AS TO THE ADMISSIBILITY OF

Application No. 26907/95
by Karl-Christian KRETZSCHMAR
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 6 December 1994 by Karl-Christian KRETZSCHMAR against Germany and registered on 29 March 1995 under file No. 26907/95;

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 presented by the applicant, may be summarised as follows.

The applicant is a German national and resident in Hanover. He is a practising lawyer and notary by profession.

On 1 August 1987 the applicant subscribed to the "Norddeutscher Rundfunk", a German public broadcasting corporation with the status of an autonomous public-law corporation, and has since been paying a quarterly fee of DM 18 in respect of the radio in his car, which is used for professional purposes.

In November 1991 the applicant instituted proceedings before the Hamburg Administrative Court (Verwaltungsgericht) against the "Norddeutscher Rundfunk", claiming payment of DM 144 and interest as refund of the wireless licence fees paid in 1991, and further a declaratory judgment to the effect that he was not obliged to pay radio licence fees. He submitted that the levying of wireless licence fees amounted to a restriction of his right to receive information and violated Article 10 of the Convention. Moreover, he mainly used the radio in his car to receive traffic news and otherwise only listened to private radio stations.

On 25 June 1992 the Hamburg Administrative Court dismissed the applicant's action. The Administrative Court found that the applicant was obliged to pay wireless licence fees, pursuant to the relevant provisions of the Broadcasting (Finance) Treaties (Rundfunkgebühren-staatsvertrag/Rundfunkfinanzierungsstaatsvertrag).

As regards the applicant's argument that the fee was unlawful on the ground that, except for the traffic news, he only listened to private radio stations, the Administrative Court observed that traffic news were mainly broadcast by public broadcasting corporations. In any event, the wireless licence fee was not only levied from persons listening to programmes broadcast by public broadcasting corporations. In this respect, the Court considered that the wireless licence fee was levied in respect of the facility to receive broadcasting programmes, irrespective of the question whether and to what extent subscribers in fact listened to their radios. The current technical facilities required the wireless licence fees to be determined as flat rates, and the facility to receive broadcasting programmes constituted as such an advantage justifying a fee.

Moreover, the system of wireless licence fees could not be objected to under the freedom of expression, as guaranteed under the Basic Law (Grundgesetz). The Administrative Court, referring to the case-law of the Federal Constitutional Court (Bundesverfassungs-gericht), recalled that, in the dual - public and private - system of broadcasting in Germany, the public broadcasting ensured the 'basic supply' ('Grundversorgung') with programmes fully covering the variety of ideas and opinions, which was necessary in a democratic society. The wireless licence fees were a means to finance broadcasting and did not amount to an interference with the right to receive information. In particular the right to receive informations could not be understood as a right to receive information free of charge. The Administrative Court found that the same considerations applied to the applicant's arguments under Article 10 of the Convention.

On 28 December 1993 the Hamburg Administrative Court of Appeal (Oberverwaltungsgericht) dismissed the applicant's appeal. The Administrative Court of Appeal confirmed the findings and reasoning of the Administrative Court. As regards the applicant's submission that he did not intend to challenge the broadcasting system and the wireless radio fees in general, but only to the extent that the fee was levied from persons solely listening to private stations, the Administrative Court of Appeal noted that the applicant, according to his own statements, was listening to traffic news which were also broadcast by public broadcasting corporations.

On 20 May 1994 the Federal Administrative Court (Bundes-verwaltungsgericht) dismissed the applicant's request for leave to appeal. The applicant received the decision on 10 June 1994.

Meanwhile, on 22 February 1994 the Federal Constitutional Court, in proceedings for a decision on the compatibility of statutory law with the Basic Law referred to it by the Bavarian Administrative Court of Appeal, rendered a judgment on constitutional questions relating to wireless licence fees. The Federal Constitutional Court found inter alia that the freedom of reporting by means of broadcasts (Rundfunkfreiheit) required that broadcasting was not subjected to any undue influences by the State or any groups in society, but reflected the variety of subjects and opinions prevailing in society. In the dual system of public and private broadcasting, the rules on the financing of public broadcasting had to ensure that it could fulfil its functions in forming public opinion, in the entertainment and information of the general public, including its responsibilities in cultural matters. The appropriate means to finance public broadcasting was the levying of fees, which enabled it to offer a comprehensive programme independent of shares of audience and the placement of commercials. The deficits of private broadcasting in the choice of

subjects could only be accepted as long as the public broadcasting remained fully operable. It was therefore justified to levy wireless licence fees from all subscribers, i.e. all persons having a radio at their disposal, irrespective of their habits in using it.

COMPLAINTS

The applicant complains that the levying of the wireless licence fees amounts to a violation of this right to freedom of expression under Article 10 of the Convention. He submits that he only receives programmes from private stations.

As regards the conditions under Article 26 of the Convention, the applicant submits that, having regard to the Federal Constitutional Court judgment of 22 February 1994, he could not be expected to lodge a constitutional complaint with the Federal Constitutional Court.

THE LAW

The applicant complains that the levying of the wireless licence fees amounts to a violation of his right to freedom of expression under Article 10 (Art. 10) of the Convention.

Article 10 (Art. 10) provides 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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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, 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 notes that the applicant, in respect of the radio in his car used for professional purposes, subscribed to a public broadcasting corporation and that wireless licence fees are levied from him on a quarterly basis.

In the administrative court proceedings brought by the applicant, the Hamburg Administrative Court, as confirmed by the Hamburg Administrative Court of Appeal, found that the applicant was obliged to pay wireless licence fees, pursuant to the relevant provisions of the Broadcasting (Finance) Treaties. The fee in question was levied in respect of the facility to receive broadcasting programmes, irrespective of the question whether and to what extent subscribers in fact listened to their radios. In the dual - public and private - system of broadcasting in Germany, public broadcasting ensured the 'basic supply' ('Grundversorgung') with programmes fully covering the variety of ideas and opinions, which was necessary in a democratic society. The wireless licence fees were a means to finance broadcasting and did not amount to an interference with the right to receive information which could not be understood as a right to receive information free of charge.

Moreover, the Federal Constitutional Court, in its judgment of 22 February 1994 rendered in another set of proceedings, found that the rules on the financing of public broadcasting had to ensure that it

could fulfil its functions in forming public opinion, in the entertainment and information of the general public, including its responsibilities in cultural matters. The appropriate means to finance public broadcasting was the levying of fees, which enabled it to offer a programme independent of shares of audience and the placement of commercials. The deficits of private broadcasting in the choice of subjects could only be accepted as long as the public broadcasting remained fully operable. It was therefore justified to levy wireless licence fees from all subscribers, i.e. all persons having a radio at their disposal, irrespective of their habits in using it.

The Commission considers that under the relevant German legislation the right to receive information by means of broadcasting is subject to the condition of subscribing to one of the public broadcasting corporations and the payment of a wireless licence fee. Assuming that this system of financing public broadcasting amounts to an interference with the exercise of the freedom to receive information, as guaranteed under Article 10 para. 1 (Art. 10-1), the Commission finds that such interference was justified under paragraph 2 of Article 10 (Art. 10-2) for the following reasons.

The Commission finds that the levying of wireless licence fees, based on the relevant provisions of the Broadcasting (Finance) Treaties, was prescribed by law.

Moreover, the system of levying wireless licence fees from all subscribers, i.e. all persons having a radio at their disposal, was a means to ensure that public broadcasting could fulfil its functions in forming public opinion, in the entertainment and information of the general public, including its responsibilities in cultural matters, and that it could offer a comprehensive programme independent of shares of audience and the placement of commercials. The Commission finds that the rules on financing public broadcasting thereby pursue the aim of protecting the rights of others which is legitimate for the purposes of Article 10 para. 2 (Art. 10-2).

As regards the question whether the interference in question was "necessary in a democratic society", the Commission recalls that the Contracting States enjoy a margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the circumstances (cf., Eur. Court H.R., Informationsverein Lentia and Others judgment of 24 November 1993, Series A no. 276, p. 15, para. 35).

The Commission recalls the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely (cf., Eur. Court H.R., Informationsverein Lentia and Others judgment, loc. cit., p. 16, para. 38).

The Commission finds that the reasons advanced by the German courts regarding the levying of wireless licence fees as a means to finance public broadcasting are relevant and sufficient. Furthermore, having regard to the amount of the fee in question, there is no appearance of disproportionality to the legitimate aim pursued. The interference complained of was, therefore, necessary in a democratic society. There is, accordingly, no appearance of a violation of the applicant's right under Article 10 (Art. 10).

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.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)