AS TO THE ADMISSIBILITY OF

Application No. 22646/93
by H. F.
against Austria

The European Commission of Human Rights sitting in private on 26 June 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN

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 7 September 1993 by H. F. against Austria and registered on 17 September 1993 under file No. 22646/93;

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

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, an Austrian national born in 1943, is the former Head of the Regional Office of an Austrian media corporation. Before the Commission he is represented by Mr. H. Felsberger, a lawyer practising in Klagenfurt.

A. Particular circumstances of the case

In 1992 the Klagenfurt Public Prosecutor's Office charged the applicant with having committed homosexual acts with a person under the age of 18 years (Section 209 of the Criminal Code) and with having misused his power as employer for sexual assault (Section 212 of the Criminal Code).

The trial against the applicant, in which he was assisted by two counsel, took place on 6 August 1992 before the Klagenfurt Regional Court (Landesgericht). The court heard several witnesses, inter alia the alleged victim M. and two further employees of the applicant's office, who stated that they had also been sexually approached by the applicant. The defence requested the taking of further evidence, in particular the hearing of further five employees of the office, including the applicant's secretaries, and his wife.

On 26 August 1992 a further court hearing took place in which two of the witnesses requested by the defence, an employee of the office and one of the applicant's secretaries, were heard. The defence agreed that the second secretary need not be heard by the court. The Regional Court dismissed the defence's request for taking of further evidence. The Regional Court found that the evidence requested was irrelevant to the proceedings. The hearing of further employees to prove that they had unhindered access to the applicant's office during the day was not necessary as the applicant himself had admitted that he had met the victim and other witnesses undisturbed in his office in the evening. Also his secretary, who had been heard as a witness, had stated that in the evening when she left before the applicant he locked his office by key. The hearing of his wife was not necessary, as her statements would not exclude that he had extramarital relations and that her husband had been able to hide his homosexual tendencies from her. It was not necessary to obtain a psychiatric expert opinion on the victim M., whom the court had heard at length, as there were no indications which would warrant such an examination.

On the same day the Regional Court convicted the applicant under Sections 209 and 212 of the Criminal Code and sentenced him to eight months imprisonment on probation and a fine of 240 daily rates at AS 1000 each. The Regional Court found that the applicant had had sexual relations with M., in his office and elsewhere, that at the time of the beginning of their relation M. had been 15 years old, that he had entertained this relation against his will and that he had been one of the applicant's employees and thus under his authority.

On 18 November 1992 the applicant appealed, requesting, inter alia, the Court of Appeal (Oberlandesgericht) of Graz to apply to the Constitutional Court (Verfassungsgerichtshof) for review of the constitutionality of Section 209 of the Criminal Code. He relied in this respect on Article 8 and 14 of the Convention.

On 10 March 1993 the Court of Appeal, following an oral hearing, dismissed the applicant's appeal. The Court of Appeal found that the Regional Court had acted correctly in dismissing the requested evidence and, for the same reasons, dismissed the request to hear itself these witnesses. As regards the request for review of the constitutionality of Section 209 of the Criminal Code, the Court of Appeal, referring to case-law in this respect, stated that it had no doubts as to the constitutionality of this provision.

According to the applicant his case had been reported in the press.

B. Relevant provisions of domestic law and practice

1. Section 209 of the Criminal Code (Strafgesetzbuch) provides as follows:

"A male person who after attaining the age of nineteen years fornicates with a person of the same sex who has attained the age of fourteen years but not the age of nineteen years shall be sentenced to detention of between six months and five years."

2. Section 212 para. 1 of the Criminal Code, as far as relevant, provides as follows:

"Everyone ... who vis-a-vis a minor under his education, training or supervision misuses his position for sexual abuse ... shall be sentenced to detention of up to three years."

3. Constitutional Court's case law

In a decision of 3 October 1989 the Constitutional Court (Verfassungsgerichtshof) found that Section 209 of the Criminal Code was compatible with the principle of equality under constitutional law, in particular with the prohibition of gender discrimination contained therein. This decision was also at issue in a previous case dealt with by the Commission (No. 17279/90, Zukrigl v. Austria, Dec. 13.5.92, unpublished).

The relevant passages of the Constitutional Court's decision read as follows:

"The development of the criminal law in the last few decades has shown that the legislature is striving to apply the system of criminal justice in a significantly more restrictive way than before - in pursuance of the efforts it is undertaking in connection with its policy on the treatment of offenders, which have become known under the general heading of "decriminalisation". This means that it only leaves offences on the statute book or creates new offences if such punishment of behaviour harmful to society is still found absolutely necessary and indispensable after the strictest criteria have been applied. ... It is the conviction of the Constitutional Court that from the point of view of the principle of equality contained in Article 7 para. 1 of the Federal Constitutional Law and Article 2 of the Basic Constitutional Act those legislating in the field of criminal law cannot reasonably be challenged for taking the attitude, by reference to authoritative expert opinions coupled with experience gained, that homosexual influence endangers adolescent males to a significantly greater extent than girls of the same age, and concluding that it is necessary to punish under the criminal law homosexual acts committed with young males, as provided for under Section 209 of the Criminal Code. This conclusion was also based on their views of morality, which they wanted to impose while duly observing current policy on criminal justice, which aims at moderation and at restricting the punishment of offences (while carefully weighing up all the manifold advantages and disadvantages). Taking everything into account, we are dealing here with a distinction which is based on factual differences and therefore constitutionally admissible from the point of view of Article 7 para. 1 of the Federal Constitutional Law, in conjunction with Article 2 of the Basic Constitutional Act."

COMPLAINTS

1. The applicant complains under Article 6 paras. 1 and 3 (d) of the Convention that the criminal proceedings against him had been unfair

in that the Austrian courts refused to take the evidence he had requested. He further submits that his case had been reported in the press which had unduly influenced the proceedings.

2. He complains under Article 8 of the Convention that his conviction under Section 209 of the Criminal Code constituted an unjustified interference with his right to respect for private life.

3. Lastly he complains that Section 209 of the Criminal Code only applies to relations between men and not to relations between women which violates Article 14 in conjunction with Article 8 of the Convention.

THE LAW

1. The applicant complains under Article 6 paras. 1 and 3 (d) (art. 6-1, 6-3-d) of the Convention that the criminal proceedings against him had been unfair.

Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention, as far as relevant, read as follows:

> "(1) In the determination ... 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; ..."

a. As regards the applicant's complaint about the taking of evidence by the Austrian courts, the Commission recalls that the guarantees contained in paragraph 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the general concept of fair trial set forth in paragraph 1 of this Article (Art. 6-1). In the circumstances of the present case, it will consider the applicant's complaint from the angle of paragraph 1 taken together with the principles inherent in paragraph 3 (d) of Article 6 (Art. 6-3-d) (see Eur. Court H.R., Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29).

As a general rule it is for the national courts, and in particular the courts of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce (Eur. Court H.R., Barbera, Messegue and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31, para. 68). Article 6 para. 3 (d) (Art. 6-3-d) of the Convention does not give the accused an unlimited right to have witnesses called (No. 8417/78, Dec. 4.5.79, D.R. 15 p. 200). In particular a court is justified in refusing to summon witnesses when it considers that their statements could not be of any relevance to the case (No. 10486/83, Dec. 9.10.86, D.R. 49 p. 86). However, the complete silence of a judgment as to why the court rejected the hearing of a witness for the defence is not consistent with the concept of a fair trial which is the basis of Article 6 of the Convention (Eur. Court H.R., Vidal judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, paras. 33-34).

In the present case the Regional Court heard some of the witnesses requested by the applicant; in respect of one witness it was agreed that a hearing was not necessary. As regards the remaining witnesses, the Regional Court, in its judgment of 26 August 1992 did not find it necessary to hear them as it considered their statements irrelevant to the proceedings. It gave detailed explanations in this

respect.

The Commission finds that the Regional Court sufficiently explained why it considered the statements of these witnesses to be irrelevant to the proceedings. There are no indications that the Regional Court rejected the applicant's request in an arbitrary and unfair manner or that the applicant, who was assisted by counsel during the proceedings, could not argue his case properly.

b. The applicant further submits that press reports on his case had unduly influenced the proceedings.

The Commission recalls that, in certain cases, a virulent press campaign can adversely affect the fairness of a trial and involve the State's responsibility, particularly where it is sparked off by one of the State's organs (see No. 8403/78, Dec. 15.10.80, D.R. 22 p. 100 at 127; No. 10486/83, Dec. 9.10.86, D.R. 49 p. 86 at 101).

In the present case the applicant has failed to substantiate that there were reports in the media to such an extent as to have a negative impact on the conduct and the outcome of the trial.

In these circumstances the Commission finds no appearance of a violation of the applicant's right to a fair hearing.

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.

2. The applicant complains further under Article 8 (Art. 8) of the Convention that his conviction under Section 209 of the Criminal Code constituted an unjustified interference with his right to respect for his private life.

Article 8 (Art. 8) of the Convention reads as follows:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls that the prohibition of homosexual acts, even in the absence of any criminal proceedings, constitutes an interference with the rights under Article 8 (Art. 8) of the Convention of the persons concerned (see Eur. Court H.R., Dudgeon judgment of 22 October 1981, Series A no. 45, p. 18, para. 41; Norris judgment of 26 October 1988, Series A no. 142, p. 17-18, paras. 35-38; Modinos judgment of 22 April 1993, Series A no. 259, p. 10-11, paras. 17-24).

The Commission therefore finds that the applicant's conviction under Section 209 of the Criminal Code constitutes an interference with his right to respect for his private life. Such interference infringes Article 8 (Art. 8), unless it is justified under paragraph 2 of Article 8 (Art. 8-2) as being in accordance with law and necessary in a democratic society to achieve one of the aims listed in this provision.

The applicant's conviction was based on Section 209 of the Criminal Code and thus in accordance with law. The aim of the interference was the "protection of the rights and freedoms of others" and the "protection of morals".

As to the question of necessity, the Commission recalls that in a previous case it has found that Section 209 of the Criminal Code constitutes a measure necessary in a democratic society. In this respect the Commission had regard to the fact that Section 209 of the Criminal Code did not refer to homosexual activities between consenting male adults but between adults and minors within age brackets which the Commission found acceptable having regard to the State's margin of appreciation (No. 17279/90, Zukrigl v. Austria, Dec. 13.5.92, unpublished).

The Commission observes further that according to the Regional Court's judgment of 26 August 1992 the applicant had had sexual relations with a male person who at the time of the beginning of their relation was 15 years old, that this person had entertained the relation with the applicant against his will and that he had been one of the applicant's employees and thus under his authority.

The Commission therefore finds that in the circumstances of the present case the interference with the applicant's right to respect for his private life can be considered "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) 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.

3. The applicant also alleges a violation of Article 14 (Art. 14) of the Convention in conjunction with Article 8. He points out that Section 209 of the Criminal Code relates only to male homosexual behaviour, and considers that the fact that female homosexual behaviour is not included amounts to an unjustified distinction in the enjoyment of Article 8 (Art. 8) rights, contrary to Article 14 (Art. 14) of the Convention.

Article 14 (Art. 14) of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground 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."

It follows from the Commission's above findings of an interference with the applicant's rights under Article 8 (Art. 8) that Article 14 (Art. 14) is also applicable.

The Commission recalls that for the purpose of Article 14 (Art. 14) a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (Eur. Court H.R., Belgian Linguistic Case, judgment of 23 July 1968, Series A no. 6, p. 34, para. 10). However, very weighty reasons have to be put forward before a difference of treatment based exclusively on the ground of sex can be regarded as compatible with the Convention (see Eur. Court H.R., Schuler-Zgraggen judgment of 24 June 1993, Series A no. 263, pp. 21-22, para. 67; Karlheinz Schmidt judgment of 18 July 1994, Series A no. 291 B, pp. 32-33, para. 24).

The Commission observes that the Austrian Constitutional Court in a decision of 3 October 1989 concerning the constitutionality of Section 209 of the Criminal Code had examined whether a discrimination

was involved. It found that the reason why female homosexuality had been excluded from the scope of Section 209 was because it was the policy of the legislator to impose criminal sanctions only in cases where such penalty was absolutely necessary, even using the strictest criteria. It further noted that the legislator, referring to expert opinions, had considered that there was considerably more danger of homosexual influence on adolescent males than on females of the same age. Accordingly, although there was a difference in treatment, the Constitutional Court found that the distinction drawn by Section 209 of the Criminal Code between male and female homosexuality did not infringe the Constitution. In view of these reasons the Commission, in a previous decision, has found that Section 209 of the Criminal Code did not involve discrimination on the ground of sex prohibited by Article 14 (Art. 14) of the Convention (No. 17279/90, Zukrigl v. Austria, Dec. 13.5.92, unpublished).

The Commission observes that the applicant's conviction was not solely based on Section 209 of the Criminal Code but also on Section 212 para. 1, the latter provision not containing any distinction as to the sex of the offender.

Having regard to the Constitutional Court's above decision and its previous case-law, the Commission finds that in the present case the State's margin of appreciation has not been overstepped and that, consequently, there is no appearance of a violation of Article 14 in conjunction with Article 8 (Art. 14+8) of the Convention.

It follows that this part of the application is also 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.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)