AS TO THE ADMISSIBILITY OF

Application No. 14217/88
by A. A.
against Austria

The European Commission of Human Rights sitting in private on 2 April 1990, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
G. SPERDUTI
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES

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 15 July 1988 by A. A. against Austria and registered on 14 September 1988 under file No. 14217/88;

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 applicant is an Austrian citizen born in 1944. He is a lawyer and lives in N., Lower Austria.

Disciplinary proceedings were instituted against the applicant by the Disciplinary Committee of the Bar Association for Vienna, Lower Austria and Burgenland (Disziplinarrat der Rechtsanwaltskammer für Wien, Niederösterreich und Burgenland) at the request of A. junior. The charges related to having put pressure on A. junior by writing to him a letter in which, in order to persuade A. junior to settle a family dispute with his father, the applicant threatened to bring the case to the attention of the public and, in particular, the upper echelons of the conservative party (Volkspartei) (Section 2 of the Guidelines on the Exercise of the Profession of Lawyer (Richtlinien für die Ausübung des Rechtsanwaltsberufes)). At the time A. junior was standing as a candidate in local elections. The applicant was also accused, notwithstanding a settlement to the dispute, of having published the content of the dispute in the local journal of the Pan European Union, referring to the father's suicidal intentions as a

result of his son's behaviour (Section 9 of the Lawyers Act (Rechtsanwaltsordnung)).

Criminal proceedings under Article 105 of the Criminal Code (Strafgesetzbuch; putting pressure on a person with threats) were discontinued on the applicant's written statement, and a private action under Article 111 of the Criminal Code (defamation) was withdrawn.

The Disciplinary Committee found the allegations against the applicant made out and, on 20 June 1986, fined him AS 10,000 for having breached professional obligations and having prejudiced the standing of his profession. The Committee noted that the applicant had not previously been sanctioned for disciplinary matters, and took into account his financial position, including maintenance obligations.

An appeal to the Supreme Appeals and Disciplinary Committee (Oberste Berufungs- und Disziplinarkommission) was unsuccessful.

The Constitutional Court (Verfassungsgerichthof), in its decision of 7 October 1987 (received by the applicant on 29 January 1988), found no violation of the applicant's constitutional rights and right to freedom of expression. The court found that threats to disclose a private dispute to the public at a time when the applicant knew that A. junior was involved in local elections could, at the very least, reasonably be seen (by the body at first instance) as breaching professional obligations. The subsequent publication of the story, at a time when A junior was standing as candidate for mayor of the district, could likewise tenably be regarded as bringing the profession into disrepute.

COMPLAINTS

The applicant alleges violations of Articles 6 and 7 of the Convention in that, although the form of the proceedings was disciplinary, in reality he was accused of criminal offences under Articles 105 and 111 of the Criminal Code. He states that the facts of the case had nothing to do with his profession.

The applicant also alleges a violation of Article 10 of the Convention in that he was punished for having published his version of the events at issue, even though the publication was completely unrelated with his professional life.

THE LAW

1. The applicant alleges that the charges against him were disciplinary in form but criminal in nature, and that Article 6 (Art. 6) and Article 7 (Art. 7) of the Convention have been violated.

The Commission must first consider whether the proceedings against the applicant determined "criminal charges" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission notes that criminal proceedings under Articles 105 and 111 of the Criminal Code (Strafgesetzbuch) were in fact begun, but both sets of proceedings were discontinued or withdrawn.

The Commission also notes that the proceedings were brought by the Disciplinary Committee of the Bar Association, and that the charges, of breaching professional obligations and prejudicing the standing of the profession, were of their nature, disciplinary rather than criminal.

The Commission observes that the exercise of a profession may require individuals to regulate their private affairs in a way compatible with the standing of the profession. It may well be that, as in the present case, events not exclusively falling within an

individual's professional life are of sufficient concern to the professional body to fall within the scope of disciplinary proceedings. In any event, the initial letter written by the applicant to A. junior was written both in a personal context and in the applicant's capacity as A. senior's professional adviser.

Finally, the Commission notes that the fine imposed took into consideration the fact that this was the applicant's first appearance before the disciplinary organs, and his ability to pay. The fine, of AS 10.000 (which could not be converted to a prison sentence), cannot be said, bearing in mind the nature of the charges and the applicant's position, to bring the charges within the criminal sphere.

It follows that the proceedings against the applicant did not determine a criminal charge, and that his complaints under both Article 6 (Art. 6) and Article 7 (Art. 7) of the Convention are incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also alleges a violation of Article 10 (Art. 10) of the Convention in that he was punished by the disciplinary organs for having published his view of the events at issue.

The Commission accepts that the sanction in the present circumstances constitutes an interference with the applicant's right to freedom of expression under Article 10 para. 1 (Art. 10-1).

The requirement of Article 10 (Art. 10) of the Convention that restrictions must be "prescribed by law" does not require that every fact which can attract a sanction be exhaustively enumerated. Particularly in the case of disciplinary offences, it is sufficient for a type of behaviour to be referred to and for the decision as to whether a specific activity falls within that type of behaviour to be left to domestic organs (cf. Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, p. 21, para. 44 et seq). The Commission considers that Section 9 of the Lawyers Act (Rechtsanwaltsordnung) and Section 2 of the Guidelines cover the facts alleged and are clear enough to be understood by the applicant. The restriction was, therefore, "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2).

The sanction of a fine was imposed on the applicant for having behaved in an unprofessional manner in the way in which he wrote to A. junior and for subsequently revealing the story in the press.

As mentioned above, a sanction for mixed "professional" and "private" behaviour may well fall within the scope of matters which professional organs are entitled to regulate. Such was the situation in the present case. Moreover, the restriction in the present case was clearly aimed at protecting the reputation and rights of others, an aim which has to be regarded as legitimate under Article 10 para. 2 (Art. 10-2).

As to whether the interference was "necessary in a democratic society", the Commission recalls that "necessary" does not mean "indispensable", neither has it the flexibility of expressions such as "useful" or "desirable"; rather it implies a "pressing social need" (cf. Eur. Court H.R., Barthold judgment, loc. cit, p. 22, para. 55). In assessing the margin of appreciation enjoyed by contracting states, the Commission must consider whether the interference was proportionate to the legitimate aim pursued and whether the reasons for it were relevant and sufficient (cf. Eur. Court H.R., Müller and others judgment of 24 May 1988, Series A no. 133, p. 21, para. 32).

The Commission notes in this respect that the appplicant's behaviour was regarded by the domestic authorities as particularly

reprehensible. In the context of disciplinary proceedings against a lawyer, a fine of AS 10.000 with no question of restriction on practice, cannot be regarded as disproportionate to the aim of protecting the reputation of the legal profession. The reasons given for the imposition of the sanction were set out in the decision of the Disciplinary Committee, and nothing indicates that this reasoning may not have been sufficient.

This part of the application must therefore be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) 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)