AS TO THE ADMISSIBILITY OF

Application No. 36773/97

by Herwig NACHTMANN

against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 9 September 1998, the following members being present:

MM M.P. PELLONPÄÄ, President

N. BRATZA

E. BUSUTTIL

A. WEITZEL

C.L. ROZAKIS

Mrs J. LIDDY

MM L. LOUCAIDES

B. MARXER

B. CONFORTI

I. BÉKÉS

G. RESS

A. PERENIČ

C. BÎRSAN

K. HERNDL

M. VILA AMIGÓ

Mrs M. HION

Mr R. NICOLINI

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 10 January 1997 by Herwig NACHTMANN against Austria and registered on 2 July 1997 under file No. 36773/97;

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, an Austrian citizen, born in 1940, resides in Graz.

In the proceedings before the Commission he is represented by Mr Alfred Windhager, a lawyer practising in Linz.

A. The particular circumstances of the case

By a judgment of 8 August 1995 the Graz Regional Criminal Court sitting with a jury (Geschworenengericht beim Landesgericht für Strafsachen) convicted the applicant of National Socialist activities (Betätigung im nationalsozialistischen Sinne) within the meaning of Section 3h of the National Socialism Prohibition Act (Verbotsgesetz), fined him 240,000 Austrian Schillings (AS)and sentenced him to ten months' imprisonment on probation. The court found that the applicant, as the head of the editorial staff of the periodical "Aula, Das freiheitliche Magazin", was responsible for the publication of an article in that periodical entitled "Natural laws apply to Nazis and anti-fascists". In that article the National Socialist genocide and other National Socialist crimes, according to the court, had been grossly denied and minimised. The court analyzed in detail the statements suggesting that the number of the victims of the mass killings, in particular of Jews, by poisonous gas and cremation was highly exaggerated and technically impossible.

The applicant filed a plea of nullity (Nichtigkeitsbeschwerde) and an appeal (Berufung) against sentence.

By a judgment of 21 May 1996, notified to the applicant's counsel on 19 July 1996, the Supreme Court (Oberster Gerichtshof) rejected the applicant's plea of nullity, but granted his appeal (Berufung); it reduced the fine to AS 192,000 and the sentence to nine months' imprisonment on probation. The Supreme Court confirmed the findings of the Graz Regional Criminal Court and rejected the applicant's procedural complaints. As regards in particular the applicant's argument that, according to its internal organisation of work, the Regional Court should have been presided over by a judge specialised in offences under the Media Act (Mediengesetz), the Supreme Court pointed out that the applicant had failed to challenge the presiding judge at the beginning of the trial and that, in any event, the participation of a judge who was not called upon to sit according to the court's internal organisation of work did not constitute a ground of nullity.

As regards the applicant's sentence, the Supreme Court considered that the applicant's previous conviction of defamation through publication by an Italian court could not be considered as an aggravating circumstance, since there was no evidence that any such conviction had become final in Italy. In fact, in Italy there was no entry of any offence in the applicant's criminal record. The Supreme Court accordingly reduced the applicant's sentence and fine.

B. Relevant domestic law

I. Section 3h 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 five and ten years, and if the offender or his activity is particularly dangerous, by a prison sentence of up to twenty years, unless the act is punishable under a different provision stipulating a more serious sanction."

According to Section 3h 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 section 3g.

II. An amendment which entered into force on 20 March 1992, changed the range of punishment from "five to ten years" to "one to ten years".

COMPLAINTS

1. The applicant complains that he was not given a fair hearing by a tribunal established by law, contrary to Article 6 para. 1 of the Convention. The applicant alleges that the Graz Regional Criminal Court was not properly constituted. According to the court's internal organisation, a judge specialised in offences under the Media Act was assigned to his case, but a different judge presided at his trial.

2. The applicant also complains that his conviction by the Graz Regional Criminal Court violates his right to freedom of expression as guaranteed by Article 10 of the Convention. The opinion expressed in the contested article related to regrettable historical events. Discussions on such subjects should not be punishable.

THE LAW

1. The applicant complains that he was denied a fair trial by the Austrian courts. He complains that the Graz Regional Criminal Court was not properly composed, contrary to Article 6 para. 1 of the Convention. According to him, his case should have been presided over by a special media judge of that court (Medienrichter).

Article 6 para. 1 of the Convention, insofar as is relevant, reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

The Commission first notes that the applicant had the opportunity to challenge the presiding judge of the Graz Regional Criminal Court at the beginning of the proceedings, but nonetheless did not make any objection. Moreover, the Commission notes that the Supreme Court undertook a detailed analysis of the applicant's relevant complaint. It concluded that the participation of a judge whose assignment to a specific case was not normally provided for in the court's internal organisation of work, as had happened in the applicant's trial, did not infringe Austrian law. The Commission does not consider the Supreme Court's conclusions arbitrary or otherwise unfair. The Commission recalls in this context that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see Eur. Court HR, Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A, p. 18, para. 43; Bulut v. Austria judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, pp. 356, 357, para. 29). The Commission further notes that the applicant does not allege that the presiding judge was biased against him or treated the case in an unfair manner.

In the light of these circumstances, the Commission finds that the applicant has failed to show that the Graz Regional Criminal Court did not meet the requirements of being a "tribunal established by law" within the meaning of Article 6 para. 1 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 27 para. 2 of the Convention.

2. The applicant also complains that the judgment of the Graz Regional Criminal Court (as partly amended by the Supreme Court on 21 May 1996), by which he was convicted of an offence under the National Socialist Prohibition Act violates his right to freedom of expression as well as his right to freedom of thought and conscience. He invokes Article 10 of the Convention, which, as far as relevant, reads as follow:

"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 are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity ..., for the prevention of disorder or crime, ... for the protection of the reputation or rights of others ..."

The Commission considers that the applicant's conviction for the publication of the impugned article interfered with his right to freedom of expression guaranteed under Article 10 para. 1 of the Convention. It must therefore be examined whether the interference was justified under the second paragraph of that provision.

Convictions for "activities inspired by National Socialist ideas" have a legal basis in domestic law, namely Section 3 h of the National Socialist Prohibition Act. The Commission reiterates that the relevant national law must be formulated with sufficient precision to enable

the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. It is primarily for the national authorities, notably the courts, to interpret and apply domestic legislation (see, inter alia, Eur. Court HR, Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, paras. 24-25). In the present case, the Commission is satisfied that the Graz Regional Criminal Court's application of Section 3 h of the National Socialist Prohibition Act to the applicant's case did not go beyond what could be reasonably foreseen in the circumstances. Accordingly, the Commission concludes that the impugned conviction was "prescribed by law".

The interference also pursued a legitimate aim under the Convention, i.e. "the prevention of disorder and crime" and the "protection of the reputation of others". It remains to be ascertained whether the interference can be regarded as having been "necessary in a democratic society".

In this context 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 of the Convention" (No. 12774/87, Dec. 12.10.89, D.R. 62, pp. 216, 218).

The Commission also refers to Article 17 of the Convention which 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 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 repeatedly found that freedom of expression as expressed in Article 10 of the Convention may not be invoked in a sense contrary to Article 17 (cf. No. 12194/86, Dec. 12.5.88, Kühnen v. the Federal Republic of Germany, D.R. 56, p. 205 and No. 19459/92, Dec. 29.3.93 unpublished).

As regards the circumstances of the present case the Commission notes that the publication in question according to the Graz Regional Criminal Court did grossly deny and minimise the mass murders and other crimes committed under the National Socialist regime. These findings which were confirmed by the Supreme Court do not disclose any arbitrariness. Moreover, the Commission has already stated earlier that National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17 (see No. 12194/86, op. cit., p. 220).

The Commission therefore concludes that the interference at issue can be considered as "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO M.P. PELLONPÄÄ

Secretary President

to the First Chamber of the First Chamber