

## AS TO THE ADMISSIBILITY OF

Application No. 19363/92  
by Gerhard HIRMANN  
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 6 April 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  
B. CONFORTI  
N. BRATZA  
I. BÉKÉS  
E. KONSTANTINOV

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 21 November 1991 by Gerhard Hirmann against Austria and registered on 16 January 1992 under file No. 19363/92;

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

Having regard to the observations submitted by the respondent Government on 6 May 1994 and the observations in reply submitted by the applicant on 13 July 1994;

Having deliberated;

Decides as follows:

## THE FACTS

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

The applicant is an Austrian citizen, born in 1928 and resides in Ennsdorf. He is a civil engineer by profession, specialising in agriculture and forestry matters.

## A. Particular circumstances of the case

The applicant, having inspected court files concerning expropriation cases in connection with his publishing of articles, sent letters to various courts criticising several court experts.

On 4 December 1986 the Disciplinary Board (Disziplinarsenat) of the Engineer Chamber (Ingenieurkammer) of Vienna, Lower Austria and Burgundy, referring to the Engineers' Rules of Professional Conduct (Standesregeln der Ziviltechniker) and S. 48 para. 1 of the Engineer Chamber Act (Ingenieurkammergesetz) found the applicant guilty of having disregarded the principle of loyalty towards his colleagues and having criticised other engineers in a disparaging way. The Disciplinary Board issued a reprimand (schriftlicher Verweis) against

him.

In its decision, the Disciplinary Board had regard to three letters written by the applicant. In his letter of 14 March 1985, addressed to the President of the Bad Ischl District Court (Bezirksgericht), the applicant had referred to "arithmetic tricks" and stated in particular that "he quite understood that in administrative proceedings only those experts were appointed by the court (in that particular case a civil engineer specialising in forestry and the timber industry) who gave, in a 'superficial and bungling manner' ('Husch-Pfusch-Verfahren'), obviously low estimates and deliberately overlooked important factors". The applicant had further requested the President of the Klagenfurt Regional Court (Landesgericht) to consider the above letter of 14 March 1985 and to assess the qualifications of expert M. Moreover, he had requested the President of the Klagenfurt Regional Court to consider his submissions to the Feldkirchen District Court of 4 January 1986, which contained criticism regarding the experts G. and L., with a view to assessing their professional qualifications. The Disciplinary Board considered that the applicant had thereby overstepped the limits of a generally permissible criticism amongst civil engineers, and that a prejudice to the professional reputation of his colleagues whom he indicated with their names could not be excluded.

On 15 June 1987 the Disciplinary Commission (Disziplinar-kommission) of the Federal Engineer Chamber, following an oral hearing, dismissed the applicant's appeal (Berufung).

The Disciplinary Commission considered in particular that, even assuming that it was correct that in expropriation proceedings where civil engineers were appointed as court experts the amounts awarded as compensation were very moderate and to the disadvantage of the persons expropriated, the applicant had no right to take recourse to undue criticism and disregard the principle of loyalty under the Rules of Professional Conduct. The Disciplinary Commission, having regard to the wording of the applicant's statements in question, also found that he had reproached the court experts concerned for having acted - partly deliberately - contrary to their duties. Such criticism had not been necessary in order to disclose alleged grievances. The applicant had also acted disloyally in that he had requested various courts to assess the professional qualifications of certain engineers and thus placed them at the risk of professional disadvantages. He should have rather informed the competent Engineer Chamber.

On 3 March 1989 the Constitutional Court (Verfassungsgerichtshof), upon the applicant's constitutional complaint, found that the Disciplinary Commission's decision of 15 June 1987 violated his right to freedom of expression. The decision in question was quashed, and the case referred back to the Disciplinary Commission.

The Constitutional Court confirmed that the impugned decision was prescribed by the relevant provisions of the Engineer Chamber Act. It also considered that it was necessary, in a democratic society, to protect the reputation and rights of others, here civil engineers, against unfair criticism by their colleagues in the context of disciplinary proceedings. However, civil engineers were not in general exempt from criticism, and justified criticism by their colleagues could not automatically be regarded as violation of the principle of loyalty. In particular, such criticism could not be limited to submissions addressed to the competent Engineer Chamber. In the light of these considerations, the findings of the lower instances could not be objected to, except for their assessment of the applicant's request to the President of the Klagenfurt Regional Court to take note of a letter addressed to the Feldkirchen District Court, which did not

contain unfair criticism.

On 19 July 1989 the Disciplinary Commission of the Federal Engineer Chamber (Bundesingenieurstkammer) acquitted the applicant of having disregarded the Rules of Professional Conduct regarding the statement on "arithmetic tricks" in his letter of 14 March 1985 addressed to the Bad Ischl District Court as well as his letter to the President of the Klagenfurt Regional Court. It dismissed the remainder of the applicant's appeal against the decision of 4 December 1986. Rather, the Disciplinary Commission, referring to S. 48 paras. 1 and 2 and S. 49 of the Engineer Chamber Act and the Rules of Professional Conduct of Civil Engineers, found the applicant guilty of having, in two respects, committed a disciplinary offence and issued a reprimand against him.

The Disciplinary Commission, having particularly regard to the Constitutional Court's findings, considered that the wording 'superficial and bungling manner' ('Husch-Pfusch-Verfahren'), and his assertion that some experts gave obviously low estimates and deliberately overlooked important compensation factors, as well as his request to the President of the Klagenfurt Regional Court to consider the above submissions, constituted unfair and disparaging criticism and were not covered by the right to freedom of expression.

On 1 October 1991 the Constitutional Court refused to entertain the applicant's further constitutional complaint. The Constitutional Court found that the challenged decision had been taken in the light of its previous judgment of 12 December 1988 and could not be objected to. The applicant's request to transfer the complaint to the Administrative Court (Verwaltungsgerichtshof) was rejected on the ground that the matter was excluded from its competence.

#### B. Relevant domestic law

The Federal Engineer Chamber Act, Federal Law Gazette 1969/71 (Ingenieur-Kammergesetz, BGBl 1969/71) established four Regional Chambers (Landeskammern) and a Federal Chamber (Bundeskammer), which are public law institutions. Membership in a Regional Chamber and the Federal Chamber is compulsory for civil engineers who exercise their profession (S. 5).

According to S. 48 para. 1, civil engineers are subjected to disciplinary sanctions if (1) they disparage colleagues and/or superiors, either publicly or in private, or (2) their conduct is not in line within the meaning of the oath to which they are sworn as a member of this profession. S. 49 para. 1 provides for disciplinary measures, a reprimand being the lowest sanction.

Furthermore, the Engineer Chamber has issued Regulations on the Professional Conduct (Standesregeln) of Civil Engineers, which lay down inter alia the principle of loyalty between civil engineers and prohibit unfair and disparaging criticism of other civil engineers.

#### COMPLAINTS

The applicant complains under Article 10 of the Convention that the reprimand issued against him violated his right to freedom of expression.

#### PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 November 1991 and registered on 16 January 1992.

On 2 March 1994 the Commission decided to communicate the applicant's complaint about the decision of the Disciplinary Commission of the Federal Engineer Chamber of 19 July 1989 to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure. The remainder of the application was declared inadmissible.

The Government's written observations were submitted on 6 May 1994. The applicant replied on 13 July 1994.

#### THE LAW

The applicant complains under Article 10 (Art. 10) of the Convention that the reprimand issued by the Disciplinary Commission of the Federal Chamber on 19 July 1989 infringed his right to freedom of expression.

Article 10 (Art. 10) of the Convention, 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 protection of the reputation or rights of others ..."

a. The respondent Government maintain that the applicant failed to lodge his complaint within the six months' time-limit, as required by Article 26 (Art. 26) of the Convention. They submit that the Constitutional Court, in its decision of 3 March 1989, only objected to the findings of the disciplinary bodies in regard to the applicant's request to the President of the Klagenfurt Regional Court to take note of a letter addressed to the Feldkirchen District Court, which did not contain unfair criticism. Thus, as to the disciplinary punishment for the remainder of statements made by him, this decision of 3 March 1989, or at least the decision of the Disciplinary Commission of the Federal Engineer Chamber of 19 July 1989, applying the principles established by the Constitutional Court, constituted the final decisions for the purposes of Article 26 (Art. 26). The applicant's second complaint to the Constitutional Court could not be regarded as an effective remedy.

The applicant submits that the Constitutional Court, in the said decision of 3 March 1989, quashed the Disciplinary Commission's decision of 15 June 1987 in its entirety. At that time, he could not, therefore, have complained of any decision to his detriment. Moreover, the second set of proceedings comprised a full examination of all the disciplinary charges against him. Thus his complaint to the Constitutional Court regarding the Disciplinary Commission's decision of 19 July 1989 could not be regarded as an ineffective remedy.

The Commission recalls that according to Article 26 (Art. 26) of the Convention, "it may only deal with the matter ... within a period of six months from the date on which the final decision was taken".

In the present case, the applicant's disciplinary conviction in the first set of proceedings was quashed by the Constitutional Court in March 1989, and subsequently, new proceedings were conducted against the applicant before the Disciplinary Commission. In the light of the Constitutional Court's reasoning, the applicant was again convicted of part of the charges against him, and acquitted of the remainder. His

second complaint to the Constitutional Court was dismissed on 1 October 1991 as unfounded.

In these circumstances, the applicant, having lodged his application on 21 November 1991, may be regarded as having complied with the six months' rule under Article 26 (Art. 26). The application cannot, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

b. As regards the merits of the applicant's complaint, the Government submit that the interference with the applicant's right to freedom of expression was justified under Article 10 para. 2 (Art. 10-2) of the Convention. According to the Government, the legal basis of the interference concerned was S. 48 para. 1 of the Engineer Chamber Act in conjunction with the Rules of Professional Conduct. It pursued the legitimate aim of protecting the reputation of the applicant's colleagues, and, having particular regard to the reasoning of the Constitutional Court, was necessary in a democratic society.

The applicant maintains that his criticism of his colleagues was justified, and that a disciplinary punishment for such criticism was not necessary in a democratic society. He also raises doubts as to the clarity of the legal basis for his punishment, as far as the Rules of Conduct were concerned.

The Commission notes that on 19 July 1989 the Disciplinary Commission of the Austrian Federal Engineer Chamber, following earlier successful appeal proceedings, found that the applicant had disregarded rules of professional conduct in that he had criticised his colleagues in an unfair and disparaging manner, and issued a reprimand against him.

The Commission finds that this measure constituted an interference with the exercise of the applicant's 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 legal basis of the interference under consideration was S. 48 para. 1 and S. 49 of the Federal Engineer Chamber Act in combination with the Rules of Professional Conduct. The Commission finds that these provisions were accessible, and that the disciplinary measure complained of was also foreseeable under the relevant legislation (cf. *mutatis mutandis*, Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, pp. 21-23, paras. 45-48). The reprimand issued against the applicant can, therefore, be considered as "prescribed by law" for the purposes of Article 10 para. 2 (Art. 10-2).

Moreover, the decisions complained of aimed to protect "the reputation or rights of others", namely the civil engineers criticised by the applicant, which is a legitimate aim under Article 10 para. 2 (Art. 10-2).

It remains to be determined whether the interference complained of was "necessary in a democratic society" and proportionate to the legitimate aim pursued.

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 such a need exists, but it goes

hand in hand with a European supervision (cf. European Court H.R., Observer and Guardian judgment of 26 November 1991, series A No. 216 pp. 29-30, para. 59).

The Commission notes that disciplinary proceedings were conducted against the applicant for breach of the principle of loyalty and for having criticised other civil engineers in an unfair and disparaging manner, in accordance with the relevant provisions of the Rules of Professional Conduct and the Federal Engineer Chamber Act.

The Commission has seen the interference complained of in particular against the background of the decisions taken in the first set of proceedings which were quashed by the Constitutional Court on 3 March 1989 on the ground that the Disciplinary Commission had, as regards one of the letters, disregarded the applicant's right to freedom of expression. In a detailed reasoning, the Constitutional Court balanced the right to raise criticism against the necessity, in a democratic society, to protect the reputation and rights of others, here civil engineers, against unfair criticism by their colleagues in the context of disciplinary proceedings.

In the second set of proceedings, the Disciplinary Chamber, in the light of the Constitutional Court's considerations, confirmed the finding of a breach of professional duties in respect of the unfair and disparaging wording of two of the letters sent by the applicant. In the first of these letters, he had stated that particular experts worked in an 'superficial and bungling manner' ('Husch-Pfusch-Verfahren'), and that they gave obviously low estimates and deliberately overlooked important compensation factors. In the second letter, he had requested the President of the Klagenfurt Regional Court to consider the above submissions.

The Commission finds that, balancing the applicant's interest in raising criticism in respect of the professional performance of some of his colleagues, and the protection of the reputation and rights the civil engineers concerned against unfair and disparaging statements, there were relevant and sufficient reasons for a disciplinary measure against the applicant.

Moreover, the sanction chosen, i.e. a reprimand, does not appear disproportionate to the legitimate aim pursued.

In these circumstances, the interference complained of can, therefore, be regarded as "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 the remaining part of the application is manifestly ill-founded with the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber

President of the First Chamber

(M.F. BUQUICCHIO)

(C.L. ROZAKIS)