AS TO THE ADMISSIBILITY OF

Application No. 21318/93
by Walter OCHENSBERGER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 2 September 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 13 January 1993 by Walter OCHENSBERGER against Austria and registered on 3 February 1993 under file No. 21318/93;

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 an Austrian citizen, born in 1941 and resident in Sibratsgfäll (Vorarlberg). Before the Commission he is represented by Mr. H. Schaller, a lawyer practising in Traiskirchen.

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

A. Particular circumstances of the case

On 30 May 1991 the Feldkirch Public Prosecutor's Office drew up a bill of indictment in which he accused the applicant of having edited, published and distributed in 1989 and 1990 articles in the periodical "Sieg-AJ-Pressedienst", which, having regard to the contents of these articles, constituted National Socialist activities (Betätigung im nationalsozialistischen Sinne) under Section 3g of the National Socialism Prohibition Act (Verbotsgesetz).

On 29 November and 9 December 1991 the trial against the applicant took place before the Court of Assizes of the Feldkirch Regional Court sitting with a jury (Geschwornengericht).

According to the transcript of the hearing of 29 November 1991 the Public Prosecutor, with the agreement of the defence, marked certain parts of the incriminated articles with red ink which were then read out in court. Copies of the marked issues of the periodical

concerned were distributed to the members of the jury.

At the same court hearing the applicant's lawyer also made numerous requests for the taking of evidence. He proposed that the Court of Assizes should obtain reports by experts in contemporary history, theology, ethnology, anthropology, ecology, journalism and economic history. These expert opinions should prove the truth of the incriminated articles, in particular on the dangers of uncontrolled and unrestrained immigration for the local population and its ethnic purity, on systematic malpractice of Jews in the United States, on the guilt for causing the Second World War and on the purpose and operation of concentration camps by the Third Reich. These requests were rejected by the bench of the Court of Assizes which found that they were phrased too generally to allow the taking of specific evidence and, in any event, concerned matters of legal qualification involving value judgments for which the opinions of the requested experts were irrelevant. Moreover, in respect of historical facts, the evidence requested by the applicant concerned matters of common knowledge in regard to which evidence need not be taken.

On 9 December 1991 the Court of Assizes convicted the applicant of the offence under Section 3g of the National Socialist Prohibition Act and sentenced him to three years' imprisonment.

The Court of Assizes found that in 1989 and 1990 the applicant had engaged in National Socialist activities by having edited, published and distributed articles and contributions in the periodical "Sieg-AJ-Presse-Dienst" specified in the judgment. These articles and contributions, as apparent from their lay-out, presentation, pictures and contents, had incited people to racial hatred, antisemitism and xenophobia, glorified the Germanic race in a biased manner and denied the sovereignty of Austria. They also presented in a biased and propagandist manner the actions and aims of the Third Reich dominated by Adolf Hitler, in particular by justifying the installation of concentration camps in the territory of the Third Reich and in the territories occupied in the course of the Second World War, by minimising the killings therein and by putting the blame for those killings on the allied powers. As regards the editing, publishing and distribution of further articles specified in the judgment, the Court of Assizes acquitted the applicant of the offence under Section 3g of the National Socialist Prohibition Act.

On 17 July 1992 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity but granted his appeal and reduced the sentence to two years' imprisonment.

As regards the applicant's argument that his conviction exceeded the bill of indictment, the Supreme Court noted that the Public Prosecutor in his bill of indictment had stated that the entire contents of the incriminated articles were the subject of the charge, that at the trial he had marked particular passages which had been read out in court and that the judgment referred to the entire articles. The Supreme Court found that the Public Prosecutor could not be deemed to have partly abandoned the charge against the applicant since he had made no such unequivocal statement, either expressly or implicitly, at the trial. As was apparent from the transcript of the hearing, the purpose of marking and reading out in court certain passages of the incriminated articles was to show the opinion of their authors by pointing to salient examples.

The Supreme Court also found that the Court of Assizes had acted correctly when it refused to take the evidence proposed by the applicant.

It found, in particular, that the applicant's request for expert reports on ethnology, anthropology, ecology, contemporary history and journalism, in order to prove that all the dangers foreseen by the

applicant in an uncontrolled immigration policy in fact caused serious prejudice to the local Austrian population, was irrelevant to the allegation of incitement to racial hatred. Moreover, the request for expert reports on American contemporary and economic history, to prove that the description of malpractices of Jews in the United States was based on concrete facts, was also irrelevant to this accusation.

The requested expert opinion on contemporary history, to prove that the articles concerning the concentration camps were true, had no relevance for the allegations that the applicant had incited people to racial hatred, had presented in a biased and propagandist way the acts of violence, in breach of human rights, which had been committed by the National Socialist regime, and had minimised the killings in the concentration camps.

The further requests for evidence to prove that the demand for the "Anschluss" of Austria to the German Reich, and the claim that antisemitsm and the fight against large scale immigration were not part of the typical National Socialist ideology, were also irrelevant to the charge. It was common knowledge, requiring no evidence, that anti-semitism was not an exclusive idea of National Socialism and that there had been demands for the "Anschluss" immediately after the First World War.

With respect to the further request for an expert report on an aspect of contemporary German history, the applicant had failed to indicate why such an opinion was necessary.

As regards the applicant's sentence, the Supreme Court noted that meanwhile the statutory range of punishment had been reduced, and found that, in view of this development in the law, the applicant's sentence had also to be reduced.

B. Relevant domestic law

Section 3g of the National Socialist Prohibition Act (Verbotsgesetz) reads as follows:

> "Whoever performs activities inspired by National Socialist ideas in a manner not coming within the scope of Section 3a to 3f shall be liable to punishment by a prison sentence between 5 and 10 years, and if the offender or his activity is particularly dangerous, by a prison sentence of up to 20 years, unless the act is punishable under a different provision stipulating a more serious sanction. The court may also pronounce the forfeiture of property."

By an amendment which entered into force on 20 March 1992, the range of punishment was amended from 5 to 10 years to 1 to 10 years.

COMPLAINTS

1. The applicant complains under Article 10 of the Convention that his conviction for National Socialist activities violated his right to freedom of expression. He submits that, in a non-totalitarian democratic State based on the rule of law, political activities like his should not be liable to punishment and that the provisions on prohibition against activities involving the expression of National Socialist ideas were not sufficiently precise.

2. The applicant also complains about the alleged unfairness of the criminal proceedings conducted against him. He submits that the defence was gravely misled on the actual contents of the charge against him. While the Public Prosecutor in his bill of indictment initially stated that the entire contents of the articles concerned were the subject of the charge, he had at the trial, on 29 November 1991, reduced the charge to specific passages in these articles. Nevertheless, the judgment referred again to the entire articles. The

applicant further submits that the Court of Assizes refused to take certain expert evidence proposed by the defence and refers in this respect to the whole of his plea of nullity to the Supreme Court. He relies on Article 6 para. 3 (a) and (d) of the Convention.

THE LAW

1. The applicant complains under Article 10 (Art. 10) of the Convention that his conviction for National Socialist activities violated his right to freedom of expression.

Article 10 (Art. 10) of the Convention, as far as material to the case, 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 and regardless of frontiers. ...
>
> 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 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 the applicant's conviction for having edited, published and distributed various articles and finds, therefore, that there has been an interference with the applicant's freedom of expression within the meaning of Article 10 para. 1 (Art. 10-1) of the Convention. Such interference entails a breach of Article 10 (Art. 10) unless it is justified under the second paragraph of Article 10 (Art. 10).

The Commission observes that the applicant's conviction was based on Section 3g of the National Socialism Prohibition Act and was, therefore, "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

The Commission refers to its previous case-law in which it has held that "the prohibition against activities involving the expression of National Socialist ideas is both lawful in Austria and, in view of the historical past forming the immediate background of the Convention itself, can be justified as being necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime. It is therefore covered by Article 10 para 2 (Art. 10-2) of the Convention" (No. 12774/87, Dec. 12.10.89, D.R. 62 p. 216, at p. 220).

The Commission also refers to Article 17 (Art. 17) of the Convention which reads as follows:

> "Nothing in this Convention may be interpreted as implying for any State, group of 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."

In respect of this provision the Commission has previously held that it "covers essentially those rights which will facilitate the attempt to derive therefrom a right to engage personally in activities

aimed at the destruction of any of the rights and freedoms set forth in the Convention. In particular, the Commission has found that the freedom of expression enshrined in Article 10 (Art. 10) of the Convention may not be invoked in a sense contrary to Article 17 (Art. 17)" (No. 12194/86, Dec. 12.5.88, D.R. 56 p. 205, at p. 209).

As regards the circumstances of the present case, the Commission particularly notes the findings of the Court of Assizes that the applicant's publications incited the reader to racial hatred, antisemitism and xenophobia. Consequently, the Commission finds that the applicant is essentially seeking to use the freedom of information enshrined in Article 10 (Art. 10) of the Convention as a basis for activities which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention (cf. loc. cit. No. 12194/86).

Under these circumstances the Commission concludes that the interference with the applicant's freedom of expression can be considered as "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) 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.

2. The applicant also complains of alleged unfairness in the criminal proceedings against him. He submits that the defence was gravely misled about the actual contents of the charge against him and that the Court of Assizes refused to take certain expert evidence proposed by the defence. He invokes Article 6 para. 3 (a) and (d) (Art. 6-3-a, 6-3-d) of the Convention.

The relevant part of Article 6 (Art. 6) of the Convention reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> > a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; ...
> >
> > 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 recalls that the guarantees contained in paragraph 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the general concept of a fair trial set forth in paragraph 1 of the Article. Accordingly, the Commission will examine the applicant's complaints under the two provisions taken together and in the light of the proceedings considered as a whole (see Eur. Court H.R., Isgró judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 31).

As regards the nature and content of the charge against the applicant, the Commission finds that the applicant has not shown that the defence was misled by the prosecution in the present case. In this connection the Commission has had regard to the findings of the Supreme Court concerning the indictment and the marking of particularly relevant passages in the publication in question with the agreement of the applicant's counsel.

Insofar as the applicant complains that his requests for the taking of evidence were not granted, the Commission recalls that paras. 1 and 3 (d) of Article 6 (art. 6-3-d) do not grant the defence an absolute or unlimited right to have expert testimony taken. It is primarily the task of the domestic courts to decide on the relevance of the evidence proposed (cf. No. 10486/83, Dec. 9. 10.86, D.R. 49 p. 86, at p. 102).

In this respect, the Commission notes that in the present case the Court of Assizes rejected the applicant's requests because they involved matters which were either of common knowledge or irrelevant to the proceedings. The Commission finds that the reasons given by the Court of Assizes, and confirmed by the Supreme Court, were neither arbitrary nor unfair.

The Commission concludes that there is no evidence in the present case that the applicant's defence rights were impaired.

It follows that this part of the application is also 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) — (A. WEITZEL)