AS TO THE ADMISSIBILITY OF

Application No. 19459/92
by F.P.
against Germany

The European Commission of Human Rights sitting in private on 29 March 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
A.S. GÖZÜBÜYÜK
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ
Mrs. J. LIDDY
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M. NOWICKI

Mr. H.C. KRÜGER, Secretary to the Commission
assisted by Mr. W. PEUKERT

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

Having regard to the application introduced on 21 November 1991 by F.P. against Germany and registered on 30 January 1992 under file No. 19459/92;

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 a German citizen born in 1943 and living in Westensee.

He is represented by Mr Theodor Gerlach, a lawyer practising in Zeven. In 1965 the applicant became a professional soldier and eventually Captain in the Navy (Korvettenkapitän).

On 9 June 1989 the competent Military Court (Truppendienstgericht Süd) found the applicant guilty of a disciplinary offence and ordered his reduction to a lower rank.

The Court found that on the occasion of a private party which he gave on 15 September 1987, the applicant had stated in the presence of German and American soldiers

- that the Holocaust was a lie of Zionists while in reality Jews had never been persecuted and killed.

- that he had evidence showing that allegations about

persecutions of Jews in Germany were a part of a strategy of Zionism and Communism in order to discredit Germany.

- that the Wannsee-protocol was a fake.

- that lists about killed Jews had been faked while the alleged victims later reappeared in the United States where they lived under a false name.

- that only criminals had been detained in Concentration Camps and that Communists were responsible for cruelties committed in Concentration Camps.

- that films taken at the moment of the liberation of detainees in Concentration Camps were fakes.

- that some Concentration Camps had been constructed only after the war for the purposes of anti-German propaganda.

- that there was no proof of the existence of Auschwitz except for a faked and unclear photo.

- that the educational system was used to give pupils a wrong picture of German history.

It was further found that the applicant had made critical remarks about Zionism and Nato-allied forces.

On 28 September 1990 the applicant's appeal (Berufung) was to no avail while the Federal Administrative Court (Bundesverwaltungsgericht) granted the appeal of the military public prosecutor (Bundeswehrdisziplinaranwalt) and decided to curtail the applicant's military service for having committed a disciplinary offence. The Court stated that the facts had to be considered as established in view of the applicant's own submissions and the statements of various witnesses. The Court considered that the applicant had violated his duty of political loyalty in the most serious manner and that he had not actively served, supported and defended the ideals of the State. He had thereby intentionally violated Sections 7, 8 and 10 para. 6 of the Soldiers Act (Soldatengesetz-SG). Such a violation was given whenever a soldier actively or passively supported objectives that endangered the free democratic order. The Court admitted that the mere holding of an opinion and the manifestation of such opinion was not a violation of military duty. It exceeded however the limits of this right if a soldier drew conclusions from his opinion which were decisive for his attitude vis a vis the Federal Republic's constitutional order and the manner in which he fulfilled his military duties and also influenced his social contacts with other soldiers or other activities. By having denied historical events related to Nazi persecution against Jews the applicant not only had criticised conceptions of history but had tried to clean National Socialism of the stain of mass murder. He thereby had discriminated against Jewish people who had the right that the historical fact of this mass murder was not put in question. He had also intentionally violated Section 17 para. 2 second sentence of the Soldiers Act by having in private behaved in a manner that was detrimental to the reputation of the military.

The applicant's constitutional complaint was rejected by the Federal Constitutional Court (Bundesverfassungsgericht) on 11 September 1991 as offering no prospects of success. The Court considered that there was no appearance of any arbitrariness and that also the principle of proportionality had not been violated. It was true that for many years the applicant had carried out his military service in an unobjectionable manner and that the application of the maximum

penalty was a severe measure. Nevertheless there was nothing to show that the Federal Administrative Court had not taken into account all particular circumstances and the degree of the applicant's culpability. In this context the Court also noted that the applicant had been granted payment of a subsistence allowance (Unterhaltsbeitrag) and had also been given the possibility of an additional social security insurance (Nachversicherung).

COMPLAINT

The applicant alleges violations of Articles 9 and 10 of the Convention.

THE LAW

The applicant complains of an interference with his rights to manifest his beliefs and to freedom of expression as guaranteed under Articles 9 and 10 (Art. 9, 10) of the Convention in that as a professional soldier he was imposed the severe disciplinary sanction of dismissal from military service for having at a private party made remarks in the presence of other soldiers that were considered to violate in a very serious manner his duty of political loyalty as required under Section 8 of the Soldiers Act.

Article 9 para. 1 (Art. 9-1) of the Convention provides that:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, ownership, teaching, practice and observance."

The Commission considers that this provision cannot be invoked by the applicant as the incriminating remarks he made at a private party did not reflect a "belief" within the meaning of Article 9 (Art. 9) of the Convention which is essentially destined to protect religions, or theories on philosophical or ideological universal values. The disciplinary sanction can however be considered to constitute an interference with freedom of expression as it was imposed on the applicant for having expressed before fellow soldiers and others his view on certain historic events.

Article 10 para. 1 (Art. 10-1) provides:

> "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. ..."

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, 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."

As to the requirements set out in paragraph 2 it has first to be noted that the sanction in question was imposed on the applicant for having violated in a severe manner various sections of the German

Soldiers Act. The Soldiers Act defines rights and duties of soldiers and serves inter alia to maintain order and discipline in the military service. It thus pursues a legitimate aim under Article 10 para. 2 (Art. 10-2) of the Convention, namely the interests of national security and the prevention of disorder.

It remains to be ascertained whether the measure in question was necessary in a democratic society and proportionate to the aims pursued (Eur. Court H.R., Schwabe judgment of 28 August 1992, Series A No. 242-B, para. 29 with further references).

In this respect the Commission refers to Article 17 (Art. 17) of the Convention. This provision states:

> "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) 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.

As regards the circumstances of the present case the Commission notes the detailed findings of the domestic courts about statements made by the applicant in the presence of other soldiers. These statements did according to the German courts not only deny historical facts but were aimed at cleansing the totalitarian Nazi regime of the stain of mass murder and therefore discriminated against Jewish people.

The statements in question which the applicant repeats in his submissions to the Commission clearly contain racist matter and are discriminatory against the Jewish people. The Commission notes that the applicant was dismissed because his statements were considered to be incompatible with his duty of loyalty as a professional officer. The Commission finds that a state may impose special obligations on those representing the state as civil servants or officers. Under the circumstances of the present case the Commission does not find that the German courts applied that principle in a way contrary to Article 10 para. 2 (Art. 10-2) of the Convention.

Under these circumstances the Commission concludes that the interference at issue was "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention (cf. No. 12194/86, Dec. 12.5.19, Kühnen v. the Federal Republic of Germany, DR 56, p.205).

It follows that the application does not disclose any appearance of a violation of Convention rights and has to be rejected as being 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 Commission	President of the Commission
(H.C. Krüger)	(C.A. Nørgaard)