AS TO THE ADMISSIBILITY OF

Application No. 26602/95
by W. R.
against Austria

The European Commission of Human Rights sitting in private on 30 June 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 13 February 1995 by W. R. against Austria and registered on 1 March 1995 under file No. 26602/95;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 14 February 1997 and the observations in reply submitted by the applicant on 25 March 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1954, is an Austrian national. He is a lawyer by profession and is residing and practising in Mauerkirchen.

A. Particular circumstances of the case

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

On 30 April and 15 May 1985, respectively, the president of the Mauerkirchen District Court (Bezirksgericht) laid a disciplinary information against the applicant. Subsequently, preliminary investigations were carried out.

On 15 June 1987 the Disciplinary Council of the Upper Austrian Bar Chamber (Disziplinarrat der Oberösterreichischen Rechtsanwaltskammer) decided to open disciplinary proceedings against the applicant.

On 16 May 1988 the Disciplinary Council joined a further set of disciplinary proceedings against the applicant, which had been started in 1987, to the above proceedings and held a hearing in presence of the applicant.

On 18 January 1989 the Disciplinary Council, after having held a further hearing in presence of the applicant, convicted him on three counts. The Disciplinary Council found that he had, in two sets of civil proceedings before the Mauerkirchen District Court, wrongly accused the competent judge of having made incorrect entries in the records and that he had, in a set of civil proceedings before the Ried Regional Court (Landesgericht), repeatedly interrupted the judge and put questions to the party without having obtained the judge's permission to do so. The Disciplinary Council, referring to S. 2 of the Guidelines for the Professional Conduct of Lawyers (Richtlinien für die Ausübung des Rechtsanwaltsberufes, für die Überwachung der Pflichten des Rechts-anwaltes und für die Ausbildung der Rechtsanwaltsanwärter, RL-BA 1977), found that the applicant had thereby committed a breach of his professional duties and had infringed the profession's honour and reputation. It ordered him to pay a fine of ATS 5,000.

The Disciplinary Council acquitted the applicant on three other counts. In particular, it found that he had, while acting as the substitute for another lawyer at a hearing in civil proceedings before the Mauerkirchen District Court, stated that the judge's opinion that a lease and not a tenancy contract was at issue was ridiculous. This statement contained a strong criticism, coloured by personal emotion. However, it fell just short of an act which would have to be qualified as requiring a disciplinary measure. The criticism was apparently the result of a serious tension between the applicant and the judge. In the circumstances of the case, however, it did not amount to a breach of professional duties.

On 25 January 1993 the Appeals Board (Oberste Berufungs- und Disziplinarkommission) dismissed the applicant's appeal. Upon the appeal of the Bar Chamber, the Appeals Board confirmed the Disciplinary Council's finding of guilt as regards the three counts set out above, and also found the applicant guilty as regards two of the counts on which he had been acquitted by the Disciplinary Council.

The Appeals Board found in particular that the applicant's statement that the judge's legal view was ridiculous also amounted to a breach of his professional duties. Referring to S. 9 of the Lawyers Act (Rechtsanwaltsordnung), it noted that a lawyer was entitled to submit whatever he considered expedient to argue his client's case. This could also make it necessary for a lawyer to emphatically oppose

the judge's opinion, in particular if the judge, in the course of a hearing, stated a legal view which was disadvantageous to his client. Such an interpretation of the Lawyers Act was required in view of the right to freedom of expression as guaranteed by Article 10 of the Convention. Nevertheless, the criticism of a judge's legal opinion had to be made with the necessary objectivity. Not each and every small slip resulting from the emotion of the moment constituted a violation of S. 2 of the Guidelines for the Professional Conduct of Lawyers. However, in the present case, the applicant had breached his professional duties. There was no reason for him to oppose a doubtful or incorrect view of the judge as it followed clearly from the file that in fact a lease contract was at issue. It rather appeared that the applicant's statement was the result of the tense atmosphere between him and the judge and was aimed at provoking the latter.

In the same decision the Appeals Board decided on appeals brought by both the applicant and the Bar Chamber in two further sets of disciplinary proceedings, which were started in 1988 and 1991, respectively. As to the proceedings started in 1991, the Appeals Board, noting that the applicant had requested his acquittal, while the Bar Chamber had requested that the fine imposed on him by the Disciplinary Council be replaced by a three months' prohibition to exercise his profession, found that the Disciplinary Council, in its decision of 7 October 1991, had failed to establish the relevant facts. Consequently, the Appeals Board quashed this decision and referred the case back to the Disciplinary Council. As to the proceedings started in 1988, the Appeals Board found the applicant guilty on two counts. Noting that the applicant had been found guilty on altogether seven counts of disciplinary offences, the Appeals Board, referring to the 1990 Disciplinary Act (Disziplinarstatut 1990), imposed a fine of ATS 25,000 on him.

On 17 May 1993 the applicant lodged a complaint with the Constitutional Court (Verfassungsgerichtshof). He complained in particular about the length of the disciplinary proceedings against him and about the fact that the Appeals Board had not had regard to the duration of these proceedings. As regards his statement that the judge's view was ridiculous, the applicant pointed out that he had only acted as another lawyer's substitute. Admittedly he had not pleaded that lawyer's legal opinion with style. However, the disciplinary conviction violated his right to freedom of expression.

On 12 October 1994 the Constitutional Court dismissed the applicant's complaint. If found in particular that the Appeals Board had dealt with a number of different sets of disciplinary proceedings against the applicant and a variety of different facts. In the circumstances of the case, the duration of the proceedings was not excessive. As regards the applicant's further complaints, the Constitutional Court found that his submissions did not disclose a violation of his right to freedom of expression or any other right guaranteed by the Constitution.

B. Relevant domestic law

S. 12 of the 1872 Disciplinary Act (Disziplinarstatut 1872) provided for the following disciplinary penalties: a written reprimand, a fine of up to ATS 360,000, a prohibition to practise as a lawyer for a period not exceeding one year and being struck off the bar roll.

S. 16 of the 1990 Disciplinary Act (Disziplinarstatut 1990), which entered into force on 1 January 1991, provides for the same disciplinary penalties, with the modification that the fine may go up to ATS 500,000.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention about the length of the disciplinary proceedings against him. He argues that these proceedings could eventually have resulted in a temporary or permanent prohibition to exercise his profession.

2. The applicant complains under Article 10 of the Convention that the decision by the Appeals Board, as regards the finding that he had insulted a judge by stating that the latter's legal view was ridiculous, violated his right to freedom of expression.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 13 February 1995 and registered on 1 March 1995.

On 15 October 1996 the Commission decided to transfer the case to the Plenary Commission.

On 21 October 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 14 February 1997, after an extension of the time-limit fixed for that purpose. The applicant replied on 25 March 1997.

THE LAW

1. The applicant complains under Article 6 (Art. 6) of the Convention about the length of the disciplinary proceedings against him.

Article 6 para. 1 (Art. 6-1), so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

The Government submit that Article 6 (Art. 6) of the Convention is not applicable to the present case. As to the civil head of this Article, the Government argue that the disciplinary proceedings at issue did not affect the applicant's right to practise as a lawyer and hence his civil rights and obligations. In particular, the penalty of being struck off the bar roll may only be applied in the most serious cases, namely when a lawyer has obtained entry in the roll by deceit or has worked during a temporary prohibition of his right to practise his profession. Further, the degree of the disciplinary penalty must be proportionate to the extent of guilt and the disadvantage caused by the offence. In the circumstances of the case, the applicant did not have reasons to fear that his right to practise his profession would be suspended nor was any such penalty imposed on him.

As to the criminal head of Article 6 (Art. 6), the Government, referring to the case-law of the Convention organs, argue that the proceedings are not regarded as criminal proceedings in domestic law, and that they are designed to ensure that practising lawyers comply with certain professional rules of conduct. As to the severity of the sanction they point out that a fine of ATS 25,000 was actually imposed on the applicant and that the law provides for a fine of up to ATS 500,000. They argue that the amount of the maximum penalty alone does not justify the qualification of the proceedings as criminal. They point out in particular that the fine may not be converted into a term of imprisonment in case of default and that there are no other circumstances which would bring the case into the criminal sphere.

The applicant contests the Government's view. He argues that the disciplinary proceedings concerned his civil rights and submits in particular that the Bar Chamber, in its appeal, requested a three months' prohibition of his right to practise as a lawyer.

As regards the length of the proceedings the Government submit that the case was complex. They point out, in particular, that a disciplinary information was laid against the applicant in 1985 which necessitated extensive investigations. On 15 June 1987 the Disciplinary Council decided to open disciplinary proceedings. Also in 1987, a further disciplinary information was laid against the applicant. The two sets of proceedings were joined in 1988 and, following two oral hearings, the Disciplinary Council gave its decision on 18 January 1989. Meanwhile, in 1988, a further set of disciplinary proceedings had been opened. They were joined to the previous proceedings on appeal and the Appeals Board gave its decision on 25 January 1993. It was confirmed by the Constitutional Court on 12 October 1994. Given that there were several sets of disciplinary proceedings against the applicant concerning numerous counts, the Government argue that the duration of the proceedings was not excessive.

The applicant maintains that the disciplinary proceedings lasted unreasonably long. He alleges that there were a number of delays imputable to the authorities. According to the applicant the investigations were terminated a couple of months before the Disciplinary Council, on 15 June 1987, decided to open proceedings against him. It took more than seven months until the decision regarding the opening of proceedings was served on him, there was a lapse of seven months between the two hearings before the Disciplinary Council and, finally, after he had filed his appeal in May 1990, it took more than two and a half years until a decision was taken by the Appeals Board.

The Commission finds that the present application requires a determination of whether Article 6 para. 1 (Art. 6-1) of the Convention is applicable to the proceedings at issue and, if so, whether the applicant had a hearing within a reasonable time as required by that provision.

After examination of these issues in the light of the parties' submissions, the Commission considers that they raise complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits. The Commission concludes, therefore, that this part of the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant complains under Article 10 (Art. 10) of the Convention that the decision by the Appeals Board, as regards the finding that he had insulted a judge by stating that the latter's legal view was ridiculous, infringed his right to freedom of expression.

Article 10 (Art. 10), so far as relevant, reads 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 ...
>
> 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 protection of the reputation or rights of others, ..., or for maintaining the authority and impartiality of the judiciary."

The Government submit that the interference with the applicant's right to freedom of expression was justified under Article 10 para. 2 (Art. 10-2) of the Convention, as being necessary for the protection of the reputation of others. They argue in particular that the Appeals Board, in its decision of 25 January 1993, discussed the applicant's incriminated statement in great detail, weighing his right to freedom of expression against the judge's right to protection of his reputation and taking all the circumstances of the case into account. The Appeals Board, thus, came to the conclusion that the applicant had reacted in an excessive manner to a legally correct opinion expressed by the judge. Finally, the Government point out that the disciplinary measure against the applicant also served to protect the authority of the judiciary. Given the special role of the judiciary and the unfoundedness of the criticism expressed by the applicant, the Government argue that the interference with the applicant's right to freedom of expression has to be regarded as necessary.

The applicant contests the Government's view. He submits in particular that, in the civil proceedings in which he made the incriminated remark, he acted as a substitute for another lawyer. He concedes that he did not plead that lawyer's opinion with style, but argues that it is excessive to sanction such a remark, which was moreover made in a situation of serious tensions between him and the judge concerned.

The Commission considers that the decision of 25 January 1993 by the Appeals Board finding the applicant guilty of having breached his professional duties and imposing a fine of ATS 25,000 on him for having, at a court hearing in civil proceedings, called the legal view of the judge ridiculous, constituted an interference with his right to freedom of expression. Such interference is in breach of Article 10 (Art. 10), unless it is justified under paragraph 2 of this Article, i.e. it must be "prescribed by law" and have a legitimate aim and be "necessary in a democratic society".

The interference at issue was based on S. 16 of the 1990 Disciplinary Act and S. 2 of the Guidelines for the Professional Conduct of Lawyers. Further, it served a legitimate aim, namely to protect the reputation of others and to maintain the authority of the judiciary.

As regards the necessity of the interference, the Commission recalls that the adjective "necessary" implies a "pressing social need". When assessing whether the interference complained of falls within the margin of appreciation enjoyed by the Contracting States, the Convention organs have to determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (Eur. Court HR, Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59; Barthold v. Germany judgment of 25 March 1985, Series A no. 90, pp. 24-25, para. 55).

The Commission recalls that it has recently declared inadmissible two similar cases under Article 10 (Art. 10) concerning insulting remarks made by lawyers about judges in written submissions in the context of court proceedings. In one case, disciplinary proceedings were conducted against the applicant and he was found guilty of having violated his professional duty of objectivity. He received a reprimand and a fine of DM 4,000 was imposed on him. In the other case, criminal proceedings were conducted against the applicant. He was found guilty of insult and a fine of DM 3,000 was imposed on him. In both cases the Commission, having particular regard to the detailed reasoning given by the domestic courts and the balance struck by them between the lawyer's concern to protect the interests of his client and the need to protect the reputation and rights of the judges concerned, found

that the interference with the respective applicant's right to freedom of expression had, in the circumstances of these cases, been "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention (cf. No. 30549/96, Meister v. Germany, Dec. 10.4.97 and No. 30339/96, Bossi v. Germany, Dec. 15.4.97, both unpublished).

The Commission notes that the present case concerned a variety of disciplinary charges against the applicant. However, his complaint under Article 10 (Art. 10) is limited to the charge of having breached his professional duties by insulting a judge stating that his legal view was ridiculous. The Disciplinary Council acquitted the applicant as regards this charge. It found that the impugned statement contained a strong criticism, coloured by personal emotion. However, it just fell short of an act which would have to be qualified as requiring a disciplinary measure. The criticism was apparently the result of a serious tension between the applicant and the judge. The Appeals Board, in contrast, found the applicant guilty of having breached his professional duties by making this statement. It examined the issue of the applicant's professional conduct also under the angle of the right to freedom of expression, with an explicit reference to Article 10 (Art. 10) of the Convention, and came to the conclusion that the applicant, by publicly qualifying the judge's legal view as "ridiculous" had gone beyond the limits of permissible criticism. The decision expressly recognises that an attorney, in the interest of the party he is representing, has not only the right but also the duty to reject the legal opinion of a judge, if he considers that opinion wrong. He may do so in rather strong terms - it is in this context that Article 10 (Art. 10) of the Convention is referred to - but he must always refrain from personal insult. The Appeals Board further considered that the applicant's statement resulted from the tense atmosphere between him and the judge and was aimed at provoking the latter, all the more so as the judge's opinion had been objectively correct.

The Commission notes that the Appeals Board gave very detailed reasons for its decision. It had regard to the applicant's freedom of expression and, taking into account the tension which apparently existed between the applicant and the judge, it carefully weighed the applicant's professional interest in pleading his client's case and in voicing his criticism against the judge's interest in being protected against personal insult. In conclusion, the Commission finds that the reasons adduced by the Appeals Board were "relevant" and "sufficient" for the purposes of Article 10 para. 2 (Art. 10-2).

Moreover, taking into account that the sanction imposed consisted only in a fine of ATS 25,000, the interference complained of does not appear disproportionate to the legitimate aim pursued.

In these circumstances, the interference complained of can be regarded as "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10) 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 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 ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint about the length of the disciplinary proceedings against him;

DECLARES INADMISSIBLE the remainder of the application.

H.C. KRÜGER S. TRECHSEL

Secretary
to the Commission

President
of the Commission