AS TO THE ADMISSIBILITY OF

Application No. 19363/92
by Gerhard HIRMANN
against Austria

The European Commission of Human Rights sitting in private on 2 March 1994, 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
I. BÉKÉS
E. KONSTANTINOV

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 21 November 1991 by Gerhard HIRMANN against Austria and registered on 16 January 1992 under file No. 19363/92;

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 is an Austrian citizen, born in 1928 and resides in Ennsdorf. He is a civil engineer by profession, specialises in agriculture and forestry matters.

A. Particular circumstances of the case

The applicant, having inspected various court files concerning expropriation cases in connection with his publishing of articles, sent letters to various courts criticising several court experts.

On 4 December 1986 the Disciplinary Board (Disziplinarsenat) of the Engineer Chamber (Ingenieurkammer) of Vienna, Lower Austria and Burgundy, referring to the Engineers' Rules of Professional Conduct (Standesregeln der Ziviltechniker) and S. 48 para. 1 of the Engineer Chamber Act (Ingenieurkammergesetz) found the applicant guilty of having disregarded the principle of loyalty towards his colleagues and having criticised other engineers in a disparaging way. The Disciplinary Board issued a reprimand (schriftlicher Verweis) against him.

In its decision, the Disciplinary Board had regard to three

letters written by the applicant. In his letter of 14 March 1985, addressed to the President of the Bad Ischl District Court (Bezirksgericht), the applicant had referred to "arithmetic tricks" and stated that "he quite understood that in administrative proceedings only those experts were appointed by the court (in that particular case a civil engineer specialised in forestry and the timber industry) who gave, in a 'superficial and bungling manner' ('Husch-Pfusch-Verfahren'), obviously low estimates and deliberately overlooked important factors". The applicant had further requested the President of the Klagenfurt Regional Court (Landesgericht) to consider the above letter of 14 March 1985 and to assess the qualifications of expert M. Moreover, he had requested the President of the Klagenfurt Regional Court to consider his submissions to the Feldkirchen District Court of 4 January 1986, which contained criticism regarding the experts G. and L., with a view to assessing their professional qualifications. The Disciplinary Board considered that the applicant had thereby overstepped the limits of a generally permissible criticism amongst civil engineers, and that a prejudice to the professional reputation of his colleagues whom he indicated with their names could not be excluded.

On 15 June 1987 the Disciplinary Commission (Disziplinarkommission) of the Federal Engineer Chamber, following an oral hearing, dismissed the applicant's appeal (Berufung).

The Disciplinary Commission considered in particular that, even assuming that it was correct that in expropriation proceedings where civil engineers were appointed as court experts the amounts awarded as compensation were very moderate and to the disadvantage of the persons expropriated, the applicant had not been entitled to take recourse to undue criticism and disregard the principle of loyalty under the Rules of Professional Conduct. The Disciplinary Commission, having regard to the wording of the applicant's statements in question, also found that he had reproached the court experts concerned for having acted - partly deliberately - contrary to their duties. Such criticism had not been necessary in order to disclose alleged grievances. The applicant had also acted disloyally in that he had requested various courts to assess the professional qualifications of certain engineers and thus placed them at the risk of professional disadvantages. He should have rather informed the competent Engineer Chamber.

On 3 March 1989 the Constitutional Court (Verfassungsgerichtshof), upon the applicant's constitutional complaint, found that the Disciplinary Commission's decision of 15 June 1987 violated his right to freedom of expression. The decision in question was quashed, and the case referred back to the Disciplinary Commission.

The Constitutional Court confirmed that the impugned decision was prescribed by the relevant provisions of the Engineer Chamber Act. It also considered that it was necessary, in a democratic society, to protect the reputation and rights of others, here civil engineers, against unfair criticism by their colleagues in the context of disciplinary proceedings. However, civil engineers were not in general exempt from criticism, and justified criticism by their colleagues could not automatically be regarded as violation of the principle of loyalty. In particular, such criticism could not be limited to submissions addressed to the competent Engineer Chamber. In the light of these considerations, the findings of the lower instances could not be objected to, except for the applicant's request to the President of the Klagenfurt Regional Court to take note of a letter addressed to the Feldkirchen District Court, which did not contain unfair criticism.

On 19 July 1989 the Disciplinary Commission of the Federal Engineer Chamber (Bundesingenieurskammer) acquitted the applicant of having disregarded the Rules of Professional Conduct regarding his letter of 14 March 1985 addressed to the Bad Ischl District Court, so far as he had referred to "arithmetic tricks", as well as his letter

to the President of the Klagenfurt Regional Court referring to a letter to the Feldkirchen District Court. It dismissed the remainder of the applicant's appeal against the decision of 4 December 1986. Rather, the Disciplinary Commission, referring to S. 48 paras. 1 and 2 and S. 49 of the Engineer Chamber Act and the Rules of Professional Conduct of Civil Engineers, found the applicant guilty of having, in two respects, committed a disciplinary offence and issued a reprimand against him.

The Disciplinary Commission, having particularly regard to the Constitutional Court's findings, considered that the wording 'superficial and bungling manner' ('Husch-Pfusch-Verfahren'), and his assertion that some experts gave obviously low estimates and deliberately overlooked important compensation factors, as well as his request to the President of the Klagenfurt Regional Court to consider the above submissions, constituted unfair and disparaging criticism and were not covered by the right to freedom of expression.

On 1 October 1991 the Constitutional Court refused to entertain the applicant's further constitutional complaint. The Constitutional Court found that the challenged decision had been taken in the light of its previous judgment of 12 December 1988 and could not be objected to. The applicant's request to transfer the complaint to the Administrative Court (Verwaltungsgerichtshof) was rejected on the ground that the matter was excluded from its competence.

B. Relevant domestic law

The Federal Engineer Chamber Act, Federal Law Gazette 1969/71 (Ingenieur-Kammergesetz, BGBL 1969/71) established four Regional Chambers (Landeskammern) and a Federal Chamber (Bundeskammer), which are public law institutions. Membership in a Regional Chamber and the Federal Chamber is compulsory for civil engineers who exercise their profession (S. 5).

According to S. 48 para. 1, civil engineers are subjected to disciplinary sanctions if (1) they impair, by their conduct towards the public, clients or colleagues, the standing or dignity of the profession, or if (2) if they infringe professional duties which they undertook to keep upon their oath as member of this profession, or which they were obliged to keep under the Civil Engineer Act or other provisions. S. 49 para. 1 provides for disciplinary measures, namely a reprimand as the lowest sanction; further a fine calculated in relation to the civil engineers' fees per hour, the suspension of the right to vote and to stand as a candidate in the Chambers, the suspension of the right to practise as a civil engineers.

Furthermore, the Engineer Chamber has issued Regulations on the Professional Conduct (Standesregeln) of Civil Engineers, which lay down inter alia the principle of loyalty between civil engineers and prohibit unfair and disparaging criticism of other civil engineers.

COMPLAINTS

1. The applicant complains under Article 10 of the Convention that the reprimand issued against him violated his right to freedom of expression.

2. The applicant complains under Article 6 of the Convention that the proceedings before the Disciplinary Commission of the Federal Engineer Chamber and before the Constitutional Court were unfair.

THE LAW

1. As regards the applicant's complaint under Article 10 (Art. 10) of the Convention that the reprimand issued by the Disciplinary Commission of the Federal Chamber on 19 July 1989 infringed his right to freedom of expression, the Commission considers that it cannot, on

the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of this complaint to the respondant Government.

2. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention about the alleged unfairness of the proceedings before the Disciplinary Board of the Federal Engineer Chamber, and also of the subsequent proceedings before the Constitutional Court.

The question arises whether Article 6 (Art. 6) is applicable to the proceedings concerned.

As to the question whether there was a determination of a criminal charge against the applicant, the Commission had regard to the relevant criteria established in the case-law (cf. Eur. Court H.R., Weber judgment of 22 May 1990, Series A no. 177, pp. 17-18, paras. 30-34). It notes as a starting-point that, according to the Austrian legal system, the offence at issue belonged to disciplinary law. The Commission attaches particular weight to the fact that the applicant was found guilty of having contravened provisions of the Austrian Civil Engineer Chamber Act in combination with the Rules of Professional Conduct, namely his duty to loyalty and his obligation not to disparage other civil engineers. These are specific rules governing the conduct of a particular professional group, and the offence defined is, by its nature, a disciplinary one for the purposes of the second criterion. The nature and degree of severity of the penalty imposed upon the applicant, namely a reprimand, and, in general, of the sanctions envisaged in the Civil Engineer Chamber Act, confirm this conclusion.

Consequently, the applicant was not charged with a criminal offence within the meaning of Article 6 (Art. 6) of the Convention.

Moreover, the decision to issue a reprimand against the applicant did not affect his right to practise as a civil engineer and did not, therefore, involve a determination of his civil rights and obligations (cf., No. 8249/78, Dec. 5.5.80, D.R. 20 p. 40).

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

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

For these reasons, the Commission, by a majority,

1. DECIDES TO ADJOURN THE EXAMINATION OF THE APPLICANT'S COMPLAINT ABOUT THE DECISION OF THE DISCIPLINARY COMMISSION OF THE FEDERAL ENGINEER CHAMBER OF 19 JULY 1989;

2. DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)