AS TO THE ADMISSIBILITY OF

Application No. 21554/93
by Ingrid JANSSEN
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 31 August 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
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 19 November 1992 by Ingrid JANSSEN against Germany and registered on 3 March 1993 under file No. 21554/93;

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 applicant is a German citizen, born in 1943 in Linz, Austria and now living in Hamburg. She is represented by Mr. K. Sojka, a lawyer practising in Hamburg.

The applicant works as a freelance non-medical practitioner (Heilpraktiker).

On 30 October 1987 the applicant was ordered by the Hamburg Regional Court (Landgericht) to abstain from advertising in the form of a newspaper article which had appeared on 11 December 1986 in a wide-spread newspaper (Bildzeitung).

The article was part of a series called "the great Hamburg non-medical practitioners, their assets, their successes, their prices". It was entitled "Ingrid Janssen helps - with plants and talks". The article shows two photos of the applicant, dressed in a white coat. On one of the photos she is measuring the blood pressure of a patient. The article mentions the case of Mrs. M. who alleged to have been cured by the applicant of gout and then speaks of the applicant's therapies which consist inter alia of giving injections with a natural product called procaine that allegedly positively influences the body's bio-energetic tensions. It also stresses that the applicant devotes a lot of time to each patient. The price for a consultation is equally mentioned.

The order was given at the request of the Hamburg Association of Non-medical Practitioners.

According to the findings of the court the publication in question had the effect of an advertisement as it not only informed about non-medical practitioners' methods but spoke of new therapies in comparison to unsuccessful therapies of other medical professions and informed about prices and healing successes. The public was thereby not in general informed about methods of non-medical practitioners but rather the activity of the applicant was praised as being successful and of good value. Therefore the article had to be considered as an advertisement. As an advertisement it ran counter to the professional standards of non-medical practitioners. The fact that the applicant was not a member of the plaintiff organisation was considered to be irrelevant. The applicant's own responsibility was seen in the fact that she had not seen to it that the article was phrased in a manner avoiding personal publicity.

The article in question not only violated the professional guidelines of non-medical practitioners but also violated Section 1 in conjunction with Section 11 of the Act on Medical Publicity (Gesetz über die Werbung im Heilwesen-HWG) and Section 1 of the Unfair Competition Act (UWG).

The applicant's appeal was rejected by the Hanseatic Court of Appeal (Oberlandesgericht) on 21 January 1988.

In the operative part of the judgment the appellate court reproduced a complete copy of the newspaper article in question and then listed the acts which it considered to constitute illicit advertisement namely having her name mentioned in connection with the formulations:

- "the great Hamburg non-medical practitioners, their assets, their successes, their prices";

- statements on alleged successful treatment of specific illnesses, on medicaments or methods and on case histories relating to successfully treated patients;

- photos showing her practising in professional dress;

The court considered it to be evident that the newspaper article in question had a publicity effect even if it also was of an informative character. Furthermore the applicant was considered to be answerable to the reproach of illicit advertisement as she had provided the necessary information to the newspaper without seeing to it that the article was drafted in an unobjectionable form.

She had thereby violated professional conduct rules. The court noted in this context that several professional organisations representing non-medical practitioners had agreed upon a code of conduct (Berufsordnung) banning professional advertising. Although these rules were considered to be private statutes they expressed the traditional and prevailing practices of the profession.

Consequently the applicant had violated the rule of the profession not to advertise.

In addition she had violated Section 1 of the Unfair Competition Act. The ban on advertisement was in the public interest as sick people were particularly vulnerable in respect of misleading publicity. The ban did not therefore violate constitutional rights as it was justified to limit freedom of expression in the interest of the protection of health.

The applicant then lodged a constitutional complaint which was

rejected by a group of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) on 9 September 1992. It is stated in the decision that the reasons given by the Regional Court were insufficient (fehlerhaft) inter alia because the court had not considered the principle of proportionality. It was however unlikely that the result of the civil court proceedings would have been different if that principle had been taken into account. In fact the applicant's legitimate interest in informing the public about the performance of non-medical practitioners could have been reached also without violating Section 1 of the HWG. The applicant could have foreseen that the use of photos showing her in a white coat taking care of her patients was not absolutely necessary and could only violate Section 1 of the UWG.

In any event the refusal to admit the applicant's case for a decision on the merits did not cause her any relevant disadvantages (aussergewöhnliche Nachteile). The applicant herself had submitted that the judgment complained of in practice had no negative effects as there was no question of having the incriminated newspaper article published again. Therefore the applicants concrete interest only related to the question of the costs of the proceedings. This unimportant interest did not however justify a decision on the merits by the Federal Constitutional Court.

COMPLAINTS

The applicant refers to the Barthold judgment and considers that the Regional Court's decision violates her rights under Articles 6, 7, 8, 9, 10 and 11 of the Convention as well as Article 1 of Protocol No. 1 to the Convention.

THE LAW

The applicant mainly complains of an interference with her right to impart information as guaranteed under Article 10 (Art. 10) of the Convention.

Article 10 para. 1 (Art. 10-1) provides:

> "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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

However, interference with this right is compatible with the Convention when it fulfils the requirements of para. 2 of Article 10 (Art. 10-2) which provides:

> "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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Commission first considers that Article 10 (Art. 10) is applicable in the present case as the restriction imposed on the applicant relates at least in part to the expression of "opinions" and the imparting of "information" (cf. Eur. Court H.R., Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, p. 17, paras 25 to 26).

As to the requirements set out in para. 2 the interference had its legal basis in Section 1 of the Unfair Competition Act, the purpose of which is the protection of the rights of businessmen against unfair practices by competitors and also the protection of the rights of consumers. This is a legitimate aim under Article 10 para. 2 (Art. 10-2) for the protection of the rights of others in a democratic society (see No. 7805/77, Dec. 5.5.79, D.R. 16 p. 68 [73]).

It cannot be found that the legislative provision in question was not adequately accessible and formulated with sufficient precision (cf. the above-mentioned Markt Intern judgment, pp. 18-19, paras. 28-30).

Relying on the judgment in the Barthold case (cf. Eur. Court H.R., judgment of 25 March 1985, Series A no. 90) the applicant mainly contests the "necessity" of the interference.

However, the present case is distinguishable from the Barthold case in that, contrary to that case the gist of the article here in question was not a specific information which the public had an interest in being familiar with. While in the Barthold case information was in question that related to objective facts, namely the absence of a nocturnal veterinary service and efforts in the profession to establish regulations concerning such emergency service, the present article relates only to subjective appreciations of a patient who believes she was cured by the applicant and of the applicant herself regarding the effectiveness of a natural product used by her in connection with the treatment of her patients. The incriminated article thus exclusively related to the applicant's personal way of exercising her profession, in sum the only information it conveyed is that of the applicant being a recommendable non-medical practitioner. There is no particular public interest in such information being made available. Having regard to the States' margin of appreciation which is particularly essential in the complex and fluctuating area of unfair competition and advertising (cf. Eur. Court H.R., Casado-Coca judgment of 24 February 1994, Series A No. 285, para. 50) the Commission concludes that the measure complained of could be considered "necessary in a democratic society".

Insofar as the applicant has likewise alleged violations of Articles 6 to 9 and 11 (Art. 6, 7, 8, 9, 11) of the Convention, she has not substantiated her complaints and the facts as submitted do not disclose any appearance of a violation of these Articles.

It follows that the application has to be rejected as being 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)