AS TO THE ADMISSIBILITY OF

Application No. 25096/94
by Otto E.F.A. REMER
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 6 September 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
G.B. REFFI
B. CONFORTI
N. BRATZA
E. KONSTANTINOV
G. RESS
A. PERENIC

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 19 August 1994 by Otto E.F.A. REMER against Germany and registered on 8 September 1994 under file No. 25096/94;

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, as they have been submitted by the applicant, may be summarised as follows.

The applicant, born in 1912, is a German national and resident in Bad Kissingen. He is a retired general. In the proceedings before the Commission he is represented by Mr. H. Schaller, a lawyer practising in Traiskirchen, **Austria**.

A. Particular circumstances of the case

On 22 October 1992 the Schweinfurt Regional Court (Landgericht) convicted the applicant of incitement to hatred (Volksverhetzung) and race hatred (Aufstachelung zum Rassenhaß), pursuant to S. 130 (1) and S. 131 (1) of the German Penal Code (Strafgesetzbuch). The applicant was sentenced to one year and ten months' imprisonment and various publications were confiscated.

The Regional Court found that the applicant was the editor of an irregularly issued publication "Remer Depeschen", and himself author of some of the reports and comments. He identified himself with the political and factual statements published in the "Depeschen".

In its judgment of 113 pages, the Regional Court noted next the contents of the five relevant issues of the "Depeschen" which had been distributed in 80,000 copies. Thus, the "Depeschen" of June, August and December 1991 as well as of February and April 1992 had contained articles suggesting that the gas chambers in the concentration camps during the Nazi regime had never existed. Further publications contained information about the applicant's efforts to inform the population about the truth regarding in particular the concentration camp in Auschwitz and to fight against the lies about the gassing of four million Jews in Auschwitz. Other articles condemned the German policy regarding Israel, or complained about the preferential treatment of asylum seekers, "gipsies" and drug traffickers as compared to German nationals, and about the destruction of Germany as a result of the immigration of foreigners.

The Regional Court considered that the publications concerned made believe that under the Nazi regime no gas chambers for the killing of Jews had existed and that this so-called lie had been invented by the Jews in order to extort money from the German Government. In this respect, the Regional Court analyzed in detail the statements made in the various articles. According to the Regional Court the applicant knew about the obvious and historical truth as regards the gassing of Jews in concentration camps such as Auschwitz under the Nazi regime. He had not only sought to open a public discussion on this matter, but also to instigate to hatred against Jews.

The Regional Court stated that its factual findings were based in particular upon the applicant's statements that he was responsible for the publications at issue and that he intended further to impart the information and ideas contained in the incriminated articles. Moreover, the publications had been consulted in the course of the trial.

The Regional Court found that it was common knowledge (offenkundig) that the contents of the publications concerned, namely the allegations denying the existence of gas chambers in the concentration camps as well as the gassing of millions of Jews and the allegation that the Jews extorted money from the German people, were untrue, as these matters were historically proven facts. In this respect, the Regional Court referred to the case-law of the Federal Constitutional Court (Bundesverfassungsgericht) as to the interpretation of the term of common knowledge, and to the entries in several common encyclopedia, and other publications on contemporary history, regarding the issues gas chamber, concentration camp, Zyklon B and Auschwitz.

On 16 November 1993 the Federal Court of Justice (Bundesgerichts-hof) dismissed the applicant's appeal on points of law (Revision).

In its decision, the Court of Justice confirmed the findings of the Regional Court that the mass murder of Jews in the gas chamber of concentration camps during the Second World War were historically proven and therefore common knowledge. The taking of evidence on such matters was consequently not necessary. In this respect, the Court of Justice referred to the constant case-law of the Federal Constitutional

Court, its own constant case-law as well as the jurisprudence of the German Courts of Appeal.

The Federal Court of Justice also refuted the applicant's defence that his publications had served the purpose of historical research. The Court of Justice observed that SS. 130 and 131 of the German Penal Code aimed to secure the peaceful coexistence of the population in the Federal Republic of Germany. Anybody who on the basis of ideas of national socialism incited to hatred against parts of the population in making commonly known untrue factual allegations in public and reproaching them with lying and extortion and thus portraying them as particularly abominable. This consideration applied the more when the fate of the Jews under the national socialist regime was depicted as an "invention" and when this allegation was combined with the alleged motive of extortion.

On 10 February 1994 the Federal Constitutional Court (Bundes-verfassungsgericht) refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde). The decision was served on 21 February 1994.

B. Relevant domestic law

S. 131 (1) of the German Penal Code (Strafgesetzbuch) provides that anybody who incites to hatred, or violence or arbitrary acts, against parts of the population in such a manner as to disturb the public peace shall be punished by imprisonment for a term of three months to five years.

According to S. 131 (1) of the Penal Code, anybody who disseminates publications which describe cruel or otherwise inhuman brutalities against human beings in such a manner that such brutalities are glorified or minimised, or that the cruel or inhuman character of the event is shown in such a way as to violate human dignity, shall be punished by imprisonment for a term not to exceed one year or by a fine.

Sentences to imprisonment are executed in accordance with SS. 449 et seq. of the Code of Criminal Procedure (Strafgesetzbuch). S. 455 provides for a stay of the execution of a sentence to imprisonment in cases of serious health risks. The execution of sentences to imprisonment is further regulated by the Execution of Sentences Act (Strafvollzugsgesetz). SS. 56 to 65 of the Execution of Sentences Act contain detailed provisions on the health care for prisoners.

COMPLAINTS

1. The applicant complains about his conviction by the Schweinfurt Regional Court of 22 October 1992. He considers that his case was of a political nature and that his conviction of incitement to hatred infringed his right to freedom of thought and conscience, as well as his right to freedom of expression, in respect of the - according to the applicant - true statement that no gas chambers existed in German concentration camps. He invokes Articles 9 and 10 of the Convention.

2. The applicant further complains that the sentence of one year and ten months' imprisonment amounts, taking into account his age, to inhuman punishment within the meaning of Article 3 of the Convention.

3. The applicant also complains under Article 6 of the Convention

that he did not have a fair trial by an impartial court. In this respect, the applicant considers in particular that the courts unduly dismissed his requests to take evidence as to the truth of the incriminated statements and challenges the courts' findings that these events were historical facts and therefore common knowledge which did not call for a further taking of evidence. He submits that he was convicted on the basis of mere assumptions, contrary to the presumption of innocence.

THE LAW

1. The applicant complains about the Court of Appeal judgment of 22 October 1992 convicting him of incitement to hatred. He invokes Articles 9 and 10 (Art. 9, 10) of the Convention.

The Commission finds that the essence of the applicant's complaint is his conviction for having distributed various publications and has, therefore, examined his submissions in this respect under Article 10 (Art. 10) of the Convention. This provision, as far as relevant, provides:

> "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 ...
>
> 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, ... for the prevention of disorder or crime, ... for the protection of the reputation or rights of others ..."

The Commission considers that the impugned measure was an interference with the applicant's exercise of his freedom of expression. Such interference is in breach of Article 10 (Art. 10), unless it is justified under paragraph 2 of Article 10 (Art. 10-2), i.e. it must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 (Art. 10-2) and be "necessary in a democratic society".

The interference was "prescribed by law", namely the relevant provisions of the Penal Code. SS. 130 and 131 of the Penal Code are accessible to the general public, and, taking into account the case-law of the German courts on questions of incitement to hatred, the consequences of his conduct were clearly foreseeable to the applicant.

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

The Commission recalls that the adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with a European supervision. Thus the measures taken at national level must be justifiable in principle and proportionate (cf. European Court H.R.,

Observer and Guardian judgment of 26 November 1991, Series A no. 216 pp. 29-30, para. 59).

The Commission finds that the provisions of the Penal Code at issue, and their application in the present case, aimed to secure the peaceful coexistence of the population in the Federal Republic of Germany. The Commission therefore has also had regard to Article 17 (Art. 17) of the Convention. This provision 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 (Art. 17) accordingly prevents a person from deriving from the Convention a right to engage in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention, inter alia the right to freedom of expression under Article 10 (Art. 10) (cf. No. 12194/86, Dec. 12.5.88, D.R. 56 p. 205).

As regards the circumstances of the present case, the Commission notes the detailed findings of the Regional Court as to the contents of the applicant's publications in which he had attempted to incite to hatred against Jews. Moreover, the Federal Court of Justice confirmed that anybody who on the basis of ideas of national socialism incited to hatred against parts of the population in making commonly known untrue factual allegations in public and reproaching them with lying and extortion and thus portraying them as particularly abominable. The Court of Justice considered that such a consideration applied the more when the fate of the Jews under the national socialist regime was depicted as an "invention" and when this allegation was combined with the alleged motive of extortion.

The Commission finds that the applicant's publications ran counter one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace, and further reflect racial and religious discrimination.

The public interests in the prevention of crime and disorder in the German population due to incitement to hatred against Jews, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews in the concentration camps under the Nazi regime, and the allegations of extortion (see also No. 9235/81, Dec. 16.7.82, D.R. 29 p. 194).

In these circumstances, there were relevant and sufficient reasons for the applicant's conviction. The judgment of the Schweinfurt Regional Court of 22 October 1992, as confirmed by the Federal Court of Justice, was therefore, "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Accordingly, there is no appearance of a violation of the applicant's right under Article 10 (Art. 10) of the Convention.

It follows that this part of the application is manifestly ill-founded with the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains that the sentence of one year and ten months' imprisonment amounts, taking into account his age, to inhuman punishment within the meaning of Article 3 (Art. 3) of the Convention.

The Commission recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is relative and must take account of all the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the person subjected to it (e.g. Eur. Court H.R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 162). In order for a punishment to be degrading and in breach of Article 3 (Art. 3), the humiliation or debasement involved must attain a particular level and must in any event be other than the usual element of humiliation associated with imprisonment after a criminal conviction. Such an examination is also relative and depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution (Eur. Court H.R., Tyrer judgment of 25 April 1978, Series A no. 26, p. 15, para. 30).

The Commission notes that on 22 October 1992 the Schweinfurt Regional Court convicted the applicant, born in 1912, of incitement to hatred and race hatred and sentenced him to one year and ten months' imprisonment. The applicant did not allege that he is unfit, for health reasons, to serve the prison sentence concerned, that there would be insufficient health care in case of imprisonment or that he could not, if necessary, apply for a stay of execution of the sentence in accordance with the relevant provisions of German law. (cf. mutatis mutandis No. 7994/77, Dec. 6.5.78, D.R. 14 p. 238).

The Commission, considering all circumstances of the present case, finds no appearance that the sentence of imprisonment imposed upon the applicant would go beyond the threshold set by Article 3 (Art. 3) of the Convention.

Consequently, this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

3. The applicant finally complains under Article 6 (Art. 6) of the Convention that he did not have a fair trial by an impartial court. In this respect, the applicant considers in particular that the courts unduly dismissed his requests to take evidence as to the truth of the incriminated statements and challenges the courts' findings that these events were historical facts and therefore common knowledge which did not call for a further taking of evidence. He submits that he was convicted on the basis of mere assumptions, contrary to the presumption of innocence.

The Commission finds no indication that the applicant, assisted by counsel, could not duly present his arguments in defence or could not effectively exercise his defence rights.

As regards his complaints about the taking and assessment 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 Regional Court, in its judgment of 22 October 1992, dismissed the applicant's requests for the taking of further evidence, finding that it was common knowledge that the contents of the publications concerned, namely the allegations denying the existence of gas chambers in the concentration camps as well as the gassing of millions of Jews and the allegation that the Jews extorted money from the German people, were untrue, as these matters were historically proven facts. In this respect, the Regional Court referred to the case-law of the Federal Constitutional Court as to the interpretation of the term of common knowledge, and to the entries in several common encyclopedia, and other publications on contemporary history. The Federal Court of Justice, in its decision of 16 November 1993, confirmed the findings of the Regional Court that the mass murder of Jews in the gas chamber of concentration camps during the Second World War were historically proven and therefore common knowledge. The taking of evidence on such matters was consequently not necessary. The Court of Justice referred to the constant case-law of the Federal Constitutional Court, its own constant case-law as well as the jurisprudence of the German Courts of Appeal.

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)..

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (C.L. ROZAKIS)