

AS TO THE ADMISSIBILITY OF

Application No. 23697/94
by Renate SASZMANN
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 27 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 2 February 1994 by Renate SASZMANN against Austria and registered on 17 March 1994 under file No. 23697/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the observations submitted by the respondent Government on 7 November 1995 and the observations in reply submitted by the applicant on 8 February 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1948 and residing in Vienna. At the relevant time she was member of the committee of editors of the periodical "akin". Before the Commission she is represented by Mr. Th. Prader, a lawyer practising in Vienna.

The facts of the case, as they have been submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

On 15 December 1992 Judge E. Maurer of the Vienna Regional Court for Criminal Matters (Landesgericht für Strafsachen) convicted the applicant of incitement to general disobedience of laws (allgemeiner Ungehorsam gegen ein Gesetz) under Section 281 of the Penal Code

(Strafgesetzbuch) and incitement to the commission of criminal acts (Aufforderung zu mit Strafe bedrohten Handlungen) under Section 282 para. 1 of the Penal Code. The Regional Court sentenced the applicant to three months' imprisonment suspended for a probationary period of three years and ordered that the judgment be published in the next issue of "akin".

The Regional Court found that the applicant at the relevant time was the responsible editor of the periodical "akin". In its issue No. 3 of 1991 the following leaflet had been published:

<original>

"Aufruf:

Militär und Gewalt sind für mich keine geeigneten Mittel internationale und nationale Konflikte zu lösen. Das Bundesheer ist eine Institution, die zu blindem Gehorsam und Unmündigkeit führt. Ich bin der Überzeugung, daß es längst an der Zeit ist, das Bundesheer abzuschaffen.

Solange das nicht geschieht werden Menschen, die sich weigern der Wehrpflicht nachzukommen, verfolgt und eingesperrt. Ich erkläre meine Solidarität mit jenen, die wegen ihrer politischen, religiösen oder ethischen Überzeugung eingesperrt werden.

Ich fordere daher die Einstellung aller Verfahren gegen Wehrdienst- und Totalverweigerer und die Streichung aller Strafbestimmungen aus Wehr-, Militärstraft- und Zivildienstgesetz.

Damit dies geschieht fordere ich alle auf, Militärgesetze nicht zu befolgen.

Ich bin mir darüber im klaren, daß dies eine Aufforderung zum Ungehorsam gegen Gesetze (im Sinne des Paragraphen 281 StGB) ist.

P.S.: Ich wünsche eine Veröffentlichung dieses Aufrufs in einer Zeitschrift bzw. Zeitung. Im Inserat wird nur der Aufruf, die Namen der UnterzeichnerInnen und, falls gewünscht, der Beruf veröffentlicht.

Bitte deutlich schreiben (Blockbuchstaben)

Name	Beruf	Adresse	Unterschrift"
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<translation>

"Proclamation:

For me army and violence are not suitable means for resolution of international and national conflicts. The Federal Army is an institution which leads to blind obedience and immaturity. I am convinced that it is high time to abolish the Federal Army.

Until this happens people who refuse to comply with their duty to serve will be prosecuted and imprisoned. I declare my solidarity with all those who are imprisoned because of their political, religious or ethical convictions.

I request the discontinuation of all proceedings against conscientious objectors and total objectors and the abolition of all criminal offences in the Armed Forces Act, in the Code of Military Offences and in the Civilian

Service Act.

In order for this to come about I call upon everybody not to obey military laws.

I am aware that the present proclamation is an incitement to disobedience of law (within the meaning of Section 281 of the Penal Code).

P.S.: I desire the publication of this proclamation in a periodical or newspaper. In the advertisement only the proclamation itself, the names of those signing it and, if they wish, their profession will be published.

Please write clearly (capital letters)

Name	Profession	Address	Signature"
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On the bottom of the leaflet, a "Group for Total Refusal" ("Gruppe für Totalverweigerung") was referred to as the "contact committee" for the manifesto.

On 14 April 1993 the applicant appealed. She submitted that the purpose of the leaflet was to provoke a political discussion on the Federal Army and military force in general. The demand to disregard military laws could in this context not be understood as a serious incitement to disregard laws but merely as a means to provoke this discussion. The leaflet had merely been published for the purpose of informing the reader of "akin" on this initiative and the intention of its initiators that the proclamation be published once it had found sufficient support by persons signing it.

She also submitted that in 1991 some 600 persons had signed the leaflet. The text of the leaflet, together with the names of the signatories had been published on 3 September 1991 as an advertisement in the daily newspaper "Arbeiterzeitung" and in the periodical "Falter". Only she had been convicted of the offence under Section 281 and 282 para. 1 of the Penal Code but not those who had signed the proclamation or had published the advertisement.

On 4 August 1993 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal. This judgment was served on the applicant's lawyer on 10 November 1993. The Court of Appeal found in particular that the applicant's conviction did not violate Article 10 of the Convention. Article 10 of the Convention protected those passages of the text which expressed critical ideas about the Federal Army, but did not protect the one which concerned the incitement to disregard of military laws. While it lay in the nature of a democratic society to tolerate the opinions of others it also required that laws which had been passed following a democratic procedure were only changed by the procedures which the constitution provided for but not by means of unconstitutional pressure. The demand to bring about the dissolution of the Federal Army by general disobedience of military laws constituted the exercise of unconstitutional coercion. Such activities could jeopardize the functioning of a democratic society which was based on respect for its rules and ran counter to the spirit of democracy and, therefore, could not claim the protection of Article 10 of the Convention. The interference with the applicant's freedom of expression thus pursued an aim mentioned in paragraph 2 of Article 10 of the Convention and was necessary in a democratic society. It was irrelevant whether other cases mentioned in the appeal proceedings had been discontinued rightly or wrongly.

It appears that on 1 March 1994 Judge B. Weis of the Vienna Regional Court for Criminal Matters discontinued criminal proceedings instituted under Sections 281 and 282 para. 1 of the Penal Code against 50 persons, who had signed the proclamation at issue. The proclamation

had subsequently also been published in issue No. 43 of 1992 of the periodical "Falter".

The Regional Court found that the text at issue concerned a discussion of the role of armed forces and military power, the general request to discontinue proceedings and to abolish criminal provisions in certain acts. These were political statements which were unobjectionable in a democratic state. The subsequent passage, which contained the demand that military laws should be disregarded, had to be read in the context of the previous passage, namely that all criminal proceedings should be discontinued. It was clear for an intelligent reader that the accused only demanded that the precondition for the subsequent discontinuation of proceedings be laid. Their demand to disregard military laws was nothing else than the demand for discontinuation of proceedings and did not fall under Section 281 of the Penal Code. In any event, the incitement to disregard all military laws, notwithstanding the reference in the leaflet to Section 281 of the Penal Code, was too vague to constitute a criminal offence.

On 19 April 1994 the Vienna Court of Appeal quashed the Regional Court's decision of 1 March 1994 and remitted the case to the Regional Court. The Court of Appeal found that Judge B. Weis had no competence to discontinue proceedings as such a decision could have only been taken by the Judges' Chamber (Ratskammer). It appears that these criminal proceedings are still pending.

B. Relevant domestic law

Section 281 of the Penal Code provides as follows:

"Incitement to general disobedience of laws"

"Whoever by way of publication, broadcast, or any other means providing access to the general public, incites to general disobedience of laws, shall be punished by imprisonment of up to one year."

Section 282 para. 1 of the Penal Code provides as follows:

"Incitement to committing criminal acts and approval of criminal acts"

"(1) Whoever by way of publication, broadcast, or any other means providing access to the general public, incites others to commit criminal acts, shall be punished by imprisonment of up to two years, unless he is liable to more severe punishment in accordance with Section 12."

COMPLAINTS

1. The applicant complains under Article 10 of the Convention that her conviction under Sections 281 and 282 para. 2 of the Penal Code violated her right to freedom of expression.
2. She further complains under Article 7 of the Convention that the Austrian courts attributed to Sections 281 and 282 para. 2 of the Penal Code a meaning which these provisions did not have in that they treated the publication of a leaflet for the purpose of information like the signing of the declaration contained therein.
3. Lastly, she complains about discrimination prohibited by Article 14 of the Convention in that only she was convicted by the Austrian courts while criminal proceedings against persons who signed the leaflet were discontinued.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 February 1994 and registered on 17 March 1994.

On 28 June 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 7 November 1995, after an extension of the time-limit fixed for that purpose. The applicant replied on 8 February 1996, also after an extension of the time-limit.

THE LAW

1. The Government submit that it is doubtful whether the applicant has complied with the six months' time-limit under Article 26 (Art. 26) of the Convention. In their view the relevant date for the starting of this time-limit was 4 August 1993, when the Court of Appeal orally pronounced its decision on the applicant's appeal. The time limit thus expired on 4 February 1994. While the application to the Commission was dated 2 February 1994 it was received by the Commission's Secretariat on 7 February 1994. Only if the application had actually been posted on 4 February 1994 would the applicant have complied with the six months' time limit.

The Commission finds, however, that the six months' period under Article 26 (Art. 26) of the Convention started on 10 November 1993, when the decision was served on the applicant (see No. 22714/93, Dec. 27.11.95, D.R. 83-A, p.17). It follows that the applicant has complied with the six months' time-limit under Article 26 (Art. 26) of the Convention.

2. The applicant complains under Article 10 (Art. 10) of the Convention that her conviction under Sections 281 and 282 para. 2 of the Penal Code violated her right to freedom of expression.

Article 10 (Art. 10), so far as relevant, 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 health or morals, for the protection of the reputation or rights of others,"

The Government submit that the applicant's conviction was justified under Article 10 paragraph 2 (Art. 10-2) of the Convention. It was a measure "prescribed by law" and served a legitimate purpose under paragraph 2 of Article 10 (Art. 10-2), namely maintaining the order in the federal army and safeguarding national security.

As regards the necessity of the interference in a democratic society, the Government submit that one has to distinguish between polemical but permissible criticism of the military forces and impermissible calls for disobedience. While the State must tolerate criticism of its democratic institutions and allow debates on the need for military defence this cannot go so far as tolerating calls for disobedience, as such incitement would constitute a considerable danger to the internal peace in a democratic society. The aim of the leaflet

was to persuade members and future members of the army not to do their duty, thereby paralysing the operations of Federal Army, in particular by refusing to obey orders.

In assessing the necessity of the measure at issue, the crucial point cannot be whether the manifesto has in fact resulted in an increased number of criminal acts against the discipline of the Federal Army. Rather, what must be not allowed to arise is the wrong impression that the organs of the State would tolerate such breaches of the law in respect of the Federal Army. Moreover, supporters of the "Group for Total Refusal", the "contact committee" mentioned at the bottom of the leaflet at issue, had engaged in creating disturbances of the enlistment process at the Vienna Army Command. On 31 January 1991 riotous scenes occurred at the offices of the Enlistment Commission of the Vienna Army Command because "legal advisers" of the conscripts, more than eight persons for one conscript, disturbed the proceedings to a considerable extent and distributed leaflets similar to the one published by the applicant. Earlier, on 15 October 1990, there had already been similar incidents on the Enlistment Commission's premises which had been organised by the same activists of the "Group for Total Refusal".

This is disputed by the applicant. She submits that the Austrian courts had failed to take sufficiently into account the political context in which the leaflet had been published. For the readers of the periodical at issue, who in general were highly interested in politics, it had been apparent that the leaflet issue merely constituted a means to provoke a political discussion and they had been aware that its intention had not been to call on anybody actually to disregard actually military laws. The applicant had published the leaflet at issue in her capacity as a journalist and merely for the sake of informing the public and to promote an active peace policy.

She submits further that the events before the Enlistment Commission of the Vienna Army Command of 31 January 1991, to which the Government refers, had no connection to her. The dispute at the Army Command on 31 January 1991 merely arose because the Army Command did not accept that conscripts were accompanied by legal advisers. As a consequence of the determined conduct of the conscripts on that day and on previous occasions, to which the Government also refers, legal advisers are now accepted. The "Group for Total Refusal" was merely a body giving advice to persons liable for military or civilian service. Apparently the Government refer to these events merely for the sake of connecting this body to acts of violence.

The Commission finds that the applicant's conviction constitutes an interference with her right to freedom of expression. Such interference is in breach of Article 10 (Art. 10) of the Convention, if it was not justified under paragraph 2 of Article 10 (Art. 10-2), namely prescribed by law and necessary in a democratic society for one of the aims mentioned in this paragraph.

The Commission finds that the applicant's conviction was prescribed by law, namely by Sections 281 and 282 para. 2 of the Austrian Penal Code. Moreover, it was aimed to protect public safety and to prevent disorder and crime, legitimate aims under Article 10 para. 2 (Art. 10-2) of the Convention.

As to whether the interference was "necessary in a democratic society", the Commission recalls that the adjective "necessary" within the meaning of Article 10 (Art. 10) implies the existence of a "pressing social need". The Contracting States enjoy a certain margin of appreciation in determining whether such a need exists, but this goes hand in hand with an European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. Freedom of expression is one of the basic conditions for a democratic society's progress, and is also applicable

to "ideas" that offend, shock or disturb. Furthermore, the press, in a democratic society, has the task to impart information and ideas on matters of public interest, and plays thereby a role of "public watchdog" (Eur. Court HR, *Sunday Times (no. 2) v. the United Kingdom* judgment of 26 November 1991, Series A no. 217, p. 29, para. 50).

In the present case the applicant was convicted by the Vienna Regional Penal Court on 15 December 1992 of having published, as responsible editor, a leaflet which contained, inter alia, the demand that people should disregard military laws. This conviction was upheld by the Court of Appeal on 4 August 1993 which also considered whether the applicant's conviction violated Article 10 (Art. 10) of the Convention. The Court of Appeal found that the leaflet at issue contained on the one hand critical political arguments regarding the use of military force and the criminal persecution of conscientious objectors which were legitimate in a democratic society. On the other hand the incitement to disregard military laws constituted unconstitutional pressure aiming at the abolition of laws which had been passed in a constitutional manner. Such unconstitutional pressure could not be tolerated in a democratic society.

The Commission observes that the Court of Appeal also examined the question whether the applicant's conviction was necessary in a democratic society. In this respect it distinguished between parts of the leaflet which contained political arguments and demands which one must be able to raise legitimately in a political discussion in a democratic society and another part, containing the demand to disregard military laws, which it considered as unconstitutional pressure not to be tolerated in a democratic society.

The Commission finds that the arguments given by the Court of Appeal appear reasonable and that it carefully evaluated the necessity of the applicant's conviction. In this respect the Commission has also regard to its own case-law in the *Arrowsmith* case and the Court's case-law in the case of *Vereinigung Demokratischer Soldaten Österreichs and Gubi (Arrowsmith v. United Kingdom, Comm. Report 12.10.78, D.R. 19 p. 5; Eur. Court HR, Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria* judgment of 19 December 1994, Series A no. 302). In the latter case which concerned the prohibition on distribution of a military periodical among servicemen in the military barracks the Court, in finding a violation of Article 10 (Art. 10) of the Convention, attached particular importance to the fact that the publication at issue though putting forward proposals for reforms and encouraging its readers to institute legal complaints did not recommend disobedience or violence (*Vereinigung Demokratischer Soldaten Österreichs and Gubi* judgment, op. cit. para. 38).

In these circumstances, the Commission finds that it cannot be said that the applicant's conviction went beyond the margin of appreciation left to the national authorities.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further complains under Article 7 (Art. 7) of the Convention that the Austrian courts attributed to Sections 281 and 282 para. 2 of the Penal Code a meaning which these provisions did not have in that they treated the publication of a leaflet for the purpose of information like the signing of the declaration contained therein.

Article 7 para. 1 (Art. 7-1) of the Convention states:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it

was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Commission recalls that Article 7 para. 1 (Art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty, and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision what acts and omissions will make him liable (see Eur. Court HR, *Kokkinakis v. Greece* judgment of 25 May 1993, Series A no. 260 A, para. 52).

Having regard to the wording of Sections 281 and 282 para. 2 of the Penal Code the Commission finds that it cannot be seriously doubted that the publication of an incitement to disregard military laws could fall under these provisions. Whether in the circumstances of the present case the applicant's acts did constitute the offences at issue and in particular with which intention the applicant had acted was a question which the Austrian courts had to examine in the criminal proceedings at issue. Moreover, it is apparent from the text of the leaflet that the author himself considered that its publication could constitute an offence under Section 281 of the Penal Code.

The Commission therefore finds that there is no appearance of a violation of Article 7 (Art. 7) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. Lastly, the applicant complains about discrimination prohibited by Article 14 (Art. 14) of the Convention in that only she was convicted by the Austrian courts while criminal proceedings against the persons who signed the leaflet were discontinued.

Article 14 (Art. 14) of the Convention, as far as relevant, reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government submit that the Regional Court's decision of 1 March 1994 had been quashed by the Court of Appeal on 19 April 1994 and to the fact that meanwhile several persons have been finally convicted in criminal proceedings concerning the leaflet at issue. The applicant did not make further submission on this issue.

The Commission finds that this complaint falls to be considered under Article 10 in conjunction with Article 14 (Art. 10+14) of the Convention.

The Commission recalls that Article 14 (Art. 14) safeguards individuals, places under analogous situations from discrimination (see Eur. Court HR, *van der Mussele v. Belgium* judgment of 23 November 1983, Series A no. 70, p. 22, para. 46).

The Commission observes that the applicant was convicted under Section 281 and 282 para. 1 of the Criminal Code for having published, as responsible editor of a periodical the leaflet at issue, while the others to whom the applicant refers had been charged under these

provisions of the Criminal Code for having signed the leaflet at issue which was subsequently published. Thus, the two proceedings did not concern the same factual circumstances. Furthermore, the Regional Court's decision of 1 March 1994 had been quashed by the Court of Appeal and the criminal proceedings concerned are still pending. The Commission also notes the Government's submission according to which several persons had been finally convicted with regard to the leaflet at issue, which is not disputed by the applicant.

In these circumstances the Commission finds that the applicant was not placed in an analogous situation as others against whom criminal proceedings have been discontinued. Consequently, there is no appearance of a violation of Article 10 in conjunction with Article 14 (Art. 10+14) of the Convention.

It follows that also this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber