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 18 October 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is an Austrian citizen, born in 1941 and residing in Königstetten. His a writer and editor of various periodicals. Before the Commission he is represented by Mr. H. Schaller, a lawyer practising in Traiskirchen (**Austria**).

A. Particular circumstances of the case

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 Section 3g of the National Socialist Prohibition Act. The investigations related to articles appeared in the above periodical in September and November 1986 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 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. It charged him under Section 3g of the National Socialism Prohibition Act of having in several publications denied National Socialist systematic mass extermination in gas chambers of National Socialist concentration camps and had presented them as false propaganda.

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 (Geschwornengericht) 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. It proposed that the Court of Assizes should obtain reports by experts in medicine, chemistry, building and engineering on this issue.

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 (Cyclone B). On 4 May 1992 the prosecution and defence questioned the expert.

On 4 May 1992 the applicant submitted a further request for the taking of evidence. He requested in particular the expert opinion of a graphological expert be taken for verifying the authenticity of several documents on which the expert had relied and a medical expert opinion on the effects of the gas Cyclone B.

On 5 May 1992 the bench of the Court of Assizes rejected the requests of the defence for taking of evidence of 22 April 1992 and 4 May 1992. It found that the requested evidence was irrelevant to the proceedings because the detailed expert opinion had confirmed the previous case-law of the Supreme Court, namely that the existence of gas chambers in concentration camps under the National Socialist regime and their use for mass extermination were facts of common knowledge. In regard to such facts, however, evidence need not be taken.

On 5 May 1992 the Public Prosecutor and the defence made their final submissions at the trial. Thereafter the Presiding Judge asked the applicant to make a full confession and gave him the floor.

On 5 May 1992 the Court of Assizes convicted the applicant of the offence under Section 3g para. 1 of the National Socialist Prohibition Act. Having regard to convictions by the Vienna Regional Court of 31 May 1990, the St. Pölten Regional Court of 6 September 1990, the Munich Regional Court of 6 December 1990 and the Vienna Regional Court of 19 June 1991 it sentenced the applicant to an additional term of imprisonment (Zusatzstrafe) of one year six months and ten days.

The Court of Assizes found that between 1986 and 1988 the applicant had edited, published and distributed articles in the periodical "Halt" and a book with the title "Hitler's acquittal" ("Freispruch für Hitler") in which he had denied the systematic mass extermination of certain groups of the population in gas chambers of National Socialist concentration camps and had discredited such claims as false propaganda. The Court of Assizes found that the conviction had to be based on Section 3g of the Prohibition Act as in force until 1992, but that regard must be had to the reduced minimum penalty in its new version. As regards further passages of the applicant's book specified in the judgment, the Court of Assizes acquitted the applicant. The Court of Assizes also ordered the seizure of the incriminated publications and that the applicant had to pay the costs of the criminal proceedings.

On 1 October 1992 the applicant lodged a plea of nullity and an appeal against the sentence. He submitted, inter alia, that the Court of Assizes had refused to take the evidence he had requested, that the report of the court expert G.J. was defective and that the expert had not properly given his oath as expert.

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, after an oral hearing, dismissed the applicant's plea of nullity. The Supreme Court 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 therein 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 an offence under Section 3g of the National Socialism Prohibition Act. This was also confirmed by the newly enacted Section 3h of the National Socialism Prohibition Act. Moreover the evidence requested by the applicant related to the mere modalities of the mass extermination not of relevance for the charge and could not question the historical truth of the basic facts.

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.

On 23 March 1994 the Presiding Judge of the Court of Assizes fixed the fees of the expert G.J. at 2,541,888 AS.

On 12 April 1994 the applicant appealed and submitted that the expert had failed to submit his claim in time and that, in any event, the quality of the report had been so poor that it was not justified to annual fees.

On 3 May 1994 the Vienna Court of Appeal dismissed the applicant's appeal. It found that the expert had submitted his request in time, that the sum awarded by the Court of Assizes was correct and that complaints as to the quality of an expert report had to be dealt with at the trial and in subsequent plea of nullity proceedings.

B. Relevant domestic law

1. 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 of the National Socialist Prohibition Act (BGBl No. 148/1992) which entered into force on 20 March 1992, the range of punishment was amended from 5 to 10 years to 1 to 10 years. In the same

amendment a new offence, Section 3h, was introduced, which reads as follows:

> "Under Section 3 g is also punishable whoever denies, plays down, welcomes or seeks to justify the national socialist genocide or other national socialist crimes against humanity in a periodical, in broadcasting or another media or by any other means which allows access to a large public."

2. Section 380 et seq. of the Code of Criminal Procedure deal with the costs of criminal proceedings. In general the convicted person has to reimburse the State the costs of the proceedings (Section 389 para. 1). These costs consist of lump sum for expenses not specified (Pauschalkostenbeitrag) and, inter alia, expenses for expert reports (Section 381 para. 1). In proceedings before a Court of Assizes the lump sum must not exceed 30,000 AS; in proceedings before other courts lower maximum amounts are provided for (Section 381 para. 3). The liability of the convicted person to pay the costs in principle must be decided in the judgment (Section 389 para. 1). However, the specific amount of these costs must be determined by the court in a separate cost order (Section 395 para. 4). If the court finds that the convicted person has no sufficient means it can declare the costs uncollectible (uneinbringlich) (Section 391 para. 2).

COMPLAINTS

1. The applicant complains under Article 10 of the Convention that his conviction under Section 3g of the National Socialism Prohibition Act violated his right to freedom of expression.

2. The applicant also complains under Article 6 of the Convention about the alleged unfairness of the criminal proceedings against him in several respects:

a. he submits that the Court of Assizes refused to take the evidence he had requested.

b. he submits that the report of the expert in contemporary history was wrong, that the expert had not made his expert oath properly and that the expert had delivered his report orally at the trial instead of giving it in writing in advance which infringed his defence rights.

c. he submits that the newly enacted offence of Section 3h of the National Socialism Prohibition Act restricted his right to defence since neither the expert nor the Austrian courts could independently evaluate the essential facts of the applicant's case, as the main issue had already been decided by the law.

d. he submits that the Presiding Judge unduly influenced the jury because at the end of the trial he had asked the applicant to make a full confession.

3. The applicant complains under Article 1 of Protocol No. 1 that the award of fees to the expert violated his right to property.

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

THE LAW

1. The applicant complains under Article 10 (Art. 10) of the Convention that his conviction under Section 3g of the National Socialism Prohibition Act 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. 10-2).

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; No. 21318/93, Dec. 2.9.94, unpublished).

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" (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 and the Supreme Court that the applicant's publications in a biased and polemical manner far from any scientific objectivity denied the systematic killing of jews in National Socialist concentration camps by use of toxic gas. The Commission has previously held that statements of the kind the applicant made ran counter one of the basic ideas of the Convention, as expressed in its preambular, namely justice and peace, and further reflect racial and religious discrimination (No. 9235/81, Dec. 16.7.82, D.R. 29, p. 194; No. 21318/93, Dec. 2.9.94, unpublished; No. 21128/92, Dec. 11.1.95, D.R. 80, p. 94). 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 under Article 6 (Art. 6) of the Convention about the alleged unfairness of the criminal proceedings against him in several respects.

The Commission observes that the Austrian courts have not yet decided on the applicant's appeal against the sentence because the applicant is for the time being of unknown abode. The question therefore arises whether the applicant has complied with the requirement of exhaustion of domestic remedies under Article 26 (Art. 26) of the Convention. The Commission, however, may leave this issue unresolved because the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention about the alleged unfairness of the proceedings are, in any event, inadmissible for the following reasons.

The Commission finds that it has to examine these complaints from the point of view of paragraphs 1 and 3 (b) and (d) (Art. 6-1, 6-3-b, 6-3-d) taken together, especially as the guarantees in paragraph 3 (Art. 6-3) represent aspects of the concept of fair trial contained in paragraph 1 (Art. 6-1) (Eur. Court H.R., Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29).

Article 6 para. 1 and 3 (b) and (d) (Art. 6-1, 6-3-b, 6-3-d) 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 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; ..."

a. As regards his complaint about the taking of evidence, the Commission recalls that as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. More specifically, Article 6 para. 3 (d) (Art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it does not require the attendance and examination of every witness on the accused's behalf (cf., Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

The Commission notes that the Court of Assizes on 5 May 1992 dismissed the applicant's requests for the taking of further evidence, finding that the requested evidence was irrelevant to the proceedings. The Court of Assizes stated that the detailed expert opinion had confirmed the previous case-law of the Supreme Court, namely that the existence of gas chambers in concentration camps under the National Socialist regime and their use for mass extermination were facts of common knowledge. In regard to such facts evidence need not be taken. The Supreme Court, in its decision of 16 February 1994 confirmed the findings of the Regional Court.

In these circumstances, the Commission finds no sufficient grounds to form the view that there were any special circumstances in the present case which could prompt the conclusion that the failure to take further evidence was incompatible with Article 6 (Art. 6) (cf. No. 9235/81, Dec. 16.7.82, D.R. 29, p. 194).

b. The applicant submits further that the report of the expert for contemporary history was wrong, that the expert had not made his expert oath properly and that the expert had delivered his report orally at the trial instead of giving it in writing in advance which infringed the applicant's defence rights.

As regards the complaint about the correctness of the expert report, the Commission observes that it is not competent to deal with any application alleging errors of fact or law have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see e.g. No. 21283/93, dec. 5.4.9, D.R. 77-A, p. 81).

To the extent the Commission is nevertheless able to consider the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the

Convention, it observes that the expert on contemporary history presented his report orally in court on 29 and 30 April 1992. On 4 May 1992 the prosecution and defence extensively questioned the expert. The applicant, who was assisted by counsel, did not request the Court of Assizes to adjourn the hearings for its purpose of preparing his defence.

In these circumstances the Commission finds that there is no appearance that with regard to the expert report the applicant's defence rights had been infringed.

c. The applicant also submits that the newly enacted offence of Section 3h of the National Socialism Prohibition Act restricted his right to defence since neither the expert nor the Austrian courts could independently evaluate the essential facts of the applicant's case, as the main issue had already been decided by the law.

In this respect the Commission observes that the applicant was neither charged nor convicted under Section 3h of the National Socialism Prohibition Act. Furthermore, in its judgment of 16 February 1994 the Supreme Court referred to its constant case-law according to which the denial of the historic facts of the existence of gas chambers in concentration camps and their use for systematic mass exterminations and the discrediting of reports thereon as false propaganda constituted an offence under Section 3g of the National Socialism Prohibition Act. This jurisprudence was confirmed by the newly enacted Section 3h of the National Socialism Prohibition Act.

Under these circumstances the Commission finds that the enactment of Section 3h of the National Socialism Prohibition Act did not unduly restrict the applicant's defence rights.

d. The applicant also submits that the conduct of the Presiding Judge unduly influenced the jury. However, the Commission cannot find that the mere invitation to the applicant to make a confession could have influenced the jury in a way to render the proceedings as a whole unfair.

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.

3. The applicant complains that the granting of fees to the expert violated his right to peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1 (P1-1).

However under Article 25 para. 1 (Art. 25-1) of the Convention the Commission may only deal with an application if the applicant can claim to be a victim of an alleged violation, by one of the High Contracting Parties, of the rights set forth in the Convention or its Protocols.

Having regard to the relevant provisions of the Code of Criminal Procedure the Commission observes before that a person can become liable to pay the costs of criminal proceedings it is not sufficient that a judgment finds that a convicted person has to bear these costs; a cost order must also be made specifying their exact amount.

The Commission finds that in the absence of such a cost order there has been no interference with the applicant's rights under

Article 1 of Protocol No. 1 (P1-1). The applicant therefore cannot claim to be victim of an alleged violation of this provision.

Consequently, this part of the application is incompatible ratione personae with the provisions of the Convention or its Protocols in accordance with Article 27 para. 2 (Art. 27-2) of the Convention

4. 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.

The Commission, having examined the above complaint under Article 6 (Art. 6) of the Convention, considers it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of this complaint to the Government.

For these reasons, the Commission, unanimously,

DECIDES TO ADJOURN the examination of the applicant's complaint about the length of the criminal proceedings against him;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber (M.F. BUQUICCHIO)

President of the First Chamber (C.L. ROZAKIS)