

AS TO THE ADMISSIBILITY OF

Application No. 12774/87
by B.H., M.W., H.P. and G.K.
against **Austria**

The European Commission of Human Rights sitting in private
on 12 October 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTI
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Mrs. G.H. THUNE
MM. C.L. ROZAKIS
L. LOUCAIDES

Mr. J. RAYMOND, Deputy Secretary to the Commission

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 December
1986 by B.H., M.W., H.P. and G.K. against **Austria** and registered on 25
February 1987 under file No. 12774/87;

Having regard to the report provided for in Rule 40 of the
Rules of Procedure of the Commission;

Having deliberated on 5 July and 12 October 1989;

Decides as follows:

THE FACTS

The applicants, Austrian citizens born in 1951, 1958, 1958 and
1950 respectively, reside in Vienna. All are represented by the
first applicant who has lodged two previous applications with the
Commission (No. 8514/79 rejected on 16 October 1980 and No. 9905/82
rejected on 15 March 1984).

The facts submitted may be summarised as follows.

The applicants complain of Assize Court (Geschworenengericht)
proceedings taken against them and other persons under the National
Socialism Prohibition Act (Verbotsgesetz). The investigation started
in 1978, and the indictment was preferred in February 1983. The trial
before the Regional Criminal Court (Landesgericht für Strafsachen) of
Vienna opened in October 1983. On 2 April 1984 each of the applicants
was convicted of one or more offences under Section 3g of the above

Act. They received conditional prison sentences of 9, 3, 18 and 12 months respectively.

Section 3g para. 1 provides:

(German)

"Wer sich auf andere als in den §§3a bis 3f bezeichnete Weise im nationalsozialistischen Sinne betätigt, wird, sofern die Tat nicht nach einer anderen Bestimmung strenger strafbar ist, mit Freiheitsstrafe von 5 bis 10 Jahren, bei besonderer Gefährlichkeit des Täters oder der Betätigung bis zu 20 Jahren bestraft. Auch kann auf Vermögensverfall erkannt werden."

(Translation)

"Whoever performs activities inspired by National Socialist ideas in a manner not coming within the scope of Sections 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."

As provided for in the Code of Criminal Procedure (Strafprozessordnung) in regard to Assize Court proceedings, the judgment was not reasoned. In view of the detailed questions put to the jury (Geschworenen) it appears that the applicants were found guilty of various acts, performed by them in connection with their membership and leading functions in right wing political organisations called "Aktion Neue Rechte" (ANR) and "Nationalistischer Bund Nordland" (NBN), which constituted activities inspired by National Socialist ideas. These activities included, inter alia, the preparation and promotion of certain publications (such as pamphlets suggesting that the killing of six million Jews by the Nazis was a lie; the ANR party programme based on biological differences between individuals, peoples and races, the principle of elitarianism, the national unity of the German nation in its "Lebensraum" as a whole, including "foreign occupied territories", rejection of the concept of an "Austrian nation" and recognition of the German character of this territory; publications calling for a boycott of the Austrian national holiday which was described as a hypocritical exercise, while the State Treaty was referred to as the "Diktat" of Vienna and the prohibition of Anschluss as being null and void and contrary to the right of self-determination; publications calling for the celebration of the day of German unity in **Austria** and describing the concept of an Austrian nation as a lie; proposals to introduce typical Nazi songs and Nazi titles in the ANR, etc.). They further included the participation in certain demonstrations (inter alia celebration of the 90th birthday of Hitler in Braunau, organisation of a demonstration against the Austrian State Treaty, holding of paramilitary exercises, use of uniforms remindful of Nazi outfits and shouting of Nazi paroles such as "Sieg Heil", "Rotfront verrecke").

The presiding judge had in his legal instructions to the jury stated that **Austria** had made a reservation concerning the compatibility of the Prohibition Act with Articles 10 and 11 of the Convention. The legal instructions also listed examples of acts coming within the scope of Section 3g, in order to provide guidance to

the jury in view of the broad wording of this provision. A voluminous expert opinion on affinities between ANR and NBN activities and National Socialist ideology, which had been prepared during the investigation, was, however, not used at the trial.

The Supreme Court (Oberster Gerichtshof) confirmed the above convictions on 25 June 1986 while reducing the sentence of the third applicant to fifteen months. It rejected, in particular, the applicants' pleas of nullity (Nichtigkeitsbeschwerden) by which they had challenged the composition of the Assize Court (alleged bias of a juror), the expert opinion to which the indictment referred (alleged bias of the expert and one-sidedness of the opinion), the refusal to hear further experts at the trial, the formulation of the questions to the jury (allegedly partly prejudicial to the defence and partly not sufficiently precise) and of the legal instructions given to the jury (allegedly wrong information concerning an Austrian reservation to the Convention and prejudicial examples of acts coming within the scope of Section 3g of the Prohibition Act), the late transmission of the trial transcript to the defence (as interference with the applicant's rights of defence, in particular as regards their appeals) and finally the order imposing the entire costs of proceedings on the applicants although they had partially been acquitted.

COMPLAINTS

The applicants allege violations of their rights under Articles 6, 7, 10, 14, and 18 of the Convention.

THE LAW

1. The Commission has first examined the applicants' complaints under Articles 7, 10, 14 and 18 (Art. 7, 10, 14, 18) of the Convention concerning the legal basis of their conviction.

Article 7 para. 1 (Art. 7-1) of the Convention provides:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The applicants submit that Section 3g of the National Socialism Prohibition Act is not a valid norm of Austrian law. It was enacted in an unlawful procedure and abrogated by subsequent constitutional legislation, including Article 10 (Art. 10) of the Convention. Moreover Section 3g is not sufficiently precise to serve as a basis for a criminal conviction. Its broad wording allows arbitrary application to acts not inspired by National Socialist ideology, but by German nationalist thinking compatible with the Austrian democratic system. There has thus been a violation of Article 7 para. 1 (Art.7-1) of the Convention.

The Commission notes, however, that the Austrian Supreme Court confirmed the continued validity and the constitutionality of Section 3g of the Prohibition Act, which is primarily a question of internal law. The Commission finds that this decision is neither arbitrary nor unreasonable. It here observes that in the Austrian State Treaty of 1955 **Austria** undertook to maintain its legislation outlawing National

Socialist activities. As regards the alleged lack of precision of Section 3g, it is true that the reference to "activities inspired by National Socialist ideas" is rather vague. However, the legislator intended to outlaw any kind of National Socialist activities. The scope of the provision is limited to National Socialism as a historical ideology, frequently referred to in **Austria** and elsewhere. This is a sufficiently precise concept which allows distinctions to be drawn from other types of nationalist thinking. The Commission notes that the case-law and legal doctrine in **Austria** have developed further criteria making the applicable law sufficiently accessible and foreseeable. Thus the jury in the present case was also able to distinguish between activities of the applicants which could and which could not be regarded as being inspired by National Socialist ideas.

The Commission therefore finds no appearance of a violation of Article 7 (Art. 7) of the Convention. This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants claim that Section 3g, as applied in their case, unjustifiably interfered with their freedom of expression guaranteed by Article 10 (Art. 10) of the Convention in that it provided a disproportionate sanction for the expression of certain opinions, in particular on historical facts which should be discussed freely in a democratic society. The applicants also complain of discrimination, contrary to Article 14 (Art. 14) of the Convention, on account of their being Austrians attached to German nationalism, and state that similar sanctions are not provided for those who deny, minimize or defend communist crimes or war crimes of the Allied Powers. Finally, they invoke Article 18 (Art. 18) of the Convention, claiming that the restrictions of their freedom of expression were applied for other purposes than authorised by the Convention, namely in order to suppress German nationalist thinking and publications which were not forbidden.

However, the Commission finds no indication of a violation of these provisions. The prohibition against activities involving 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.

Insofar as National Socialist activities are treated differently in Section 3g from those of other political groups, this has an objective and reasonable justification in the historical experience of **Austria** during the National Socialist era, her treaty obligations, and the danger which activities based on National Socialist thinking may constitute for the Austrian society. The Commission also refers to Article 17 (Art. 17) of the Convention which provides that nothing in the Convention shall be interpreted as implying for any group or person any right to engage in any activity aimed at the destruction or limitation of the Convention rights (cf. No. 12194/86, Kühnen v. Federal Republic of Germany, Dec. 12.5.88, to be published in D.R.). The Commission notes 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 (Art. 17). There is therefore no appearance of discrimination contrary to Article 14 (Art. 14) of the

Convention.

Insofar as the applicants finally allege that, contrary to Article 18 (Art. 18) of the Convention, the restriction of their freedom of expression pursued other purposes than those provided for in the Convention, the Commission finds no indication that they were actually convicted of anything but activities inspired by National Socialist ideas. This also applies to the promotion of publications for which the applicants were convicted.

The applicants' complaints based on Articles 10, 14 and 18 (Art. 10, 14, 18) of the Convention are therefore manifestly ill-founded.

3. The applicants finally allege violations of Article 6 (Art. 6) of the Convention which, insofar as 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. ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

...

(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 applicants first submit that, contrary to Article 6 para. 1 (Art. 6-1), the Assize Court was not impartial. One member of the jury allegedly belonged to a trade union organisation which had called for a ban of the ANR. However, the applicants' challenge of this juror was rejected as having been raised out of time and, in any event, as being unsubstantiated. The Commission finds no evidence of bias on the part of this juror. It is further alleged that the jury as a whole was improperly influenced by a press campaign against the applicants in which the presiding judge participated. However, the applicants did not challenge the presiding judge nor the jury on this ground and there is again no evidence that the Court or any of its members were biased.

It is also submitted that the jury was improperly influenced by a one-sided expert opinion, prepared by a professor whose superiors had been engaged in activities against the ANR. However, the expert opinion in question was prepared during the investigation and only used by the prosecution when preparing the indictment; it was not put before the jury and therefore could neither have influenced its impartiality nor the fairness of the trial. The applicants complain that at the trial no further expert opinions were obtained, as

requested by the fourth applicant. However, as the first expert opinion was not laid before the Court, there was no unequal treatment of the defence and the prosecution in this respect. Moreover, Article 6 para. 1 read in conjunction with para. 3 (d) (Art. 6-1+6-3-d) of the Convention, does not give the defence an absolute right to the hearing of specific expert evidence. The Commission considers that in the present case the refusal of additional expert evidence was justified in the circumstances.

The applicants then complain that the trial was unfair because some questions to the jury were imprecise, others suggestive. However, the Commission finds nothing in the questions which would allow the conclusion that the trial was unfair.

The applicants also challenge as unfair the legal instructions given to the jury by the presiding judge. They allege that the examples given to illustrate the scope of Section 3g of the Prohibition Act corresponded to the charges and therefore implied a finding of their guilt. However, in view of the broad wording of Section 3g, the Commission accepts that it could reasonably be regarded as necessary to provide guidance to the jury by way of illustrative examples tailored towards the facts of the concrete case. The presiding judge did not simply present the various acts included in the indictment as constituting behaviour punishable under Section 3g. As observed by the Supreme Court, the examples were taken from previous case-law of the Austrian courts and left it to the jury to judge which elements should be regarded as decisive for determining the charge. The jury in fact did not follow the indictment on all points and made a number of distinctions. Viewed as a whole, the trial therefore does not appear unfair.

The applicants further complain that the presiding judge wrongly stated that **Austria** had made a reservation to Articles 10 and 11 (Art. 10, 11) of the Convention concerning the Prohibition Act. The Supreme Court considered this as irrelevant as in any event the provisions of the Prohibition Act were covered by the exceptions in paragraph 2 of each of these Articles. The Commission shares this view and finds no unfairness in this respect.

The applicants also regard it as unfair that the costs were imposed on them although they were partially acquitted. However, this order did not render the proceedings unfair either.

The applicants complain that the trial record was served upon them late, thus impairing their rights of defence in that they could not ask for corrections before the verdict of the jury and were hampered in the preparation of their appeals. However, the Commission finds no unfairness of the trial in this respect and notes that the applicants submitted voluminous pleas of nullity and appeals to the Supreme Court. It also finds no appearance of a violation of the applicants' rights under Article 6 para. 3 (b) (Art. 6-3-b).

The applicants finally complain of the length of the proceedings, including those on appeal, and observe that the prosecution knew the ANR party programme since 1976. The Commission notes that the investigation apparently commenced in 1978. The applicants were tried five years later, between October 1983 and April 1984. The appeal proceedings lasted more than two years until June 1986. The total length of the proceedings - altogether some eight years - is therefore considerable. However, the case was

complicated and involved nine defendants, most of whom were accused of several offences, extending over a long period. The offences concerned a complex behaviour consisting in numerous individual acts. Several searches were carried out and many witnesses heard, in particular during the investigation in which a voluminous expert opinion was also obtained. The trial extended over several months, the judgment runs to 97 pages, the Supreme Court decision to 80 pages. Taking all circumstances duly into account, the Commission is satisfied that the length of the proceedings did not exceed the "reasonable time" provided for in Article 6 para. 1 (Art. 6-1) of the Convention.

The applicants' complaints under Article 6 (Art. 6) of the Convention are therefore equally manifestly ill-founded.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission

President of the Commission

(J. RAYMOND)

(C.A. NØRGAARD)