AS TO THE ADMISSIBILITY OF

Application No. 11921/86
by Verein "Kontakt-Information-Therapie" (KIT)
and Siegfried HAGEN
against Austria

The European Commission of Human Rights sitting in private on 12 October 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 13 August 1985 by Verein "Kontakt-Information-Therapie" (KIT) and Siegfried Hagen against Austria and registered on 16 January 1986 under file No. 11921/86;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The first applicant is a private association (Verein) engaged in the operation of rehabilitation centres for young drug abusers. It was established in Innsbruck in 1974.

The second applicant, an Austrian citizen born in 1953, who resides in Innsbruck, is a drug rehabilitation therapist employed by the first applicant.

Both applicants are represented by Mr. Ivo Greiter, a lawyer practising in Innsbruck.

Originally, the application was introduced on behalf of the first applicant, which alleged violations of the rights of its employees and clients ("Der Verein ... fühlt sich in den Menschenrechten seiner Mitarbeiter und der betreuten Jugendlichen verletzt"). It was therefore asked to indicate whether the employees concerned by the domestic proceedings were also applicants, and if so, to give

their particulars. In reply, the applicants' lawyer on 6 February 1987 submitted a power of attorney showing that he represented the second applicant.

Notwithstanding its status as a private non-profitmaking organisation, the first applicant was granted State recognition by a decree of the Federal Minister for Health and Environmental Protection (Bundesminister für Gesundheit und Umweltschutz), Fed. Law Gazette No. 435/1981. Under its statutes (Satzung), the association performs the following tasks in the Province of Tyrol:

- the establishment and management of drug rehabilitation centres for young drug abusers;

- the promotion and training of skilled personnel and counsellors;

- the information of the public concerning the problems facing young drug abusers.

For these purposes, the association employs an average of about fifteen workers who counsel about thirty to forty young persons.

The association views its work as being grounded on a relationship of trust between the therapists and their patients. On admission to one of the rehabilitation centres, the young people are given an assurance by the employees that any information provided by them pursuant to their treatment will be held in strictest confidence.

One former patient of the rehabilitation centre of Schwaz, who had been released on 22 March 1984, subsequently became involved in criminal proceedings for drug abuse (Suchtgiftmissbrauch), an offence punishable under Section 16 para. 1 (2) of the Narcotic Drugs Act (Suchtgiftgesetz). The suspicion was based on information contained in a letter from the centre of 27 April 1984 that the patient had been discharged because of a relapse. The letter was typed by a secretary of the centre, and dictated by either the second applicant or the other rehabilitation therapist employed at that centre.

The proceedings in question were conducted by the District Court (Bezirksgericht) of Schwaz which, on 4 October 1984, summoned the above two therapists to appear as witnesses.

In response to the District Court summons, the first applicant's board of directors, in its session of 16 October 1984, announced that neither therapist would be released from his duty not to disclose confidential information.

The matter was referred to the Regional Court (Landesgericht) of Innsbruck which, in a decision of 5 February 1985, held that the two witnesses had no right under the relevant provisions of the Code of Criminal Procedure (Strafprozessordnung, Sections 151, 152) to refuse giving evidence. Their evidence was of such importance for the establishment of the facts of the case that it could not be dispensed with. For this reason, the Regional Court directed the District Court to impose penalties (Beugestrafen) should the therapists maintain their refusal to give evidence. This decision was served on the second applicant on 3 May 1985.

Notwithstanding this decision, the second applicant and the other therapist persisted in their refusal to give evidence before the District Court. On 20 May 1985, the District Court therefore imposed a fine in the amount of AS 5000.- on each of them, pursuant to Section 160 of the Code of Criminal Procedure.

Against this decision both the second applicant and the other therapist lodged an appeal (Beschwerde) with the Regional Court. They

submitted, in particular, that their refusal to give evidence was justified under Section 153 of the Code of Criminal Procedure which reads as follows:

"If the fact of giving evidence or the answer to a particular question would bring the witness or one of his close relatives ... into disgrace (Schande) or if it would expose them to the risk of criminal prosecution or to the risk of an immediate and important financial disadvantage (unmittelbarer und bedeutender vermögens-rechtlicher Nachteil), and if, for this reason, the witness refuses to give evidence, he shall be obliged to give evidence only if this is indispensable because of the particular importance of his evidence."

It was argued that in the circumstances the fact of giving evidence would bring the therapists into disgrace because the breach of confidentiality expressly assured to the accused would be regarded by the public and in particular by the patients of the rehabilitation centres as a morally deplorable conduct. The therapists would further incur a risk of financial disadvantages as it was likely that they would be dismissed by the first applicant if they breached the rule of confidentiality which was an essential condition of their employment and the observance of which had been the subject of specific instructions by the board of directors in this case. It was further submitted that there were no indications that the evidence of the two therapists in the present case was of such importance that it could not be dispensed with, having regard to the important general interests at stake. In this connection reference was also made to the principle of proportionality (Interessenabwägung) and the fact that the public functions recognised in the Minister's decree would be undermined if the witnesses were actually compelled to give evidence.

However, the Regional Court rejected the appeal by a decision of 18 June 1985. It first referred to its earlier decision of 5 February 1985 on which the District Court's decision to impose fines had been based. In the Regional Court's view the witnesses would not expose themselves to disgrace if they made true depositions in the criminal proceedings in question. Their esteem in the general public would not be reduced if they disclosed information on observations which they had made in their functions as social workers, but which did not constitute a breach of trust vis-à-vis the former patient of the rehabilitation centre who had been discharged a long time ago allegedly because of a relapse. Even less could there be a question of breach of trust vis-à-vis the unknown person who had provided this patient with heroine. Nor could it be assumed that a law-abiding conduct, namely the giving of evidence which was considered as indispensable by the competent criminal court, would lead to a dismissal of the therapists. Only an immediate and important financial disadvantage was legally relevant, but not any possible and hypothetical disadvantage. Finally the Court observed that the conflicting interests had already been weighed against each other in its earlier decision of 5 February 1985. In conclusion, it had been found justified in the absence of any other sufficient evidence to require the witnesses to give evidence. In view of this decision by which it was bound the District Court had not been obliged to give detailed reasons. No further remedy was available against this decision.

On 21 June 1985 the District Court invited the two therapists to pay the fines within two weeks. However, on 1 July they made an application to suspend the collection of the fines until a decision of the Federal President was taken to relieve them by an act of grace of the obligation to pay the fines. The District Court rejected this application by a decision of 30 July 1985, finding that it was inadmissible as the Federal President's right to make acts of grace did not extend to this type of fines (cf. Section 409a of the Code of

Criminal Procedure).

Thereupon the therapists made a new application for suspension in view of their request to the Attorney General (Generalprokuratur) to file a plea of nullity for safeguarding the law (Nichtigkeits-beschwerde zur Wahrung des Gesetzes) under Section 33 of the Code of Criminal Procedure which they had made on 18 July 1985. However, on 14 October 1985, the Attorney General informed the applicants' lawyer that he saw no reason to lodge a plea of nullity.

The fines plus costs of procedure were subsequently collected by the Republic of Austria by way of an attachment of earnings of the two therapists. The first applicant therefore had to pay these sums, being liable to deduct them from the salaries of its employees.

The therapists persisted in their refusal to give evidence even after the imposition of the fines. However, no further measures were subsequently taken against them.

Of the two therapists involved, only the second applicant is still employed by the first applicant.

COMPLAINTS AND LEGAL SUBMISSIONS

The first applicant, on behalf of its employees and patients, and the second applicant in his own name allege violations of the following provisions:

Article 3 of the Convention, and Article 13 read in conjunction with Article 3

It is submitted that forcing the therapists to give evidence and thereby to disregard their promise of confidentiality amounts to degrading treatment or punishment within the meaning of Article 3.

The applicants further claim that, contrary to Article 13, no effective domestic remedy was provided to them on this particular point. The issue was raised in the domestic proceedings by arguing that giving effect to the District Court's summons would bring the applicants into disgrace. However, the Regional Court generally ruled out any possibility of disgrace and thus failed to address the question of whether or not the particular facts involved degrading treatment or punishment.

Article 9 of the Convention (freedom of conscience)

The case involves a confrontation between demands of the State and the dictates of individual conscience. The activities of the first applicant, whose positive function has been recognised by a Minister's Decree, require a free flow of information between therapists and clients. An untenable conflict of interests must arise in any case of disclosure of confidential information given by former or present clients. The therapists therefore could not, in good faith, comply with the court's order. By enforcing the order, the State interfered with the freedom of conscience, as guaranteed by Article 9 para. 1 of the Convention.

The applicants claim that this interference must be justified under the criteria of Article 9 para. 2. They do not dispute that the interference was lawful and had a legitimate purpose. However, they submit that it was not proportionate to the legitimate aim pursued and thus was not necessary in a democratic society.

The applicants admit that an unlimited recognition on the part of the State of the individual's freedom to act in accordance with the dictates of conscience would be unworkable in a democratic society. They also admit that there is a "pressing social need" to combat drug

abuse through criminal prosecution of users and dealers. However, the treatment of young drug addicts in the early stages of their drug dependence also constitutes a legitimate aim and serves a "pressing social need", and for this reason the first applicant was granted State recognition and support as a drug treatment centre.

Treatment in a drug rehabilitation centre can only be successful in an atmosphere where the young persons have been given the guarantee that their statements about past drug abuse, made in confidence during treatment, will, under no circumstances, subsequent thereto, form the basis of a criminal indictment. The destructive repercussions inherent in such an eventuality are out of proportion to the legitimate social goal which might be realised through prosecution of putative drug recidivists. This bond, based on the promise given to young drug abusers that their statements relative to treatment will be kept confidential, is not broken on conclusion of the treatment, or even when a client is requested to leave the centre, as was the situation in the present case. For such a bond to arise at all between social workers and client, the young drug abusers must be aware that the promise of confidentiality at issue is limited neither in time nor to the judicial exigencies of the moment. It is this that the courts failed to grasp. Therefore, it was out of proportion to the legitimate aim pursued by the court to call the two therapists as witnesses in the criminal proceedings against their former client, and to order coercive penalties when they refused to give evidence.

Article 11 of the Convention (freedom of association)

The applicants claim that the court order restricted the ability of the drug rehabilitation centre's employees to meaningfully or effectively associate with the young clients. It thus also constituted an interference with the freedom of association as guaranteed by Article 11. As regards the lack of justification of this interference, the applicants repeat the arguments used under Article 9 para. 2.

Article 14 of the Convention (in conjunction with Articles 9 and 11)

The applicants invoke the Court's case law, according to which there may be discrimination contrary to Article 14 of the Convention even where a State goes beyond its Convention-based obligations (Eur. Court H.R., judgment of 23 July 1968 in the Belgian Linguistic case, Series A no. 6, p 24; Rasmussen judgment of 28 November 1984, Series A no. 87, p. 13 para. 35; Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 39 para. 82). They claim that in the present case there is a difference of treatment as regards the right to refuse giving evidence which is recognised in the Austrian Code of Criminal Procedure for members of certain professional groups in respect of information which has become known to them through consultation with their clients. It is submitted that the therapists of the drug rehabilitation centres perform a hybrid service comparable in many respects to that provided by medical practitioners (the physiological aspect of the treatment), by priests and psychiatrists (spiritual and psychological aspects) and by attorneys (discussion of legal aspects arising from the clients' drug addiction). In view of the analogous situation it is allegedly unjustified and discriminatory to treat the therapists less favourably than members of these professional groups. In the applicants' view the reasonable relationship of proportionality required by Article 14 has not been respected in the present case, having regard in particular to the disruptive consequences of the different treatment for the legitimate functions of the drug rehabilitation centres and the chilling effect on the social worker-client relationship.

Article 1 of Protocol No. 1 to the Convention

The applicants finally claim a violation of their right to the peaceful enjoyment of their possessions.

THE LAW

1. The applicants, a private association which runs a drug rehabilitation centre - the first applicant - and one of the social workers employed at this rehabilitation centre - the second applicant - complain in substance that the second applicant and another social worker were required to give evidence in criminal proceedings against a former client of the rehabilitation centre in question. They consider that this requirement involved breaches of Articles 3, 9, 11, 13 and 14 (Art. 3, 9, 11, 13, 14) of the Convention and Article 1 of Protocol No. 1 (P1-1).

The Commission notes, however, that only the second applicant was a party to the domestic proceedings while the first applicant was but indirectly concerned by those proceedings. The Commission further notes in this context that the first applicant only alleges violations of the rights of its employees and clients ("der Verein ... fühlt sich in den Menschenrechten seiner Mitarbeiter und der betreuten Jugendlichen verletzt"). The question therefore arises whether the first applicant can be regarded as a proper applicant for the purposes of Article 25 (Art. 25) of the Convention.

According to this provision the Commission may receive petitions "from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention".

As a private association, the first applicant is a "non-governmental organisation" within the meaning of this provision notwithstanding the recognition by a ministerial decree that it fulfils functions of public interest. However, the association does not claim to be a victim of a violation of its own Convention rights. Moreover, the rights primarily invoked, i.e. the right to freedom of conscience under Article 9 (Art. 9) of the Convention and the right not to be subjected to degrading treatment or punishment (Article 3) (Art. 3), are by their very nature not susceptible of being exercised by a legal person such as a private association. Insofar as Article 9 (Art. 9) is concerned, the Commission considers that a distinction must be made in this respect between the freedom of conscience and the freedom of religion, which can also be exercised by a church as such (cf. No. 7805/77, X and Church of Scientology v. Sweden, Dec. 5.5.79, D.R. 16 p. 68). The Commission concludes that the first applicant would be debarred from bringing an application invoking Articles 3 or 9 (Art. 3, 9) of the Convention in its own name.

In these circumstances the Commission considers that the first applicant does not fulfil the conditions of Article 25 (Art. 25). The application must accordingly be rejected under Article 27 para. 2 (Art. 27-2) of the Convention as being incompatible, ratione personae, with the provisions of the Convention, insofar as it has been brought by the first applicant.

2. The second applicant, a "person" in the sense of Article 25, (Art. 25) was directly concerned by the domestic proceedings and alleges a violation of his own Convention rights. The Commission finds that he is a proper applicant within the meaning of Article 25 (Art. 25).

a) The second applicant first complains that his obligation to give evidence regarding a former patient of the rehabilitation centre, to whom an assurance of confidentiality had been given, amounted to inhuman or degrading treatment within the meaning of Article 3 (Art.3) of the Convention. He further alleges that, contrary to Article 13 (Art. 13) of the Convention, he did not have an effective domestic

remedy at his disposal by which he could raise this issue.

With regard to the complaint under Article 13 (Art. 13) the Commission notes that the second applicant challenged the court order, claiming that giving the required evidence would bring him into disgrace. The Commission is satisfied that in this way he raised, in substance, the issue of degrading treatment although he did not expressly refer to Article 3 (Art. 3) of the Convention. As this provision is part of the constitutional law of Austria, the second applicant could have invoked it and the criminal courts would have been obliged to deal with an argument based on this Article. In these circumstances there is no appearance of a violation of the second applicant's right under Article 13 (Art. 13) , and his complaint in this respect must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

The Commission further finds that the second applicant has, as required by Article 26 (Art. 26) of the Convention, exhausted the domestic remedies in respect of his complaint under Article 3 (Art. 3) of the Convention. It recalls its consistent case-law according to which domestic remedies must be considered as having been exhausted if the applicant, even without quoting the relevant provision of the Convention, has submitted, in substance, to the domestic authorities the claim he is bringing before the Commission (cf. e.g. No. 9228/80, Dec. 16.12.82, D.R. 30 p. 132). As already stated, the present applicant, in substance, raised the argument of degrading treatment by alleging that compliance with the court orders complained of would bring him into disgrace. His complaint under Article 3 (Art. 3) of the Convention accordingly cannot be rejected under Article 27 para. 3 (Art. 27-3) for failure to exhaust domestic remedies.

However, the Commission does not find that the court order to give evidence constituted inhuman or degrading treatment within the meaning of Article 3 (Art. 3) of the Convention. The obligation to give the required evidence did not attain the level of severity which is required by this provision. This part of the application therefore is also manifestly ill-founded.

b) The second applicant further complains that the court order to give evidence violated his freedom of conscience as guaranteed by Article 9 (Art. 9) of the Convention and his freedom of association as guaranteed by Article 11 (Art. 11) of the Convention. He also complains that in respect of these rights he has been discriminated against, contrary to Article 14 (Art. 14) of the Convention, in that as a social worker he was treated differently from other professional groups with similar functions. The applicant finally complains that the fine imposed on him constituted an unjustified interference with his right to the peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1 (P1-1) to the Convention.

It is true that Article 9 (Art. 9) of the Convention applies, inter alia, to manifestations based on an individual's personal conscience (cf., mutatis mutandis, No. 7050/75, Arrowsmith v. United Kingdom, Comm. Rep. 12.10.78, D.R. 19 p. 5, paras. 69 et seq.). Article 11 (Art. 11) of the Convention guarantees, inter alia, the freedom of association. Article 14 (Art. 14) of the Convention secures the principle of non- discrimination in respect of the rights and freedoms set forth in the Convention, including the aforementioned freedoms guaranteed by Article 9 and 11 (Art. 9, 11). Article 1 of Protocol No. 1 (P1-1) finally secures everyone the right to the peaceful enjoyment of his possessions.

However, the Commission is not required to decide whether or not the facts alleged by the second applicant disclose any appearance of violations of the above provisions as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised

rules of international law. The mere fact that the second applicant has submitted his case to the competent courts does not in itself constitute compliance with this rule. It is also required that the substance of any complaint made before the Commission should have been raised during the proceedings concerned. In this respect the Commission refers to its established case-law (see e.g. No. 1103/61, Yearbook 5, pp. 168, 186; No. 5574/72, Dec. 21.3.75, D.R. 3, pp. 10, 15; No. 10307/83, Dec. 6.3.84, D.R. 37, pp. 113, 120).

In the present case the second applicant did not raise, either in form or substance, in the proceedings before the District Court of Schwaz and the Regional Court of Innsbruck, the complaints which he now makes before the Commission. He did not invoke any of the Convention Articles referred to above, although they form part of the constitutional law of Austria and must thus be taken into account by the courts when interpreting and applying provisions of the ordinary law such as Section 153 of the Code of Criminal Procedure. The Commission notes, in particular, that the applicant neither expressly nor implicitly invoked his constitutional right to freedom of conscience. The fact that he referred to the possibility that giving evidence might bring him into disgrace cannot be seen as an invocation of this constitutional right. Nor did the applicant raise the problem of discrimination in comparison with other professional groups by invoking, for example, his constitutional right to equality before the law.

Moreover, an examination of the case does not disclose the existence of any special circumstances which might have absolved the second applicant, according to the generally recognised rules of international law, from raising his complaints in the proceedings referred to.

It follows that the second applicant has not complied with the conditions as to the exhaustion of domestic remedies in this respect and his above complaints must accordingly be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C. A. NØRGAARD)