AS TO THE ADMISSIBILITY OF

Application No. 19520/92
by A.W.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 1 July 1992, the following members being present:

MM. E. BUSUTTIL, Acting President of the First Chamber
F. ERMACORA
A. S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C. L. ROZAKIS
Mrs. J. LIDDY
MM. M. P. PELLONPÄÄ
B. MARXER

Mr. M. de SALVIA, Secretary to the First 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 27 January 1992 by A.W. against Austria and registered on 17 February 1992 under file No. 19520/92;

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 applicant is an Austrian lawyer born in 1949 and living in Linz-Urfahr.

On 19 June 1989 a disciplinary sanction was imposed on the applicant in the form of a fine of 7,000 AS by the Disciplinary Council of the Upper Austrian Bar Association (Disziplinarrat der Oberösterreichischen Rechtsanwaltskammer) for having impaired the honour and reputation of the legal profession by

- having stated, in a letter of 9 September 1988 addressed to the Chemie Holding AG, inter alia: "In particular my client is in no way disposed to pander to a flop company managed by socialists" ("Insbesondere ist mein Mandant in keiner Weise bereit, sozialistisch geführten Pleitebetrieben Vorschub zu leisten");

- having without reason left a hearing on 28 August 1987 in the matter 9 Cg 81/88 before the Linz Regional Court and having at the same time caused his client, one of the two defendants, to leave the courtroom as well and having thereby deprived his client of the possibility of participating in the further proceedings.

The applicant's appeal was rejected by the Supreme Appeal and Disciplinary Commission for Lawyers in Vienna on 5 November 1990.

The applicant then lodged a constitutional complaint which was rejected by the Constitutional Court (Verfassungsgerichtshof) on 30 September 1991.

The Constitutional Court denied a violation of the right to freedom of expression as it was necessary in a democratic society to prevent lawyers from making insulting or inappropriate remarks violating the rights of others.

The Constitutional Court underlined that it could not examine whether or not the law had been applied correctly. It could only examine whether it had been applied in an arbitrary manner amounting to lawlessness (Gesetzlosigkeit). This was denied.

Insofar as the applicant had submitted in respect of the second disciplinary offence that in the civil proceedings in question his client's right to a fair trial had been violated and it had therefore been justified to leave the courtroom, the Constitutional Court stated that violations of procedural rights in the civil proceedings could and should have been complained of by way of remedies which were at the parties' disposal in these proceedings.

COMPLAINTS

The applicant submits in respect of the first disciplinary offence that he was sanctioned because he had dared to denounce the mismanagement of a political party. He considers that the incriminated statement was justified for the defence of the interests of his client who had been dismissed by the company in question for unjustified reasons as was confirmed in the Labour Court proceedings.

As to the second disciplinary offence the applicant denies that he deprived his client of further participation in the civil proceedings or caused him any damage by having induced him to leave the courtroom during an oral hearing of his case. He considers his action to have been justified because the court had replaced an expert and had without his or his client's consent appointed an expert who was his personal enemy. In these circumstances it had been in his client's interest to leave the oral hearing. He points out that no complaints had been raised by his client. Rather the disciplinary proceedings relating to the incident in the civil proceedings had been instituted at the instance of the civil court.

The applicant invokes the right to freedom of expression which he considers violated with regard to the charges laid against him in the disciplinary proceedings.

THE LAW

The applicant, a lawyer, complains of a disciplinary sanction in the form of a fine which in his opinion constitutes an interference with his right to freedom of expression as guaranteed by Article 10 (Art. 10) of the Convention.

However, interferences with this right are compatible with the Convention when they fulfil the requirements of paragraph 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, ... , for the protection of the reputation or rights of others, ... ".

The Commission considers that there has been an interference with the applicant's right under Article 10 (Art. 10).

As to the requirements under paragraph 2 of the provision, the applicant does not dispute that the interference complained of is based on domestic law.

It is also clear that the interference served the purpose of protecting the rights of others, namely in one case the opponent in a labour law dispute and in the second case the applicant's own client as well as the public in general which has an interest in the proper functioning of the system of justice. In addition the disciplinary law of lawyers serves the purpose of protecting the legal profession by maintaining high standards of professional conduct.

The applicant mainly seems to dispute the necessity and proportionality of the measure in question. However according to the case-law of the European Court of Human Rights the Contracting States have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference (see Markt Intern Verlag GmbH Klaus Beermann judgment of 20 November 1989, Series A no. 165). Such a margin is essential in matters of professional conduct and supervision by the Convention organs in this respect is therefore limited to the question whether the measures taken at national level are justifiable in principle and proportionate (see, mutatis mutandis, the afore-mentioned judgment, p. 20, para. 33).

In order to establish whether the interference complained of was proportionate it is necessary to weigh the requirements of the protection of the rights of others against the applicant's right to exercise his profession freely and in the best interests of his clients. It is clear from the wording of the applicant's letter of 9 September 1988 that it was meant to have a dishonouring effect. Similarly his action in the civil proceedings can be considered as a demonstration of disrespect with regard to all other persons present at the oral hearing. It is true that a lawyer is in principle entitled to use harsh language and action in order to safeguard the interests of his client, but it cannot be found in the particular circumstances of the present case that the applicant had no other choice in best defending his client's case. Consequently the measure complained of does not amount to a disproportionate interference.

The application therefore has to be rejected as being manifestly ill-founded, in accordance with 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 Acting President of the First Chamber

(M. de SALVIA) (E. BUSUTTIL)