

AS TO THE ADMISSIBILITY OF

Application No. 12194/86
by Michael KÜHNEN
against the Federal Republic of Germany

The European Commission of Human Rights sitting in private
on 12 May 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER 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 11 April 1986
by Michael Kühnen against the Federal Republic of Germany and registered
on 28 May 1986 under file No. 12194/86;

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

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the applicant, may be summarised as follows:

The applicant, a German citizen born in 1952, is a journalist currently apparently resident in Butzbach in the Federal Republic of Germany.

The applicant was in 1983 in a leading position in the "ANS/NA", an organisation allegedly attempting to reinstitute the National Socialist Party (NSDAP) prohibited in Germany. According to the subsequent decision of the Frankfurt Regional Court (Landgericht) the applicant prepared and disseminated in this context various publications. For instance, in one "Frankfurt Appeal", he advocated the fight for an independent, socialist Greater Germany (Kampf für ein unabhängiges, sozialistisches Grossdeutschland). Another pamphlet stated:

"We are called 'Neo-Nazis'! So what! ... We are against: bigwigs, bolshevists, Zionists, crooks, cheats and parasites. We are against: capitalism, communism, Zionism, estrangement by means of masses of foreign workers, destruction of the environment. We are for: German unity, social justice, racial pride, community of the people, camaraderie."

<German>

"Man nennt uns 'Neo-Nazis'! Na und? ... Wir sind gegen: Bonzen, Bolschewisten, Zionisten, Gauner, Schieber und Schmarotzer. Wir sind gegen: Kapitalismus, Kommunismus, Zionismus, Überfremdung durch Fremdarbeitermassen, Umweltzerstörung. Wir sind für: Deutsche Einheit, Soziale Gerechtigkeit, Rassenstolz, Volksgemeinschaft, Kameradschaft."

In another pamphlet the applicant stated that the ANS/NA would be dissolved once the NSDAP was reinstated. In an interview with the journal "Country-folk" ("Bauernschaft") he stated that: "Whoever serves this aim can act, whoever obstructs will be fought against and eventually eliminated" ("Wer diesem Ziel dient, kann wirken, wer es behindert, wird bekämpft und schliesslich ausgeschaltet").

Criminal proceedings were instituted against the applicant before the Frankfurt Regional Court on the grounds, inter alia, that he had issued publications contrary to S.86 of the German Penal Code (Strafgesetzbuch). S.86 prohibits the dissemination of propaganda by means of unconstitutional organisations (mittels verfassungswidriger Organisationen) to the extent that the publications at issue are directed against the basic order of democracy and freedom and the notion of the understanding among peoples (gegen die freiheitliche demokratische Grundordnung oder den Gedanken der Völkerverständigung

gerichtet).

During these proceedings the applicant requested the hearing of various witnesses who allegedly could prove, inter alia, that he had not been aware that his publications breached S.86 (Verbotsirrtum). Thus, he requested that directors of elections (Wahlleiter) be heard as witnesses, as the latter had stated that the ANS-programme did not violate German penal law. The Regional Court rejected the request as only the Court itself was competent to draw such a conclusion. The applicant also requested the preparation of an expert opinion to prove that a difference existed between the SA (Sturmabteilung), to whose legal traditions the ANS adhered, and the NSDAP. This was refused by the Regional Court as its only task was to decide whether the publications at issue breached S.86 of the Penal Code.

The Court also dismissed the applicant's requests, inter alia, to consider as evidence the views of the Frankfurt Public Prosecutor's Office, or to hear as a witness the chairman of the Committee of Petitions of the German Bundestag since none of these persons had made statements which could establish that the publications did not fall under S.86. For instance, in its procedural decision of 15 January 1985 the Court rejected a request concerning, inter alia, the hearing of a journalist as a witness on the ground that the applicant had been previously convicted for such offences and could not therefore claim that he was not aware of the criminal nature of the publications.

After 13 hearings the Regional Court convicted the applicant on 25 January 1985, inter alia, of having prepared and disseminated propaganda material appertaining to an unconstitutional organisation and sentenced him to 3 years and 4 months' imprisonment. In its judgment which numbered 77 pages the Court proceeded from the applicant's statements made in, as well as his various publications read out before, the Court. It noted that the applicant had admitted being the author of the various publications.

The Court then discussed in detail his objections according to which these publications did not fall under S.86 of the Penal Code. However, the Court found, inter alia, that the applicant's publications aggressively advocated the reinstatement of the NSDAP and of national socialism and with it the state of violence and illegality which existed in Germany between 1933 and 1945. In the Court's view this clearly violated the basic order of freedom and democracy as well as the notion of the understanding among peoples. The Court also found that the publications could revive anti-semitic sentiments in that they depreciated Zionism and emphasised pride of race. The Court concluded that the conditions of S.86 had been met and that the applicant had clearly been aware of the criminal nature of his publications.

The applicant filed an appeal on points of law (Revision)

against this judgment with the Federal Court of Justice (Bundesgerichtshof) which on 23 September 1985 dismissed the appeal as not disclosing any legal errors to the detriment of the applicant. No further reasons were stated.

The applicant then filed a constitutional complaint (Verfassungsbeschwerde) in which he complained inter alia of a breach of his rights to a fair hearing as well as to free beliefs (Weltanschauung) and the free expression of his opinion. On 25 November 1985 the Federal Constitutional Court (Bundesverfassungsgericht) did not admit his constitutional complaint as it did not offer sufficient prospects of success.

COMPLAINTS

1. Under Article 9 of the Convention the applicant complains that his prison sentence was determined on the basis of his beliefs, and under Article 10 that he was punished for the free expression of his opinion. He claims that in his case the conditions of Article 17 of the Convention were not met since he was merely advocating the reinstatement of the NSDAP as a legal party in the present framework of law and order (im Rahmen der herrschenden Ordnung).

2. The applicant also complains that he did not have a fair trial in that his requests for the taking of evidence were rejected and that the decision of the Regional Court contained contradictions. He complains that the Federal Court of Justice did not give reasons for its decision and that the Federal Constitutional Court did not admit his constitutional complaint. In this respect he relies on Article 6 paras. 1 and 3 (d) of the Convention.

3. Under Article 7 para. 1 of the Convention he claims that the Regional Court convicted him on the basis of legal views which were not clear at the time. Under Article 14 he complains of an overly broad interpretation of S.86 of the Penal Code.

THE LAW

1. The applicant complains under Articles 9 and 10 (Art. 9, 10) of the Convention that he was punished for his beliefs and the free expression of his opinion. He claims that in his case the conditions of Article 17 (Art. 17) of the Convention do not apply since he was merely advocating the reinstatement of the NSDAP as a legal party.

The Commission has examined these complaints under Article 10 (Art. 10-1) of the Convention which in para. 1 guarantees the right to freedom of expression and, inter alia, the right to impart information without interference by public authority.

The Commission notes that the applicant was convicted for issuing publications and that therefore there has been an interference with the applicant's right to freedom of expression within the meaning of Article 10 para. 1 (Art. 10-1).

The Commission must therefore examine whether this interference satisfied the conditions laid down in Article 10 para. 2 (Art. 10-2) of the Convention. Under this provision the exercise of the freedom of expression, "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, 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 first that the applicant's conviction was based on S.86 of the German Penal Code and, therefore, "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

As regards the aim of the measure at issue the Commission recalls that the freedom of expression constitutes one of the essential foundations of a democratic society.

With reference to the present case the Commission notes that the provisions of German penal law under which the applicant was convicted and sentenced aimed at protecting the basic order of freedom and democracy and the notion of the understanding among peoples. The aim was, therefore, legitimate under Article 10 para. 2 (Art. 10-2) as being established "in the interests of national security (and) public safety (and) for the protection of the ... rights of others."

In addition, the Commission notes the judgment of the Frankfurt Regional Court of 25 January 1985 according to which the applicant's publications aggressively advocated the reinstatement of the NSDAP and of national socialism and with it the state of violence and illegality which existed in Germany between 1933 and 1945. The Court also found that the publications could revive antisemitic sentiments.

As to the necessity of the measure within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention the Commission refers further to Article 17 (Art. 17) of the Convention. This provision states:

"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) 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 (Art. 17) (see Nos. 8348/78, 8406/78, *Glimmerveen and Hagenbeek v. the Netherlands*, Dec. 11.10.79, DR 18 p. 187).

As regards the circumstances of the present case the Commission again notes the detailed findings of the Frankfurt Regional Court according to which the publications at issue, by advocating national socialism, aimed at impairing the basic order of freedom and democracy. The Commission considers that the applicant's proposals thus ran counter to one of the basic values underlying the Convention, as expressed in its fifth preambular paragraph, namely that the fundamental freedoms enshrined in the Convention "are best maintained ... by an effective political democracy".

The Frankfurt Regional Court also found that the applicant's publications could revive antisemitic sentiments, inter alia, as they depreciated Zionism and emphasised pride of race. The Commission accordingly considers that the applicant's policy clearly contains elements of racial and religious discrimination.

As a result, 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, as shown above, 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.

Under these circumstances the Commission concludes that the interference at issue was "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 further complains under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention that he did not have a fair trial before the Frankfurt Regional Court. He also complains that the Federal Court of Justice did not give reasons for its decision and that the Federal Constitutional Court did not admit his constitutional complaint.

The Commission has examined these complaints under Article 6 para. 1 (Art. 6-1) of the Convention. Insofar as the applicant complains that he did not have a fair trial in that his requests for the taking of evidence and the hearing of witnesses were not granted, the Commission recalls that Article 6 para. 1 (Art. 6-1) does not grant an unlimited right to have evidence taken, and it is primarily the task of the respective courts to decide on the relevance to the proceedings of the taking of evidence (cf. No. 7450/76, Dec. 28.2.77, D.R. 9 p. 108).

In the present case the applicant could present his case, *inter alia*, at a number of trial hearings before the Frankfurt Regional Court. That Court's judgment contained on 77 pages a thorough review of the relevant facts as well as a full reasoning for the factual and legal conclusions reached. Insofar as the applicant's requests for the taking of evidence and the hearing of witnesses were refused, the Commission notes that the applicant had admitted being the author of the publications at issue and the Court's only task was to establish whether they contradicted S.86 of the Penal Code. The Commission does not find it unreasonable that the Court considered that the applicant, who had previously been convicted for the same offences, was aware of their criminal nature, and that the Court therefore regarded the testimony of the witnesses concerned as irrelevant. The Commission thus sees no indication that the applicant, who was represented by a lawyer, could not present his case properly, or that the proceedings were improperly conducted.

Insofar as the applicant complains that the Federal Court did not give reasons for its decision, the Commission recalls that Article 6 para. 1 (Art. 6-1) does not require that reasons should accompany a decision where an appeal court, such as the Federal Court of Justice, basing itself on a specific legal provision, rejects an appeal as having no chance of success (cf. No. 8769/79, Dec. 16.7.81, D.R. 25 p. 240).

Insofar as the applicant complains that the Federal Constitutional Court did not admit his constitutional complaint, the Commission finds no further issue under Article 6 para. 1 (Art. 6-1) 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.

3. The applicant also complains under Article 7 para. 1 (Art. 7-1) of the Convention that the Frankfurt Regional Court convicted him on the basis of legal views which were not clear at the time. Under Article 14 (Art. 14) he complains of the overly broad interpretation of S.86 of the Penal Code. However, the Commission finds no further issue under these provisions. It follows that the remainder of the application is also manifestly ill-founded within the meaning of

Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C. A. NØRGAARD)