postal advertisement, or by any other method is prohibited. Announcements in trade journals are permissible (Section 5). Where there is manifestly a high degree of liability to corrupt the young, the publication in question is subject to the restrictions laid down in Sections 3 to 5 without the requirement of entry in the list of public modification (Section 6). Infringements of the provisions of Sections 3 to 6 are punishable under Section 21 by up to one year's imprisonment and fines. Ordinary law courts are competent to try such cases.

Under the Act, therefore, the subject covered is made the concern of the administration - more precisely of the Federal Administration, and two concepts are created: the wider concept embodied in Section 1, "publications liable to corrupt the young", and the narrower concept of Section 6, "publications manifestly liable to corrupt the young". The sale of the former category outside business premises which the customer is not in the habit of entering - e.g. kiosks, as in the case in question - is prohibited only if they were entered in the list of prohibited publications referred to in Section 1; the sale of the latter in such premises, however, is prohibited even before their entry in this list. It is surely obvious that a publication which is "manifestly liable to corrupt the young" is also "liable to corrupt the young" and, as such, must be entered in the list in accordance with Section 1, and that the provision in Section 6 applies only to flagrant cases in which there has not been time to enter the publication in the "prohibited" list.

X was fined once before under Section 21 - in his opinion, unjustly - for contravening the regulations contained in Section 6. He maintains

that he was convicted only because the Bavarian courts interpret the conception "manifestly liable to corrupt the young" with a liberality bordering on prudery. In order to avoid any danger of further prosecution, he instructed his senior employees always to examine periodicals prior to their distribution to ensure that their content was not "manifestly liable to corrupt the young" and, if in doubt, to show them to him. He did, in fact, withhold a number of publications from distribution to kiosks, although they were not subsequently entered in the list provided for in Section 1.

3. In November 1956, X delivered to his regular customers, including several kiosks, Number 7 of the publication "Das Journal Capriccio", issued by Pressebuch W. Hermann & Co., Publishers, Hamburg. This publication was described by the Public Prosecutor's Office as "manifestly liable to corrupt the young" on the grounds that seven of its illustrations were likely to "considerably overexcite and misdirect the sexual fantasy of adolescents". The District Court of A endorsed this opinion and sentenced X on ... 1957 to a fine of DM 50 for offences under Section 6 in conjunction with Sections 4 and 21 of the above Act.

X protested against this sentence which was thereby rendered void and a court hearing was fixed. At the public hearing of ... 1957, X declared that his employees had not shown him the publication prior to its distribution, but even if they had done so, he would still have had it distributed to the kiosks, for he did not consider it as being in any way harmful to the morals of young persons, let alone "manifestly liable to corrupt". The Bavarian Public Prosecutor's Office, it seemed, was alone in regarding it as such, since no objection had ever been raised to the publication in any other Federal Land.

Viewed objectively, the publication was not "manifestly liable to corrupt the young"; he offered the following evidence in support of this: the opinions of Father S, Chaplain of the Secondary School Hostel, C, of ... 1957, and of Frau Dr. T, psychologist at the ... institut of ... 1957, neither of whom thought the publication likely to corrupt the young, the opinion of a certain Frau U, of ... 1957, who, as a mother, did not consider the publication as dangerous to the morals of young persons, and finally, the verdict of the Federal Inspection Office (Sections 8 et seq.), of ... 1957, which declined to include the publication in the list provided for in Section 1.

On ... 1957, the District Court of A found X guilty of negligence under Sections 4, 6 and 21 and imposed a fine of DM 30. In the grounds given for this verdict, it was stated that the publication was manifestly highly prejudicial to the morals of young persons, that it was devoid of any artistic or literary value and merely displayed the physical charms of film stars, while the text dwelt on the love affairs of film stars whom adolescents frequently idolised and imitated. The decision of the Inspection Office of ... 1957 not to include the publication in the "prohibited" list provided for in Section 1 was not binding on the Court. Further evidence adduced by X was ignored by the Court. In determining the penalty, it took into account against X a previous conviction under the same section of the regulations and the fact that the publication was of a type likely "to be read clandestinely by adolescents", and in his favour the absence of evidence of any concrete harm having been caused.

Both the Public Prosecutor's Office and X appealed from this judgment. The Public Prosecutor's Office moved that X be charged, not with negligence, but with a deliberate breach of the regulations under Section 4 et seq. X, on the other hand, demanded his acquittal and again submitted the evidence passed over by the Court of first instance. He argued that he could not, as a newsagent, be expected to be a severer judge of the morality of the content of a periodical than a Minorite priest, a child psychologist or a mother. It was unjust to apply a standard, designed only for swift intervention in exceptional, difficult cases, to a publication which the competent authority (the

Inspection Office in Bonn) had not judged prejudicial to the morals of young persons, and declare it manifestly highly prejudicial and prosecute a newsagent for not applying criteria which, among all the Public Prosecutors' Offices in Germany, the Bavarian one alone seemed to have adopted.

The Regional Court of A heard both appeals - X's and that of the Public Prosecutor - on ... 1957. At the request of the Prosecutor, it called in an expert who expressed the view that, while the illustrations originally objected to in the publication could not - with the exception of one which on closer inspection appeared obscene - be said to be manifestly highly prejudicial to young persons, a careful perusal revealed that many passages in the text were. The Court refused X's request to hear a second expert and to rectify the expert's statement on the basis of the tape-recordings submitted.

By a decision of ... 1957, the Regional Court rejected both appeals and upheld the fine of DM 30 imposed on X as being "commensurate with the guilt of the accused and adequate as a penalty and deterrent".

In the grounds given for the judgment, the Court devotes 12 pages to describing a number of illustrations and passages in the publication. It found only two of the incriminated illustrations likely to have a corrupting influence on young persons:

a colour photograph of the film star Lana Turner who, dressed as an oriental dancer, behind a gossamer-thin curtain, "seemed to be looking straight at the reader and beckoning to him"; the veil-like curtain "threw into relief rather than concealed the charms of the lower part of the body";

a picture of the film star Mamie van Doren as a "tap dancer in a sleeveless blouse, satin briefs, net stockings and evening shoes; the tight-fitting briefs seemed to emphasise the contours of the female sex organs, particularly the vulva". Until the expert drew their attention to it, this fact has "escaped the notice of the members of the Court, particularly since there did not seem, at first glance, to be anything in the picture to make it harmful to the morals of young persons". A careful examination of it, however, left the Court no longer in any doubt as to the "highly licentious nature of the picture, even though it had to be admitted that many adolescents would not look at the picture closely enough to notice the detail in question and hence be aware of the obscenity of the picture as a whole".

The Court went on to state that while "the illustrations in general" could not be said to be manifestly liable to corrupt the young, nevertheless parts of the text described the "extravagance, frivolity, looseness and profligacy" of filmstars' lives, and thus presented a grave danger to adolescents who were much more prone than adults to seek models to imitate and emulate. Hence the risk that they might choose such a way of life as an ideal to strive after. The Court considered that, since the text and illustrations belonged together - "on this one point the Court could not agree with the expert" - the entire publication was manifestly liable to corrupt the young. The publication should have been examined either by X himself or by some of his employees; in which case they could not have failed to recognise the danger to young readers and should not have distributed the magazine to kiosks. The defence's arguments that the provision of Section 6 was not applicable in this instance because it was designed only for rapid intervention in particularly serious cases, was unfounded, for it was "not the intention of the legislator to take the decision in a normal case out of the hands of the State organs of justice and transfer it to other organisations". No mention of the opinions submitted as evidence by X was made by the Court in this judgment either.

X applied to the Court of Appeal of A for a review of the Regional Court's decision, basing his plea on a number of points of law, including the following:

(a) improper application of the provision of Section 6 due to the fact that the publication - which was not subsequently included in the list of publications prohibited under Section 1 as "prejudicial to young persons" - was pronounced "manifestly liable to corrupt the young", in accordance with what were not generally accepted criteria, and this only after a careful study, and that a criminal charge was brought against X for distributing it;

(b) violation of the right of the defence to the admission and consideration of evidence submitted by it as proof of the accused's innocence;

(c) violation of the right of the defence to an explanation by the Court of why a newsagent should be a severer judge of the corruptive nature of a publication than a chaplain in charge of the spiritual welfare of young people, a qualified child psychologist or the competent Office.

The Criminal Appeals Senate of the Court of Appeal reviewed the case at a public hearing on ... 1959 and rejected the appeal by its decision of ... 1959.

X appealed to the Federal Constitutional Court in Karlsruhe against this decision, but the Federal Constitutional Court rejected X's appeal in a decision taken at a non-public hearing on ... 1961. In the grounds given in accordance with Section 24 of the Basic Law (Federal Constitution Act), it is stated that the Court could find no evidence of any violation of X's constitutionally guaranteed rights in the criminal proceedings described above. With regard to the alleged violation of the rights safeguarded in the Human Rights Convention, the Court states:

"The reference to the Human Rights Convention is pointless, since an appeal to a constitutional court on the grounds of its violation cannot be supported."

4. Whereas the Applicant alleges:

1. violation of the right safeguarded in Article 6, paragraphs (1) and (3), of the Convention in that, in the criminal proceedings which began in the Regional Court of A, the evidence adduced by him was not admitted or his arguments heeded, and that the judgment issued against him was based on biased evidence, assertions which conflicted with the case-file and an arbitrary application of the law;

2. violation of freedom of the press safeguarded by Article 10 of the Convention, in that the obligation was imposed on him, a newsagent, to censor publications in accordance with criteria alien to both the competent administrative organ and a democratic society;

3. violation of his rights safeguarded in Articles 7, paragraph (1), 5, paragraph (1) and 14, of the Convention, in that he was convicted in Bavaria for an act which is not expressly defined as punishable under the general law applicable to all the Federal Länder and which is regarded as legal in the rest of the Federal territory where, though committed repeatedly, it has never been punished;

4. violation of his right safeguarded in Article 13 of the Convention, in that the judicial authorities to which he had applied in the prescribed manner - the last of these being the Federal Constitutional Court - failed to submit his appeal to appropriate examination and based their decisions on speculative, manifestly incorrect assumptions, or refused to give a proper legal verdict.

THE LAW

As regards the alleged violation of Article 6, paragraphs (1) and (3) (Art. 6-1, 6-3) of the Convention.

Whereas, during the proceedings before the District Court of A, the first Applicant availed himself of the possibility of submitting in evidence written statements by three private persons supporting his own submissions in defence;

Whereas, during the proceedings on appeal he unsuccessfully requested the permission of the Regional Court of A to call a counter-expert to refute the evidence of the expert appointed by the Court at the request of the Public Prosecutor;

Whereas Article 6, paragraph (3) (d) (Art. 6-3-d) provides that "everyone charged with a criminal offence has the right ... to examine or have examined witnesses against, and to obtain the attendance and examination of, witnesses on his behalf under the same conditions as witnesses against him."

Whereas, in its decisions on the admissibility of Application Number 1290/61 (M. v. Austria) the Commission considered that "the calling of experts as witnesses is covered by the terms of Article 6, paragraph (3) (d) (Art. 6-3-d) of the Convention";

Whereas, however, the Commission has held in several decisions (Number 617/59 - Hopfinger v. Austria - Yearbook III, page 370 - and Number 753/60 - E. v. Austria - ibidem page 310) that "this provision does not allow the accused to call everyone, in particular persons who are not in a position to assist by their statements in elucidating the truth; whereas, in other words, paragraph (3) (d) (Art. 6-3-d) does not prohibit the Court from refusing to summon persons who cannot be 'witnesses on his behalf' within the meaning of that same paragraph";

Whereas the Regional Court of A had in the case-file the written statements of three witnesses on behalf of the Applicant as well as the evidence of an expert which it had itself appointed; whereas the Court thus considered that the evidence before it was adequate for it to reach a decision without calling the expert proposed by the Applicant; whereas the Applicant has not shown that the Court in so evaluating the evidence acted in violation of the rights guaranteed to the Applicant in paragraph (3) (d) (Art. 6-3-d) or in a wider notion of a "fair trial" embodied in paragraph (1) of Article 6 (Art. 6-1) whereas therefore this part of the Application is manifestly ill-founded and must be rejected in accordance with Article 27, paragraph (2) (Art. 27-2) of the Convention.

As regards the alleged violation of Article 10 (Art. 10) of the Convention;

Whereas the Commission has frequently held in cases in which a public authority is shown to have interfered with the rights or freedoms guaranteed by the Convention that the Commission has not only the right but also the duty to examine the question whether such interference either by legislation or otherwise complies with terms of the relevant provisions of the Convention; whereas it has further held in considering this question both generally and with particular reference to Article 10, paragraph (2), (Art. 10-2), that a State is given a certain margin of appreciation in determining the limits that may be placed on freedom of expression; whereas in this respect the Commission refers to its decision on the admissibility of Application Number 753/60 (see above);

Whereas the first Applicant was sentenced under Sections 4, 6 and 21 of the Act of 9th July 1953 on the circulation of publications liable to corrupt the young; whereas the Commission finds that these provisions in no way exceeded the above margin of appreciation and constitute restrictions on the freedom of expression such as are

authorised under paragraph (2) of Article 10 (Art. 10-2) since they are provided for by law and represent measures necessary "for the protection of morals" of young persons;

Whereas, in respect of the application of the provisions to the Applicant, the Commission on the general evidence before it and without considering it necessary to examine the actual contents of the publication in question, finds that the Regional Court of A and the Court of Appeal of A have not applied these restrictions on the right to receive and impart information in a manner contrary to the provisions of the Convention and in particular to Article 10 (Art. 10); whereas it follows that this part of the Application is manifestly ill-founded and must be rejected in accordance with Article 27, paragraph (2) (Art. 27-2) of the Convention.

As regards the alleged violations of Articles 5, 7 and 14 (Art. 5, 7, 14) of the Convention;

Whereas an examination of the case as it has been submitted, including an examination made *ex officio*, does not disclose any appearance of a violation of the rights and freedoms set forth in the Convention and in particular in the Articles invoked by the Applicant; whereas, it is true that no prosecutions for similar offences took place in other parts of the Federal territory to which the Act of 9th July 1953 applies; whereas, however, the appreciation by the authorities of the terms "liable to corrupt" and "manifestly liable to corrupt" may inevitably vary according to the different standards and conditions in other parts of the Federal territory; whereas such difference in appreciation may well result in a difference in the application of the provisions of the Act by the authorities but does not thereby constitute a discrimination in its application within the meaning of Article 14 (Art. 14);

Whereas it follows that this part of the Application is manifestly ill-founded and must be rejected in accordance with Article 27, paragraph (2) (Art. 27-2) of the Convention.

As regards the alleged violations of Article 13 (Art. 13) of the Convention;

Whereas it is to be observed that the effective remedy before a national authority which is guaranteed to everyone under Article 13 (Art. 13) of the Convention relates exclusively to a remedy in respect of a violation of one of the rights and freedoms set forth in the Convention; and whereas, the first Applicant not having established any violation of Articles 5, 6, 7, 10 or 14 (Art. 5, 6, 7, 10 or 14) of the Convention, there is no basis for the Application of Article 13 (Art. 13) to the present case; whereas the Commission in this respect refers to its decisions on the admissibility of Applications Number 472/59 (*W. v. the Federal Republic of Germany* - Yearbook III, page 206) and Number 912/60 (*W. v. Sweden*); whereas it follows that this part of the Application is manifestly ill-founded and must be rejected in accordance with Article 27, paragraph (2) (Art. 27-2) of the Convention;

Now therefore the Commission declares this application inadmissible.