AS TO THE ADMISSIBILITY OF

Application No. 18116/91
by Gudrun HAUER and Alfred GUGGENHEIM
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 13 October 1993, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA

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 4 April 1991 by Gudrun HAUER and Alfred GUGGENHEIM against Austria and registered on 24 April 1991 under file No. 18116/91;

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 parties, may be summarised as follows:

The first applicant, born in 1953, is an Austrian national and resident in Vienna. She is a journalist by profession. The second applicant, born in 1926, is also an Austrian national and resident in Vienna. He is a businessman by profession. Before the Commission they are represented by MM. T. Prader and W. Goeritz, lawyers practising in Vienna.

A. The particular circumstances of the case

In the evening of 24 November 1988 a memorial against war and fascism was unveiled in the course of a celebration at the Albertinaplatz in Vienna. Some thousand persons participated in the event, amongst them the applicants, members of an association furthering the interests of homosexuals. The applicants unrolled a banner with the inscription "Thousands of homosexual victims of concentration camps wait for their rehabilitation" ("1000e homosexuelle KZ-Opfer warten auf ihre Rehabilitierung"). Subsequently, at about 19.20 hrs., two police officers requested the applicants to remove the banner. Two other members of the association accompanied them in order to ask a superior police officer about the reasons for this request. At about 19.30 hrs., a group of twenty to thirty police officers rushed towards the banner, tore the staff away on the first applicant's side,

the staff on the second applicant's side having been twisted. The banner was taken away by the authorities.

On 4 January 1989 the applicants lodged a complaint with the Constitutional Court claiming that they had been violated in their right to freedom of expression.

On 8 March 1989 the Attorney General's Department, in their observations upon the applicants' complaint, submitted that prior to the unveiling of the memorial an illegal demonstration had commenced and had to be dissolved. At the celebration members of the association furthering a homosexual initiative had unrolled two banners with the above-mentioned inscription on one of them and on the other the inscription "Der Führer ging, die Arisierer blieben" ("The 'Führer' left, the 'Aryanisers' stayed"). They also unrolled a red and black flag. Participants of the illegal demonstration joined them. This manifestation had not been announced in writing. At 19.09 hrs. police officers requested the applicants to remove the banners. The persons participating in the demonstration refused and resisted the police officers, hit and kicked them. Two groups of police officers were then ordered to remove the banners. One of the banners was removed; it was damaged. Some of the participants in the demonstration were arrested. The Department considered that the applicants had expressed their opinion in the course of a demonstration which they had not duly announced in accordance with the Assembly Act (Versammlungsgesetz). This demonstration could therefore have been dissolved under S. 13 para. 1 of the Assembly Act. As a less stringent measure, the competent authority decided to remove the banners concerned, which characterised its carriers as a particular demonstration. Such a restriction was necessary in a democratic society within the meaning of Article 10 of the Convention.

On 12 October 1990 the Austrian Constitutional Court (Verfassungsgerichtshof) dismissed the applicants' complaint under S. 144 of the Federal Constitution (Bundes-Verfassungsgesetz). The Constitutional Court found that the action taken by police officers of the Vienna Federal Police Department (Bundespolizeidirektion) on 24 November 1988 at about 19.30 hrs., namely to take away a banner held up by the applicants, had not violated their constitutional rights. The Constitutional Court transferred the complaint to the Austrian Administrative Court (Verwaltungsgerichtshof) for a decision whether the measure complained of had violated any other of their rights.

The Constitutional Court, having heard the applicants and several witnesses and consulted the police files, established the relevant facts as follows: On 24 November 1988 the Vienna Municipality had organised a ceremony to unveil a memorial against war and fascism at the "Albertinaplatz". Shortly before, police authorities had dissolved an unlawful assembly at the opera, whose participants had obviously intended to join the ceremony. Some thousand persons participated in this ceremony. The applicants and other members of the association furthering the interests of homosexuals displayed a 4 m. long banner stating that thousands of homosexual victims of concentration camps demanded their rehabilitation. Another group, apparently participants of the previously dissolved assembly, displayed a banner stating that the 'Führer' left, but the 'Aryanisers' stayed. The police authorities could reasonably assume a connection between both groups. Although two police officers had requested the applicants to take the banner down, they had continued to show it and thus caused agitation. After they had disregarded a further request, police officers took the banner away. The Constitutional Court considered that, so far as the statements of the persons heard were divergent, namely on the question whether or not the banner had caused agitation, those witnesses denying it were untrustworthy as the action as such was obviously intended to draw public attention to the aims of the group of homosexuals.

The Constitutional Court considered that the removal of the

banner constituted an act of direct administrative authority and coercion (Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt) within the meaning of S. 144 para. 2, second sentence, of the Constitution, which interfered with the applicants' right to freedom of expression, as guaranteed by the Austrian Basic Law (Staatsgrundgesetz) and Article 10 of the Convention.

According to the Constitutional Court, the interference would have been unconstitutional if the administrative act had been taken without any legal basis, or on a legal basis which was at variance with Article 10 of the Convention, or if the competent authority had applied a legal basis, which was unobjectionable under the Constitution, in an inconceivable manner.

The Constitutional Court rejected the applicants' argument that the removal of their banner had no legal basis at all.

The Constitutional Court found that Article 11 of the Convention obliged the State authorities to protect lawful assemblies (with reference to Eur. Court H.R., Plattform 'Ärzte für das Leben' judgment of 21 June 1988, Series A no. 139). Having regard to this constitutional duty, S. IX para. 1 (1) of the Administrative Proceedings (Introduction) Act (Einführungsgesetz zu den Verwaltungs-verfahrensgesetzen) had to be interpreted in such a way as to qualify any conduct running counter to the exercise of freedom of assembly as a disturbance of public order. Although this provision, according to its wording, belonged to administrative criminal law, it had to be interpreted in conformity with constitutional law to the effect that it entitled and obliged the police authorities to oppose any disturbances of public order in the course of an assembly. Such police measures were, however, limited to the extent that, in the circumstances of the particular case, the measure in question had to be appropriate and proportionate in order to ensure the undisturbed course of the assembly.

In the present case, the applicants had attempted to demonstrate their interests and claims at a particularly solemn ceremony to unveil a memorial against war and fascism. The police officers could reasonably assume that the applicant's conduct did amount to a disturbance of the ceremony, and that the other participants surrounding them had only restrained their annoyance in order not to disturb the ceremony further. Noting that the applicants had refused to take the banner down, the Constitutional Court found that its removal was the appropriate and proportionate means in order to terminate the disturbing action.

According to the Constitutional Court, the applicants' banner had thus been removed pursuant to the duty of the authorities under Article 11 of the Convention to protect lawful assemblies and in a conceivable application of S. IX para. 1 (1) of the Administrative Proceedings (Introduction) Act. Consequently the applicants' right to freedom of expression had not been violated.

The question whether the authorities had acted lawfully (rechtsrichtig) was not to be decided by the Constitutional Court, but by the Austrian Administrative Court (Verwaltungsgerichtshof).

The decision was served on 20 November 1990.

On 26 November 1990 the Administrative Court requested the applicants to complete their complaint and indicate the legal provisions which had allegedly been violated.

On 16 January 1991 the Administrative Court discontinued the complaint proceedings on the ground that the applicants had not complied with its request of 26 November 1990.

B. Relevant domestic law

The Assembly Act 1953 (Versammlungsgesetz) regulates the exercise of the right of assembly.

S. 2 para. 1 provides that any person intending to organise a public meeting or any meeting which is generally open to persons other than invited guests shall give the authorities notice in writing at least 24 hours in advance, indicating the purpose, place and time of the meeting. This notice must reach the authorities not less than 24 hours before the time at which the planned meeting is to be held.

According to S. 13 para. 1 any meeting organised in contravention of the Act shall be prohibited and, if necessary, terminated by the authorities.

S. IX para. 1 (1) of the Administrative Proceedings (Introduction) Act (Einführungsgesetz zu den Verwaltungsverfahrens-gesetzen) provides that the breach of the peace in a public place by behaviour likely to cause annoyance is an administrative offence punishable by a fine of up to AS 3000 or, in aggravating circumstances, by imprisonment of up to two weeks. As from 1 May 1993 S. IX para. 1 (1) has been replaced by S. 81 of the Security Police Act (Sicherheitspolizeigesetz).

The competence of the Constitutional Court to receive complaints about the violation of constitutionally guaranteed rights is laid down in S. 144 para. 1 of the Federal Constitution (Bundesverfassungs-gesetz), and relates to complaints against formal decisions of administrative authorities or complaints concerning the exercise of direct administrative authority and coercion against a particular individual (Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt gegen eine bestimmte Person).

Under S. 130 of the Federal Constitution, the Administrative Court determines applications alleging the unlawfulness of an administrative decision (Bescheid) or authority and coercion (Befehls- und Zwangsgewalt) against a particular individual or the breach by a competent authority of its duty to take a decision.

COMPLAINTS

The applicants complain under Article 10 of the Convention that the Austrian police authorities violated their right to freedom of expression in that they removed their banner.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 4 April 1991 and registered on 24 April 1991.

On 2 December 1991 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 18 May 1992, after an extension of the time-limit, the Government submitted their observations. The observations in reply by the applicant were submitted on 20 July 1992.

THE LAW

1. The applicants complains that the removal of their banner by Austrian police authorities on 24 November 1988 amounted to a violation of their right to freedom of expression. They rely on Article 10

(Art. 10) of the Convention, which provides, so far as relevant, 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 prevention of disorder or crime, ... for the protection of ... the rights of others, ..."

2. The Government maintain that the applicants failed, as required by Article 26 (Art. 26) of the Convention, to exhaust the domestic remedies at their disposal under Austrian law. They submit in particular that the applicants did not pursue their complaint proceedings before the Austrian Administrative Court. The Administrative Court could have determined whether the removal of the banner had been carried out in a lawful manner. The Constitutional Court only had decided that the removal of the banner could conceivably be based on S. IX para. 1 (1) of the Administrative Proceedings (Introduction) Act. They refer, in this respect, to the Commission's decision on the admissibility of Application No. 13308/87 of 1 March 1991 (not published).

Pursuant to Article 26 (Art. 26) of the Convention, the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.

The Commission observes that the basis of the rule of exhaustion of domestic remedies under Article 26 (Art. 26) of the Convention is that, before proceedings are brought in an international court, the respondent State must have had an opportunity to redress the alleged damage by domestic means within the framework of its own legal system (cf. No. 5964/72, Dec. 29.9.75, D.R. 3 p. 57).

The Commission recalls that, in its decision on the admissibility of Application No. 13308/87 of 1 March 1991, it held that domestic remedies were not exhausted on the ground that the complaint concerned had neither been put to the Constitutional Court nor to the Administrative Court.

The Commission considers that, in accordance with S. 144 para. 1 of the Federal Constitution, the Constitutional Court was competent to determine the question whether the removal of the applicants' banner violated their right to freedom of expression. The Constitutional Court, having taken evidence and established the relevant facts, examined in detail whether the removal interfered with the applicants' right to freedom of expression, as guaranteed by the Austrian Basic Law and the Convention, whether this interference had a basis in Austrian law and was an appropriate and proportionate means in order to terminate the disturbance of public order. The Constitutional Court finally concluded that the applicants' constitutional rights, in particular their right to freedom of expression, had not been violated. It transferred the complaint to the Austrian Administrative Court only as regards the question whether any other rights had been breached.

In these circumstances, the Commission finds that the complaint proceedings instituted by the applicants before the Austrian Constitutional Court constituted an effective and sufficient remedy with regard to their complaint under Article 10 (Art. 10) of the Convention which they now raise before the Commission. The condition under Article 26 (Art. 26) of the Convention that domestic remedies

must be exhausted has, therefore, been met.

3. The Government agree that there has been an interference with the applicants' right under Article 10 para. 1 (Art. 10-1) of the Convention. They consider that this interference was justified under Article 10 para. 2 (art. 10-2). The Government, relying on the decision of the Constitutional Court and its interpretation of S. IX para. 1 (1) of the Administrative Proceedings (Introduction) Act, submit in particular that the action taken by the police authorities to protect the ceremony to unveil the memorial against war and fascism was prescribed by Austrian law. They further contend that the removal of the banner was a proportionate measure to protect the ceremony and prevent disorder.

As regards the lawfulness of the interference, the applicants submit that, in the proceedings before the Constitutional Court, the Attorney General's Department argued that the police authorities had acted with the intention to disband an unlawful assembly. However, they did not hold an assembly. S. IX para. 1 (1) of the Administrative Proceedings (Introduction) Act belonged to the sphere of administrative criminal law and did not entitle police authorities to prevent disturbances of assemblies. Furthermore, there was no indication that such a disturbance had in fact already occurred. The applicants also argue that the forcible removal of their banner was not necessary in a democratic society.

The Commission finds that there has been an interference with the applicants' right under Article 10 para. 1 (Art. 10-1), which is not in dispute between the parties. Such interference is in breach of Article 10 (Art. 10) unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 and was "necessary in a democratic society" to attain them.

As regards the question of whether the interference was "prescribed by law", the Commission recalls that the interference with the right protected by Article 10 para. 1 (Art. 10-1) must have some basis in domestic law, which itself must be accessible to the person concerned and be formulated with sufficient precision to enable the individual to foresee its consequences for him (Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, p. 21, para. 45; Müller and Others judgment of 24 May 1988, Series A no. 133, p. 20, para. 29; mutatis mutandis, Kruslin judgment of 24 April 1990, Series A no. 176-A, p. 20, para. 27; Huvig judgment of 24 April 1990, Series A no. 176-B, p. 52, para. 26; Chorherr judgment of 25 August 1993, para. 26, to be published in Series A no. 266-B).

The Commission observes that the provisions of the Assembly Act, relied upon by the administrative authorities, have not been considered a sufficient legal basis either by the Constitutional Court or by the respondent Government. The Commission notes that the Constitutional Court, in its judgment of 12 October 1990, relied on S. IX para. 1 (1) of the Administrative Proceedings (Introduction) Act, and referred to the reasoning of the European Court of Human Rights in its Plattform "Ärzte für das Leben" judgment, according to which public authorities are obliged to take positive action and protect an assembly (Eur. Court H.R., Plattform "Ärzte für das Leben" judgment of 21 June 1988, Series A no. 139). The Constitutional Court drew the conclusion that S. IX para. 1 (1) of the Administrative Proceedings (Introduction) Act had to be interpreted so as to provide a legal basis for the action taken in the present case.

The Commission considers that, in the light of the Constitutional Court's reasoning, this provision can be regarded as a legal basis for the interference in question. As regards the question of legal certainty, the Commission finds that the wording of the provision in question was such as to enable the applicants to foresee to a reasonable extent the risk of a police reaction to their conduct (cf.

Eur. Court H.R., Chorherr judgment, loc. cit., para. 26).

As regards the purpose of the interference, the Commission notes the reasoning of the Constitutional Court according to which the removal of the banner aimed at protecting a particular ceremony and thus the rights of those participating therein. The Commission finds that the interference also aimed at the prevention of disorder in general. The interference thus pursued legitimate aims within the meaning of Article 10 para. 2 (Art. 10-2).

Finally, on the necessity question, the Commission recalls that the adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) 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 a European supervision, the extent of which depends upon the circumstances. The review under the Convention is confined to the question whether the measures taken on the national level are, in the light of the case as a whole, justifiable in principle and proportionate (cf. Eur. Court H.R., Markt Intern Verlag GmbH and Klaus Beermann judgment, loc. cit., pp. 19-20, para. 33; Sunday Times (No. 2) judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50; Chorherr judgment, loc. cit., para. 32).

The Commission, having regard to the facts as presented by the applicants and established by the Constitutional Court, notes that the applicants showed their banner on the occasion of a ceremony with a solemn character.

The Commission, balancing the applicants' interest in exercising their right to freedom of expression and the public interest in protecting the undisturbed performance of the ceremony in question, finds that the removal of the applicants' banner, as a precautionary measure in the circumstances of the present case, did not overstep the margin of appreciation left to the national authorities. The interference can, therefore, be regarded as "necessary in a democratic society" for the prevention of disorder and the protection of the rights of others. In particular, there was a reasonable relationship of proportionality between the means employed and the legitimate aims pursued.

It follows that 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.

Secretary to the First Chamber — President of the First Chamber

(M.F. Buquicchio) — (A. Weitzel)