

AS TO THE ADMISSIBILITY OF

Application No. 25062/94
by Gerd **HONSIK**
against **Austria**

The European Commission of Human Rights (First Chamber) sitting in private on 27 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
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 12 August 1994 by Gerd **HONSIK** against **Austria** and registered on 1 September 1994 under file No. 25062/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the Commission's decision of 18 October 1995 to declare the application partly inadmissible and to communicate the remainder of the application to the respondent Government for observations on its admissibility and merits;
- the observations submitted by the respondent Government on 17 January 1996 and the observations in reply submitted by the applicant on 15 April 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1941 and residing

in Königstetten. He is a writer and editor of various periodicals. Before the Commission he is represented by Mr. H. Schaller, a lawyer practising in Traiskirchen (**Austria**).

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

On 16 December 1986 the Investigating Judge of the Vienna Regional Court (Landesgericht) instituted preliminary investigations (Voruntersuchung) against the applicant on the suspicion that articles written, published and distributed by the applicant in his periodical "Halt" constituted National Socialist activities within the meaning of the National Socialist Prohibition Act (Verbotsgesetz). The investigations related to articles which denied the existence of gas chambers in concentration camps under the National Socialist regime and mass extermination therein. The Investigating Judge also appointed a medical expert, J.M., to prepare a report on the effects of toxic gas and its use for killing people.

On 28 January 1987 the Investigating Judge appointed an expert on contemporary history, G.J., to prepare a report on the existence of gas chambers in concentration camps under the National Socialist regime and their use for mass extermination.

On 4 September 1987 the Investigating Judge instructed the expert Prof. G.J. to confine his report to the Auschwitz concentration camp.

Subsequently the Investigating Judge urged on several occasions the expert to submit his report to the court. In February 1988 the expert G.J. informed the Investigating Judge that he could not complete his report before autumn 1988. In January 1989 he postponed this date to summer 1989 and in November 1989 he informed the court that he could no longer state when the report would be ready.

On 7 November 1989 the Investigating Judge asked the medical expert J.M. when his report would be ready. On 10 November 1989 the expert replied that he had thought that his report would no longer be required. In any event, he could not accept the appointment because of his work-load.

On 11 December 1989 G.J. informed the Investigating Judge that he hoped to complete the report before the end of 1989. No report was received by the court at that date.

On 12 June 1990 the Vienna Public Prosecutor's Office (Staatsanwaltschaft) preferred a bill of indictment against the applicant.

On 19 September 1990 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's objection (Einspruch) against the bill of indictment.

In December 1990 the Presiding Judge of the Vienna Court of Assizes (Geschworenengericht) at the Vienna Regional Court (Landesgericht), before which the trial of the applicant was to take place, urged the expert G.J. to submit his report.

On 10 January 1991 the expert G.J. submitted an interim report explaining what research he had carried out meanwhile.

On 31 March 1992 Mr. Schaller was appointed ex officio counsel for the applicant.

On 22 April 1992 the defence submitted an extensive request for the taking of evidence relating to the existence of gas chambers in concentration camps.

On 27 April 1992 the trial of the applicant commenced. Further hearings were held on 28, 29 and 30 April and 4 and 5 May 1992. On 29 and 30 April 1992 the expert Prof G.J. presented his report orally. He concluded that in the Auschwitz-Birkenau concentration camp at least several hundred thousand persons were killed, a considerable part of them by use of toxic gas.

On 5 May 1992 the Court of Assizes convicted the applicant. Having regard to previous convictions it sentenced the applicant to an additional term of imprisonment (Zusatzstrafe) of one year, six months and ten days.

On 12 October 1992 the applicant lodged a plea of nullity and an appeal against the sentence. On 5 January 1993 the Procurator General (Generalprokurator) submitted his observations on the applicant's appeal and plea of nullity. On 28 May, 17 November, 22 November 1993, 8 February and 11 February 1994 the defence replied to the Procurator General's observations.

On 16 February 1994 the Supreme Court dismissed the applicant's plea of nullity. It found that the Court of Assizes had acted correctly when it refused to take the evidence proposed by the applicant. It referred in this respect to its previous case-law according to which the existence of gas chambers in concentration camps and the systematic mass exterminations which had occurred there were facts of common knowledge in regard to which evidence need not be taken. Furthermore it had constantly held that the denial of these historic facts and the discrediting of reports thereof as false propaganda constituted in itself an offence under the National Socialism Prohibition Act. As regards the applicant's appeal against sentence, the Supreme Court noted that the applicant was of unknown abode. Once the applicant had been found the case would be remitted to the Court of Appeal to decide on the appeal against the sentence.

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention that the proceedings have not been conducted within a reasonable time.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 August 1994 and registered on 1 September 1994.

On 18 October 1995 the Commission decided to communicate the applicant's complaint about the length of the criminal proceedings against him and declared inadmissible the remainder of the application.

The Government's written observations were submitted on 17 January 1996. The applicant replied on 15 April 1996.

THE LAW

The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the proceedings have not been conducted within a reasonable time.

Article 6 para. 1 (Art. 6-1) of the Convention, as far as material to the case, read as follows:

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

The Government submit that the case was particularly complex as it necessitated the preparing of an expert opinion in the field of contemporary history on a very complicated issue, namely mass extermination of Jews by the Nazi regime and the existence of gas chambers. Such an expert report was necessary in order to refute arguments advanced by so-called "revisionist" historians. The expert appointed, Prof. G.J., had to examine numerous documents on this question which in the course of time had been dispersed over various archives throughout the world, and in particular to examine documents in archives which had only recently become accessible. These circumstances considerably prolonged the fulfilment of his task. However, the courts themselves had dealt rather expeditiously with the applicant's case. The Regional Court repeatedly urged the expert to deliver his report and monitored the progress of his research. Having regard to the particular circumstances of the case the Government find that the criminal proceedings against the applicant have been conducted within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention. The fact that no decision has yet been taken by the Court of Appeal on the applicant's appeal against the sentence is entirely the applicant's fault as he had absconded shortly after the Supreme Court had dismissed his plea of nullity.

This is disputed by the applicant. In his view the proceedings at issue had not been complex. The applicant himself refers to the Supreme Court's case law according to which the existence of gas chambers in concentration camps and the systematic mass exterminations which had occurred there were facts of common knowledge in regard to which evidence need not be taken. The applicant emphasizes that it had taken the expert years to prepare his report and even when the trial took place he had not even finished his written report but had to give his expert opinion orally. The Austrian courts failed to take sufficient steps in order to accelerate the proceedings. As early as 1989 it had been clear that the expert would not be able to deliver his report in due time and he should therefore have been replaced.

The Commission considers, in the light of the criteria established by the case-law of the Convention organs on the question of "reasonable time" (the complexity of the case, the applicant's conduct and that of the competent authorities), and having regard to all the information in its possession, that an examination of the merits of this complaint is required.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary

J. LIDDY
President

to the First Chamber

of the First Chamber