AS TO THE ADMISSIBILITY OF

Application No. 34889/97
by Karl-August HENNICKE
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 21 May 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 3 November 1996 by Karl-August HENNICKE against Germany and registered on 12 February 1997 under file No. 34889/97;

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 applicant, born in 1927, is a German national and resident in Baden-Baden.

The applicant's previous Application No. 20564/92 concerning the Treaty on the Frontier between Germany and Poland was declared inadmissible in 1992.

The facts of the present case, as submitted by the applicant, may be summarised as follows.

On 22 March 1996 the Baden-Baden District Court (Amtsgericht) convicted the applicant of two counts of incitement to hatred (Volksverhetzung), pursuant to S. 130 para. 1 of the German Penal Code (Strafgesetzbuch), and imposed a fine amounting to DEM 6,000.

S. 130 para. 1 of the Penal Code provides that anybody who incites to hatred, or violence or arbitrary acts, against parts of the population in such a manner as to disturb the public peace shall be

punished by imprisonment for a term of three months to five years.

The District Court found that in June 1995 the applicant had distributed numerous copies of a brochure edited by him in a public park in Baden-Baden. The District Court noted the contents of the brochure and found that it contained poems on his beliefs regarding the superiority of "higher races" and the inferiority of aliens, whom he compared to leeches, and that there could be no peace as long as Jews held power in this world. He had thereby incited to hatred against foreigners and Jews in general.

On 4 June 1996 the Baden-Baden Regional Court (Landgericht) dismissed the applicant's appeal (Berufung). Following a full trial, the Regional Court established that the applicant had distributed a brochure containing publications in which, further to the above poems, he had published poems complaining about the punishment in respect of statements denying the gassing of Jews in Auschwitz, about Germany being kept in Jewish and foreign slavery and condemned to serve Israel. The Regional Court considered that the right to freedom of expression did not entitle a person to commit the offence of incitement to hatred, which was intended to protect the public peace.

On 4 September 1996 the Karlsruhe Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal on points of law (Revision).

On 21 October 1996 the Federal Constitutional Court (Bundesverfassungsgericht) refused to entertain his constitutional complaint (Verfassungsbeschwerde).

COMPLAINTS

The applicant complains under Article 10 of the Convention about his conviction by the Baden-Baden District Court of 22 March 1996, as confirmed by the Regional Court and the Court of Appeal on 4 June and 4 September 1996, respectively.

THE LAW

The applicant complains about his conviction of incitement to hatred. He invokes Article 10 (Art. 10) of the Convention.

Article 10 (Art. 10), as far as relevant, provides:

> "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 reputation or rights of others ..."

The Commission considers that the impugned measure was an interference with the applicant's exercise of his freedom of expression, which was justified under paragraph 2 of Article 10 (Art. 10-2).

The interference was "prescribed by law", namely S. 130 of the Penal Code. This provision is accessible to the general public, and, taking into account the case-law of the German courts on questions of incitement to hatred, the consequences of his conduct were clearly foreseeable to the applicant.

The interference also pursued a legitimate aim under the Convention, i.e. "the prevention of disorder and crime" and the "protection of the reputation or rights of others".

As to the test of necessity, the Commission, having regard to the criteria established in the case-law of the Convention organs (cf. Eur. Court HR, Observer and Guardian v. United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59), finds that the provision of the Penal Code at issue, and their application in the present case, aimed to secure the peaceful coexistence of the population in the Federal Republic of Germany. In this context, the Commission further recalls that Article 17 (Art. 17) prevents a person from deriving from the Convention a right to engage in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention. (cf. No. 12194/86, Dec. 12.5.88, D.R. 56, p. 205; No. 25096/94, Dec. 6.9.95, D.R. 82, p. 117; No. 25992/94, Dec. 29.11.95 and No. 26521/95, Dec. 26.6.96 - unpublished).

As regards the circumstances of the present case, the Commission notes the detailed findings of the District Court and the Regional Court as to the contents of the applicant's brochure in which he had attempted to incite to hatred against foreigners and Jews. The Commission finds that the applicant's publication ran counter to one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace, and further reflected racial and religious discrimination. The public interests in the prevention of crime and disorder in the German population due to incitement to hatred against foreigners and Jews, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart opinions such as those contained in the brochure at issue (see also No. 9235/81, Dec. 16.7.82, D.R. 29, p. 194; No. 25096/94, Dec. 6.9.95, loc. cit).

In these circumstances, there were relevant and sufficient reasons for the applicant's conviction, which can, therefore, be considered "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Accordingly, there is no appearance of a violation of the applicant's right under Article 10 (Art. 10) of the Convention.

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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber