AS TO THE ADMISSIBILITY OF

Application No. 24398/94
by Friedrich REBHANDL
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 16 January 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
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 8 June 1994 by Friedrich REBHANDL against Austria and registered on 15 June 1994 under file No. 24398/94;

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, as they have been submitted by the applicant, may be summarised as follows.

The applicant, born in 1921, is an Austrian national and resident at Schalchen. In the proceedings before the Commission he is represented by Mr. H. Schaller, a lawyer practising in Traiskirchen, Austria.

A. Particular circumstances of the case

On 4 May 1991 the Salzburg Public Prosecutor's Office (Staatsanwaltschaft) drew up a bill of indictment against the applicant. He was accused of having distributed between 1988 and 1990 the periodical "Der Volkstreue", which, having regard to the contents of the various issues of this periodical, constituted National Socialist activities (Betätigung im nationalsozialistischen Sinne) under S. 3 g of the National Socialism Prohibition Act (Verbotsgesetz), and of having exercised an undue influence on pending court proceedings (verbotene Einflußnahme auf ein Strafverfahren) within the meaning of S. 23 of the Media Act (Mediengesetz).

On 1, 2 and 24 April 1992 the trial took place before the Court of Assizes of the Salzburg Regional Court (Landesgericht) sitting with

a jury (Geschwornengericht).

At the hearing of 2 April 1992 the applicant's defence counsel lodged several requests for the further taking of evidence in order to prove that under the Nazi regime no gas chambers for the killing of Jews had existed. These requests were rejected by the Court of Assizes in accordance with the relevant case-law of the Austrian Supreme Court (Oberster Gerichtshof) on the ground that the killing of people in the concentration camps - by gassing or shooting and cremation - were a fact of common knowledge (notorische Tatsache). In any event, a historical expert had been heard on these matters.

At the hearing on 24 April 1992, the Court put two questions to the jury. The first question related to the offence of having pursued National Socialist activities in that he had distributed the periodical "Der Volkstreue", issues 2/88, 4/88, 2/89, 3/90. In this respect, the jury's attention was drawn to specific articles published in the periodical which denied the unlawfulness of the Austrian annexation and glorified this annexation and Hitler and other National Socialists; which denied the existence of the Austrian nation, the existence of the National Socialist concentration camps and the murder of millions of Jews, the moral and legal justification of the Nuremberg Trials and the German responsibility for the Second World War; which stated that the Jews had declared a financial and economic war against Germany, contained propaganda for a party with a program similar to that of the National Socialist Party and incited to hatred against the Jews, respectively. The second question related to the offence of having exercised an undue influence on the criminal proceedings pending against him in that he had criticised the opinion delivered by the historic expert at the trial in the context of an article in the periodical "Der Volkstreue".

The jury, by a unanimous verdict, found the applicant guilty of the offences of having pursued National Socialist activities and of having exercised an undue influence on the criminal proceedings pending against him.

The Court of Assizes convicted the applicant thereupon of the offences under S. 3 g of the National Socialism Prohibition Act and under the Media Act and sentenced him to one year's imprisonment and further imposed a fine of AS 900. The sentences were suspended on probation.

The applicant lodged a plea of nullity (Nichtigkeitsbeschwerde) and an appeal against sentence (Berufung). The Public Prosecutor's Office also lodged an appeal against sentence.

On 10 December 1993 the Supreme Court dismissed the applicant's plea of nullity. It increased the sentence imposed upon the applicant to one and a half year's imprisonment and a fine of AS 2,700, whereby the execution of part of the sentence, namely one year's imprisonment, was suspended on probation.

In its decision, the Supreme Court confirmed the findings of the Court of Assizes. It dismissed in particular the procedural complaints concerning the refusal of the applicant's requests for the further taking of evidence. The Supreme Court observed that the "mass murder under the National Socialist regime" and "other National Socialist crimes against humanity" formed part of the legal definition of the offence under S. 3 h of the National Socialist Prohibition Act, in force as from March 1992, and therefore constituted - ex lege - facts which did not require any further proof. The other requests either related to facts of common knowledge or were irrelevant in the circumstances.

As regards the fixing of the prison sentence, the Supreme Court found that, weighing all circumstances, the prison sentence in respect

of the offence under S. 3 g of the National Socialist Prohibition Act could not be fixed at the low end of the range of punishment. The same considerations applied as regards the fine.

The judgment was served on 11 January 1994.

B. Relevant domestic law

S. 3 g of the National Socialist Prohibition Act (Verbotsgesetz), as amended regarding the range of punishment in March 1992, provides as follows:

<German>

"Wer sich auf andere als die in den §§ 3 a bis 3 f bezeichnete Weise im nationalsozialistischen Sinne betätigt, wird, sofern die Tat nicht nach einer anderen Bestimmung strenger strafbar ist, mit Freiheitsstrafe von einem bis zu zehn Jahren, bei besonderer Gefährlichkeit des Täters oder der Betätigung bis zu 20 Jahren bestraft."

<Translation>

Whoever performs activities inspired by National Socialist ideas in a manner not coming within the scope of SS. 3 a to 3 f shall be liable to punishment by a prison sentence between one and ten years, and, if the offender or his activity is particularly dangerous, by a prison sentence of up to 20 years, unless the activity is punishable under a different provision stipulating a more serious sanction."

According to S. 3 h of the Prohibition Act, anyone who, in particular in public media, denies, grossly minimises, approves or justifies the "mass murder under the National Socialist regime" ("nationalsozialistischer Völkermord") or other "National Socialist crimes against humanity" ("nationalsozialistische Verbrechen gegen die Menschlichkeit"), is also punishable pursuant to S. 3 g.

COMPLAINTS

1. The applicant complains under Article 6 para. 3 (d) of the Convention about the alleged unfairness of the criminal proceedings against him. The applicant considers in particular that his requests to take evidence as to the truth of the incriminated publications were unduly dismissed. He challenges the courts' findings that the existence of gas chambers used for mass murder in the Nazi concentration camps were historical facts and therefore common knowledge which did not call for a further taking of evidence.

2. The applicant further complains under Article 3 of the Convention about the range of punishment under S. 3 g of the National Socialist Prohibition Act as such. He also considers that, taking into account his wife's state of health, his sentence of one year and six months' imprisonment, only one year being suspended on probation, amounts to inhuman treatment.

3. Moreover, the applicant complains that his conviction by the Court of Assizes on 24 April 1992, as partly amended by the Supreme Court on 10 December 1993, violates his right to freedom of expression under Article 10 of the Convention. He considers that statements relating to historical events should not be punishable.

THE LAW

1. The applicant complains about the alleged unfairness of the criminal proceedings against him. The applicant considers in particular that his requests to take evidence as to the truth of the

incriminated publications were wrongly dismissed. He challenges the courts' findings that the existence of gas chambers used for mass murder in the Nazi concentration camps were historical facts and therefore common knowledge which did not call for a further taking of evidence. He invokes Article 6 para. 3 (d) (Art. 6-3-d) of the Convention.

Article 6 (Art. 6), as far as relevant, provides as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
...

3. Everyone charged with a criminal offence has the following minimum rights:
...

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
..."

The Commission finds no indication that the applicant, assisted by counsel, could not duly present his arguments in defence or could not effectively exercise his defence rights.

As regards his complaints about the taking and assessment of evidence, the Commission recalls that as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. More specifically, Article 6 para. 3 (d) (Art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it does not require the attendance and examination of every witness on the accused's behalf (cf., Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

The Commission notes that the Court of Assizes, in the course of the trial, dismissed the applicant's requests for the taking of further evidence, finding that the killing of people in the concentration camps - by gassing or shooting and cremation - were a fact of common knowledge. In this respect, the Court of Assizes referred to the case-law of the Austrian Supreme Court. The Supreme Court, in its decision of 10 December 1993, confirmed the findings of the first instance court and also observed that the existence of mass murder in the gas chambers of National Socialist concentration camps and other National Socialist crimes against humanity were constituent elements of a further offence under the National Socialist Prohibition Act and - ex lege - did not require any taking of evidence.

In these circumstances, the Commission finds no sufficient grounds to conclude that the decision to dismiss the applicant's requests to take further evidence was incompatible with Article 6 (Art. 6) (cf., No. 9235/81, Dec. 16.7.82, D.R. 29 p. 194).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

2. The applicant further complains under Article 3 (Art. 3) of the Convention about the range of punishment under S. 3 g of the National Socialist Prohibition Act as such. He also considers that, taking into account his wife's state of health, his sentence of one year and six months' imprisonment, only one year being suspended on probation, amounts to inhuman treatment.

The Commission recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is relative and must take account of all the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the person subjected to it (e.g. Eur. Court H.R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 162). In order for a punishment to be degrading and in breach of Article 3 (Art. 3), the humiliation or debasement involved must attain a particular level and must in any event be other than the usual element of humiliation associated with imprisonment after a criminal conviction. Such an examination is also relative and depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution (Eur. Court H.R., Tyrer judgment of 25 April 1978, Series A no. 26, p. 15, para. 30).

The Commission notes that the applicant was convicted by the Austrian Courts of an offence with a statutory punishment to a prison term between one and ten years, in particularly aggravating circumstances up to 20 years. The Supreme Court, weighing all circumstances, sentenced the applicant to one and a half year's imprisonment, one year thereof being suspended on probation.

The Commission finds no appearance that the sentence of imprisonment imposed upon the applicant would go beyond the threshold set by Article 3 (Art. 3) of the Convention.

Consequently, this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

3. Moreover, the applicant complains that his conviction by the Court of Assizes on 24 April 1992, as partly amended by the Supreme Court on 10 December 1993, of an offence under the National Socialist Prohibition Act violates his right to freedom of expression under 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. Such interference is in breach of Article 10 (Art. 10), unless it is justified under paragraph 2 of Article 10 (Art. 10-2), i.e. it must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 (Art. 10-2) and be "necessary in a democratic society".

The interference was "prescribed by law", namely the relevant provisions of the National Socialist Prohibition Act.

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". It remains to be ascertained whether the interference can be regarded as having been "necessary in a democratic society".

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 have a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with a European supervision. Thus the measures taken at national level must be justifiable in principle and proportionate (cf. Eur. Court H.R., Observer and Guardian judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59).

The Commission finds that the provisions of the National Socialist Prohibition Act, and their application in the present case, aimed to secure the peaceful coexistence of the population in Austria. The Commission therefore has also had regard to Article 17 (Art. 17) of the Convention. This provision reads as follows:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 17 (Art. 17) accordingly 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, inter alia the right to freedom of expression under Article 10 (Art. 10) (cf. No. 12194/86, Dec. 12.5.88, D.R. 56 p. 205; No. 21318/93, Dec. 2.9.94, not published; No. 21128/92, Dec. 11.1.95, D.R. 80-A p. 94; No. 25096/94, Dec. 6.9.95, not published).

As regards the circumstances of the present case, the Commission notes the findings of the Court of Assizes concerning the contents of the periodical distributed by the applicant and the publications contained therein.

The Commission finds that the applicant's publications ran counter one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace, and further reflect racial and religious discrimination. The public interests in the prevention of crime and disorder in the Austrian population due to offences under the National Socialist Prohibition Act, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to distribute publications denying in particular the existence of the gassing of Jews in the concentration camps under the Nazi regime and the further incriminated publications relating to the National Socialist regime (see also No. 9235/81, Dec. 16.7.82, D.R. 29 p. 194; No. 25096/94, Dec. 6.9.95).

In these circumstances, there were relevant and sufficient reasons for the applicant's conviction. The judgment of the Court of Assizes at the Salzburg Regional Court of 22 April 1992, as confirmed and partly amended by the Supreme Court on 10 December 1993, can be considered therefore, "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 this part of the application is also manifestly ill-founded with 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)