

COUNCIL OF EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

Application No. 5219/71  
by Dr. Heinrich GUSSENBAUER  
against Austria

The European Commission of Human Rights sitting in private  
on 14 July 1972, the following members being present:

MM. J.E.S. FAWCETT, President,  
W.F. de GAAY FORTMAN, Vice-President  
A. SUSTERHENN  
M. SØRENSEN  
F. ERMACORA  
F. WELTER  
E. BUSUTTIL  
L. KELLBERG  
B. DAVER  
T. OPSAHL  
K. MANGAN  
J. CUSTERS

assisted by Mr. A.B. McNULTY, Secretary to the Commission  
Mr. A. KHOL

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

Having regard to the application introduced on  
25 October 1971 by Dr. Heinrich GUSSENBAUER against Austria  
and registered on 29 October 1971 under file No. 5219/71;

Having regard to the report provided for in Rule 45, 1 of  
the Rules of Procedure of the Commission;

Having deliberated,

Decides as follows:

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THE FACTS

The facts of the case as submitted by the applicant may be summarised as follows:

The applicant is an Austrian citizen, born in 1922 and at present practising as a lawyer and defence counsel in Vienna, Austria. He complains that he was obliged to do compulsory labour contrary to Art. 4 of the Convention when he had to act as a court appointed counsel under the Austrian legal aid system.

The applicant has practised at the Viennese Bar since 1954, and regularly acts under Art. 37 (3) of the Austrian Code of Penal Procedure as a defence counsel in criminal matters (Verteidiger in Strafsachen).

According to Art. 41 of this Code, a defendant who cannot afford a counsel is entitled to the appointment of an ex officio counsel.

Ex officio counsel are appointed by the court itself (either, in those criminal proceedings where legal representation is obligatory, proprio motu, or, in other criminal proceedings, at the request of the defendant) unless (in either case) there is a Bar Committee in the town where the proceedings are brought, when the court refers the question to that Committee, who choose the lawyer and propose his appointment to the court.

Any member of the Bar is obliged, under Art. 45 of the above Code, to act as defendant's counsel if appointed by the court. He can, however, refuse to act as counsel if he can state reasons for not wishing to do so and the Judges' Chamber (Ratskammer) decides that they are justified. Pending the decision of the Judges' Chamber the ex officio counsel cannot refuse to continue to act. Counsel once appointed under this system are subject to disciplinary sanctions if they refuse to carry out their professional duties.

An ex officio counsel appointed under the above Articles has, according to Art. 393 (2) of the above Code, no right to any fees. He can solely request reimbursement from the Government of expenses necessarily incurred. The Austrian Government, on the other hand, yearly pays an annually fixed lump sum - now 14 million Austrian schillings - to the Bar Association. This sum is not, however, simply distributed amongst the members of the Bar. It is used for charitable assistance for poor lawyers who are no longer practising. But there is no right by law to such pensions or other

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allowances. This lump sum only represents a fraction (according to the Government one third, according to the applicant one fourth) of the sum which would have to be paid to the lawyers for their work if the official legal tariff (Rechtsanwalttarif) were applied.

The applicant now complains that on 12 July 1971 the Juvenile Court of Vienna appointed him as an unpaid ex officio counsel for Mr. Johann M. against whom criminal proceedings for fraud had been opened.

The applicant subsequently requested, by virtue of Art. 43 (1) of the Code of Penal Procedure, to be released from this obligation since in the circumstances his appointment as a defence counsel meant compulsory labour which had been declared unlawful by Art. 4 (2) of the Convention; this Convention has the rank of applicable constitutional law in Austria. On 6 September 1971 however, the Juvenile Court decided not to grant this, and held that the basis of the applicant's appointment was Art. 41 of the Code of Penal Procedure, and that the reasons put forward by the applicant were not to be considered as relevant reasons within the meaning of this Article.

The applicant now complains that his appointment as ex officio counsel, and his obligation to act as an unpaid counsel violated Arts. 4 and 14 of the Convention, Art. 1 of the Additional Protocol No. 1. He refers in this respect to the detailed reasoning put before the Commission in his application No. 4897/71.

#### THE LAW

1. The applicant has complained that he was compelled to perform compulsory labour when called upon, under the Austrian legal aid scheme, to act as an unpaid defence counsel on behalf of a person who was the subject of criminal proceedings and who lacked the financial means himself to pay for counsel. He alleges that thereby the Austrian Government has violated Art. 4 of the Convention which guarantees that "No one shall be required to perform forced or compulsory labour", and Art. 14 of the Convention as well as Art. 1 of Protocol No. 1.
2. On 22 March 1972 the Commission declared admissible application No. 4897/71 lodged by the same applicant. In that application he complained in exactly the same way that on another occasion he was called upon to act under the Austrian legal aid scheme and thereby compelled to perform compulsory labour. The Commission then was of the opinion that this

complaint raised issues of a complex nature under Arts. 4 and 14 of the Convention, and under Art. 1 of Protocol No. 1, and that the application could, therefore, not be declared inadmissible as being manifestly ill-founded. In the proceedings relating to that application the respondent Government had invoked Art. 26 of the Convention and submitted that the applicant had not exhausted the domestic remedies available to him since he had failed to request from the Regional Court, in accordance with Art. 43 (1) of the Austrian Code of Penal Procedure, his release from the duties concerned. The Commission, however, found that the applicant had clearly shown that this remedy, although theoretically capable of constituting a remedy, did not in reality offer any chance of redressing the damage alleged. The Commission therefore found that, having regard to the provision in Art. 26 that remedies must be exhausted "according to the general rules of international law" the remedy referred to was not one that need be exhausted in order to satisfy the terms of Art. 26.

3. In the present case the applicant has indeed availed himself of this remedy, but without success: the Court decided that the applicant's request for release could not be granted since the mere allegation that his appointment as legal aid counsel constituted compulsory labour contrary to the guarantees of Art. 4 of the Convention was not a valid reason for such release under Art. 43 of the above Code. The Commission, consequently notes that no question under Art. 26 of the Convention arises in the present application.

4. The Commission, having regard to the fact that the applicant's present application raises issues which are identical with those raised by the applicant's first application, is therefore of the opinion that the present application can equally not be declared inadmissible as being manifestly ill-founded as it raises the same complex questions under Arts. 4 and 14 of the Convention, as well as under Art. 1 of Protocol No. 1.

5. The Commission consequently decides now to declare this application admissible without inviting the parties to submit written observations on admissibility and provided that the respondent Government does not require to make oral explanations on the question of admissibility.

For these reasons, the Commission

DECLARES THIS APPLICATION ADMISSIBLE AND JOINS IT  
TO APPLICATION NO. 4897/71

Secretary to the Commission      President of the Commission

(A.B. McNULTY)

(J.E.S. FAWCETT)