AS TO THE ADMISSIBILITY OF

Application No. 19130/91
by Walter DEMMER
against Austria

The European Commission of Human Rights sitting in private on 28 February 1994, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY

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 8 November 1991 by Walter DEMMER against Austria and registered on 26 November 1991 under file No. 19130/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to :

- the Commission's decision of 20 February 1992 to communicate the application;

- the observations submitted by the respondent Government, after an extension of the time-limit, on 26 June 1992 and the observations in reply submitted by the applicant on 29 September 1992 as well as the Government's supplementary observations of 19 October 1993;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, born in 1926, is an Austrian national and resident in Vienna. He is a medical practitioner by profession. Before the

Commission he is represented by Mr. G. Kahlig, a lawyer practising in Vienna.

A. Particular circumstances of the case

On 26 February 1987 Mr. K., a former patient of the applicant, filed a complaint about the applicant alleging in particular that the applicant had examined him in respect of his leukaemia as well as a presumed parasitical disease of his liver, and advised him to stop his chemotherapeutics at the local hospital.

On 14 May 1987, in the course of disciplinary proceedings against the applicant before the Disciplinary Council (Disziplinarrat) of the Austrian Medical Society (Ärztekammer), Disciplinary Commission (Disziplinarkommission) for Vienna, Lower Austria and Burgenland, concerning two accusations relating to his practice, the Disciplinary Prosecutor (Disziplinaranwalt) at the Disciplinary Commission requested that these disciplinary proceedings be extended to Mr. K.'s allegations. Mr. K. was summoned to be heard by one member of the Disciplinary Commission on 26 May 1987. On 22 May 1987 he informed the Commission that, due to his bad state of health, he could not come to the premises of the Medical Society. On 10 June 1987 one member of the Disciplinary Commission heard Mr. K. as a witness at his home. Mr. K. confirmed his allegations of 26 February 1987. Mr. K. died on 30 July 1987.

On 13 October 1987 the applicant was summoned for a hearing fixed for 28 October 1987. He was also informed about the request of the Disciplinary Prosecutor to extend the proceedings to the disciplinary charges concerning Mr. K., and he was provided with copies of this request as well as of the report of Mr. K.'s hearing as a witness on 10 June 1987.

On 28 October 1987 the Disciplinary Commission held a further hearing. The Disciplinary Prosecutor stated that the disciplinary charges had been extended to Mr. K.'s allegations in respect of his treatment by the applicant. The applicant denied the charges against him relating to Mr. K.

At the next hearing of 13 January 1988, the Disciplinary Commission heard as a witness the medical practitioner H. who had been in charge of Mr. K.'s medical treatment at the local hospital.

At the end of the hearing, the Disciplinary Commission found the applicant guilty of having violated his professional duty to treat his patients conscientiously under S. 22 para. 1 of the Austrian Medical Practitioners' Act (Ärztegesetz) in respect of the diagnosis and treatment of Mr. K.'s diseases in 1987. The Commission referred particularly to the unconfirmed diagnosis of a parasitical liver disease as well as a lymphatic vessel and the treatment with "Nosoden" (i.e. apparently an infusion with a particular sodium chloride solution), as well as to the applicant's advice to Mr. K. to stop the chemotherapeutical treatment of his leukaemia. The applicant was also found guilty of having contravened S. 18 para. 4 of the Medical Practitioners' Act in that, in the telephone directory, he had indicated a particular supplement to his profession, and of having contravened S. 13 para. 3 of the Medical Practitioners' Act in respect of excessive fees.

Referring to S. 101 paras. 1 and 2 of the Medical Practitioners' Act, the Disciplinary Commission imposed upon the applicant the disciplinary penalty (Disziplinarstrafe) of a three months' suspension and, in accordance with S. 101 para. 3 of the Medical Practitioners' Act, suspended this penalty on probation for a period of three years.

The Disciplinary Commission based its findings as regards the treatment of Mr. K. upon Mr. K.'s statements in his complaint of 26 February 1987, as confirmed when examined by one member of the

Disciplinary Commission. The Disciplinary Commission also considered the testimony of the medical practitioner H. who had confirmed that Mr. K.'s statements in the said complaint corresponded to the reports which he had earlier given her about his treatment by the applicant. The Commission further took a medical expert opinion on the quality of the applicant's treatment in Mr. K.'s case into account.

The written decision was served on 15 March 1988. On 29 March 1988 the applicant, assisted by Mr. Kahlig, lodged an appeal (Berufung) with the Disciplinary Chamber (Disziplinarsenat) of the Austrian Medical Society.

On 10 October 1988 the Disciplinary Chamber of the Austrian Medical Society, upon the applicant's appeal, quashed the decision of 13 January 1988 so far as it concerned the treatment of Mr. K. and the penalty. The remainder of the appeal was dismissed.

The decision was served on 13 February 1989.

On 18 October, 8 November and 13 December 1989, the Disciplinary Commission held hearings and heard in particular the applicant and five witnesses, namely the medical practitioner H. and a further medical expert who had examined Mr. K. in February 1987, the member of the Disciplinary Commission who had questioned Mr. K., Mr. K.'s life-companion and the applicant's wife.

On 13 December 1989 the Disciplinary Commission again found the applicant guilty of having contravened the Medical Practitioners' Act in respect of the diagnosis and treatment of Mr. K. in 1987. Taking into account the further findings in its decision of 13 January 1988, which had become final (namely the two other disciplinary offences), the Disciplinary Commission imposed the penalty of three months' suspension from practice which was suspended on probation for a period of three years. The applicant was acquitted of the charge that he had advised Mr. K. to interrupt the chemotherapeutical treatment of his leukaemia.

The decision was served on 11 October 1990.

On 8 April 1991 the Disciplinary Chamber dismissed the applicant's appeal against the finding of guilt. Upon his appeal against the penalty, it was reduced to two months' suspension on probation.

No proceedings to revoke the suspension of the penalty imposed upon the applicant have been initiated.

B. Relevant domestic law and practice

The professional conduct of medical practitioners is laid down in the Austrian Medical Practitioners' Act (Ärztegesetz).

S. 95 to S. 102 of this Act regulate disciplinary proceedings against medical practitioners.

According to S. 95 para. 1, medical practitioners commit a disciplinary offence if they impair, by their behaviour towards the community, the patients or the colleagues, the reputation of the Austrian medical profession, or if they violate their professional duties, which they promised to fulfil upon their promotion as medical practitioner or which are laid down in the Medical Practitioners' Act or other legal provisions.

S. 96 para. 1 provides that the Disciplinary Council (Disziplinarrat) of the Austrian Medical Society (Ärztekammer) decides upon disciplinary offences. For each of the different judicial districts of Courts of Appeal (Oberlandesgerichtssprengel), one Disciplinary Commission (Disziplinarkommission) was established (S. 96 para. 3). Pursuant to S. 97, the disciplinary charges are brought by the

Disciplinary Prosecutor (Disziplinaranwalt). S. 98 provides for an appeal against a disciplinary decision (Erkenntnis) of a Disciplinary Commission, or a decision not to institute disciplinary proceedings, which is to be decided by the Disciplinary Chamber (Disziplinarsenat). S.98 also regulates the appeal proceedings.

According to S. 101 para. 1, disciplinary sanctions are a written reprimand, fines or suspension from practice. S. 102 para. 2 prescribes maximum penalties, namely a maximum of a five years' suspension from practice in case of a disciplinary offence under S. 92 para. 2, or, in all other cases a maximum suspension of one year, or, in cases of a person not previously punished, of three months. The fine or the suspension from practice may be suspended on probation for a period between one and three years, in particular if the accused had so far only received a written reprimand (para. 3).

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention about the length of the disciplinary proceedings against him. He also complains under Article 6 para. 3 (d) of the Convention that he did not have the opportunity to put questions to Mr. K. He further complains about the alleged lack of impartiality of the members of the Disciplinary Commission and the Disciplinary Chamber, respectively.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 8 November 1991 and registered on 26 November 1991.

On 20 February 1992 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 26 June 1992, after an extension of the time-limit, the Government submitted their observations. The observations in reply by the applicant were submitted on 29 September 1992. In these observations, the applicant raised a further complaint as to the alleged lack of impartiality of the disciplinary bodies which had been involved in his case. The Government submitted supplementary observations on 19 October 1993.

THE LAW

The applicant complains under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention about the disciplinary proceedings which were conducted against him before the Disciplinary Commission of the Austrian Medical Society, Disciplinary Commission for Vienna, Lower Austria and Burgenland, and, upon appeal, before the Disciplinary Chamber of the Austrian Medical Society.

Article 6 (Art. 6), so far as relevant, provides as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

The Government submit that Article 6 (Art. 6) does not apply to the

disciplinary proceedings in question.

The Government consider that these proceedings did not involve a determination of a criminal charge against the applicant, or of any of his civil rights or obligations. Referring to S. 95 of the Medical Practitioners' Act, they argue in particular that the proceedings at issue were solely destined to decide upon the professional conduct of medical practitioners, and the penalties laid down in S. 101 para. 1 were of a disciplinary nature.

The Government further submit that, as the disciplinary penalty imposed upon the applicant had been suspended on probation for a period of three years, there had been no interference with his right to practise as a medical practitioner. The disciplinary proceedings did not, therefore, relate to the applicant's civil rights and obligations. In this context, the Government point out that a revocation of a decision to suspend a penalty for a probationary period is not provided for by the Medical Practitioners' Act. No case of revocation was known to them. Even if the provisions of the Austrian Penal Code regarding the revocation of the suspension of a sentence were to be applied mutatis mutandis, the disciplinary penalty could only be revoked in the context of new disciplinary proceedings.

The applicant submits that, having regard to the range of disciplinary penalties under the Medical Practitioners' Act, which included a suspension from practice, the disciplinary proceedings against him did involve a determination of a criminal charge against him. He considers that the fact that the relevant provisions of the Medical Practitioners' Act are only addressed to medical practitioners is not decisive. He also submits that the suspension of the imposed penalty on probation has no effect on the seriousness of the sentence. For the same reasons, he is of the opinion that the disciplinary proceedings against him at the same time involved a determination of his civil right to practise as a medical practitioner.

The Commission recalls the Court's case-law according to which the question whether proceedings relate to the determination of a criminal charge or are of a disciplinary nature should be examined in the light of specific criteria, namely the classification of the offence in domestic law, the nature of the offence and the severity of the sanction (cf. Eur. Court H.R., Engel and Others judgment, loc. cit.; Öztürk judgment of 21 February 1984, Series A no. 73, pp. 18-20, paras. 50-53; Weber judgment of 22 May 1990, Series A no. 177, pp. 17-18, paras. 30-35).

In the Austrian legal system, the penalty imposed upon the applicant was based upon S. 95 para. 1 of the Medical Practitioners' Act, which did not belong to the criminal sphere.

With regard to the nature of the offence, the Commission finds that S. 95 para. 1 of the Medical Practitioners' Act was designed to ensure that those exercising the profession of a medical practitioner comply with the specific rules governing their professional conduct, and did not, potentially, affect the whole population (cf., mutatis mutandis, Eur. Court H.R., Weber judgment, loc. cit., p. 18, para. 33). The offence defined is therefore of a disciplinary nature.

Moreover, the penalty incurred under S. 98 para. 1 of the Austrian Medical Practitioners' Act, i.e. a written reprimand, a fine or the - possibly probationary - suspension from practice, is, though important for the person's professional activity, of a disciplinary nature (cf., mutatis mutandis, Appl. No. 8496/79, Dec. 8.10.80, D.R. 21 p. 168; No. 9208/80, Dec. 10.7.81, D.R. 26 p. 262; No. 15965/90, Dec. 15.1.93 - not yet published).

The disciplinary proceedings against the applicant did not, therefore, involve the determination of any "criminal charge".

As regards the question whether the Austrian disciplinary authorities were faced with a dispute over the applicant's "civil rights and obligations", the Commission recalls that this phrase covers all proceedings the result of which is decisive for private rights and obligations. The dispute must be genuine and of a serious nature; civil rights and obligations must be the object - or one of the objects - of the dispute and the result of the proceedings must be directly decisive for such a right (cf., Eur. Court H.R., Le Compte, Van Leuven and De Meyere judgment, loc. cit., p. 21, para. 47; Benthem judgment of 23 October 1985, Series A no. 97, pp. 14-15, para. 31).

In the case-law of the Convention organs, disciplinary proceedings which concerned the unconditional disciplinary penalty of an - even temporary - suspension from practice as a medical practitioner were regarded as a dispute relating to "civil rights and obligations". The decisive considerations were that the disciplinary bodies had, at first instance, ordered temporary suspensions from practice to the effect that the medical practitioners concerned were temporarily deprived of their right to practise. That right was, therefore, found to be directly in issue before the higher instances, which had to examine the practitioners' complaints against the decisions affecting them. Unlike certain other disciplinary sanctions that might have been imposed (warning, censure and reprimand), the suspension at issue in these cases constituted a direct and material interference with the private right to continue to exercise the medical profession (Eur. Court H.R., Le Compte, Van Leuven and De Meyere judgment, loc. cit., pp. 20-22, paras. 45-50; Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 15, para. 28; Houart v. Belgium, Comm. Report 8.7.86, D.R. 53 p. 5). Thus, while the disciplinary penalty at stake is a criterion to distinguish between criminal and disciplinary law, the existence of a dispute over civil rights or obligations depends upon the nature of the disciplinary penalty actually imposed.

In the present case, although there was disagreement between the competent disciplinary bodies of the Austrian Medical Society finding the applicant guilty of professional misconduct, and the applicant denying these disciplinary charges, the disciplinary penalty of which the applicant complains did not, because it was suspended, amount to a direct and material interference with his right to continue to exercise the medical profession.

The Disciplinary Commission, in its decision of 13 December 1989, imposed, as a disciplinary penalty in accordance with S. 101 paras. 1 and 3 of the Medical Practitioners' Act, a three months' suspension from practice which was suspended on probation. The effect of this decision was not to deprive the applicant of his right to practise, but he remained entitled to continue to exercise the medical profession. The applicant did not suggest that the penalty imposed upon him directly affected him in his further professional activities. No measures have been taken to revoke the suspension of the disciplinary penalty imposed upon him in 1991. Moreover, any revocation of such a suspended penalty would presuppose a new procedure.

The Commission considers that, in these particular circumstances, the disciplinary proceedings against the applicant did not, therefore, involve a determination of his "civil rights and obligations" within the meaning of Article 6 para. 1 (Art. 6-1).

Consequently, Article 6 (Art. 6) of the Convention does not apply to the proceedings in question.

It follows that the application is incompatible ratione materiae with the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission | President of the Commission

(H.C. KRÜGER) | (C.A. NORGAARD)