

AS TO THE ADMISSIBILITY OF

Application No. 25992/94
by Nationaldemokratische **Partei** Deutschlands,
Bezirksverband München-Oberbayern
against **Germany**

The European Commission of Human Rights (First Chamber) sitting in private on 29 November 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
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 13 October 1994 by Nationaldemokratische **Partei** Deutschlands, Bezirksverband München-Oberbayern against **Germany** and registered on 19 December 1994 under file No. 25992/94;

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 is the Munich-Upper Bavaria regional organisation (Bezirksverband) of a political party in **Germany**. In the proceedings before the Commission the applicant organisation is represented by its chairman Mr. P.L. Aae, who is resident at Feldkirchen-Westerham.

On 8 May 1991 the Munich Municipality, acting under the Assembly Act (Versammlungsgesetz), imposed various duties upon the applicant organisation in respect of a conference organised on the subject "**Germany**'s future in the shade of political extortion?", scheduled for

the early afternoon of 12 May 1991. The applicant organisation was ordered to take the appropriate steps to ensure that, on the occasion of the meeting, the persecution of Jews under the Nazi regime was not denied or called into question. In particular, it was ordered to remind the participants, at the beginning of the meeting, of the criminal liability which such statements could incur under the relevant provisions of the Penal Code (Strafgesetzbuch) relating to incitement to hatred, insult or defiling the memory of the dead. Furthermore, the applicant organisation was ordered to stop any such statements immediately and, if necessary, to interrupt or terminate the meeting. The Municipality also decided that an appeal against its above order should have no suspensive effect.

In its decision, the Municipality noted that the applicant organisation, in a local as well as in a supra-regional party publication, had issued invitations to the above-mentioned meeting, indicating that the "well-known revisionist historian" Mr. D. Irving would attend it and comment on the question "whether the Germans and their European neighbours could further afford to accept the 'contemporary history' as means of extortion". The Municipality considered that, taking into account the text of the invitation, the general views held by Mr. Irving as well as correspondence exchanged between him and the applicant organisation in the preparation of the meeting, there was a high risk that the above-mentioned criminal offences be committed on the occasion of the meeting. The Municipality also observed that, when heard on 7 May 1991 on the issue, Mr. Aae had not been able to dissipate the said suspicion.

On 10 May 1991 the applicant organisation lodged an administrative appeal (Widerspruch).

The meeting took place on 12 May 1991.

On 9 August 1991 the Government of Upper Bavaria rejected the administrative appeal in view of the lapse of time. The costs of the proceedings were awarded against the applicant organisation on the ground that the appeal would have been unsuccessful.

On 9 September 1992 the Munich Administrative Court (Verwaltungsgericht) dismissed the request of the applicant organisation for a finding that the decision of 8 May 1991 had been unlawful (Fortsetzungsfeststellungsklage). The Administrative Court found that the decision in question had been lawful and had not, therefore, violated any rights of the applicant organisation.

The Administrative Court noted that S. 5 (4) of the Assembly Act allowed for the prohibition of an assembly if there were reasons to believe that the organiser of the assembly or supporters would make statements or accept statements made by others which constituted a criminal offence. This provision would also allow for more lenient measures such as the obligations imposed upon the applicant organisation. The Court found that at the relevant time the conditions under S. 5 (4) had been met as regards the assembly organised by the applicant organisation. In this respect, the Court argued in detail that a person denying the persecution of Jews under the Nazi regime was not covered by the right to freedom of expression but committed criminal offences and that such statements were likely to be made on the meeting organised by the applicant organisation.

On 30 June 1993 the Bavarian Administrative Court of Appeal

(Verwaltungsgerichtshof) dismissed the appeal (Beschwerde) of the applicant organisation. The Court of Appeal confirmed the Administrative Court's reasoning and in particular that there had been a real risk that statements constituting criminal offences be made at the meeting in question. The Court of Appeal did not grant leave to appeal to the Federal Administrative Court (Bundesverwaltungsgericht).

On 19 November 1993 the Federal Administrative Court refused the request of the applicant organisation for leave to appeal (Nicht-zulassungsbeschwerde).

On 13 April 1994 the First Senate of the Federal Constitutional Court dismissed the constitutional complaint (Verfassungsbeschwerde) of the applicant organisation as obviously ill-founded. The Constitutional Court considered that the decision of 8 May 1991 as well as the ensuing administrative and court decisions, obliging the applicant organisation to ensure that at the meeting the persecution of Jews under the Nazi regime was not denied or put into question, did not amount to a violation of the right to freedom of expression. The Constitutional Court observed that the applicant organisation had not challenged the prognosis made by the Munich Municipality and later confirmed by the administrative courts that there had been a risk of such statements, but rather claimed the right to make such statements. The Constitutional Court found that the denial of the persecution of Jews under the Nazi regime was an untrue statement of fact and referred in this respect to the countless testimonies of eye-witnesses and documents, the findings of criminal courts in numerous criminal proceedings and the findings of historical science. Such statements were not protected.

The Constitutional Court further stated that, even assuming a restriction of the freedom of expression regarding the whole meeting, the impugned decision could not be objected to under constitutional law. The decision concerned had been based on the Assembly Act. There had been no violation of the right to freedom of assembly. Moreover, the obligations imposed upon the applicant organisation related to statements involving criminal liability and aimed at preventing them. The general risks for the right to freedom of expression inherent in preventive measures could be balanced by strict requirements as to the prognosis of such punishable statements. These requirements were met with regard to the challenged decisions. In particular, the relevant provisions of the Assembly Act and the Penal Code, as interpreted by the Federal Court of Justice (Bundesgerichtshof) in accordance with the constitutional provisions, had been correctly applied in the instant case.

COMPLAINTS

The applicant organisation complains under Article 10 of the Convention about the decision of the Munich Municipality of 8 May 1991, as confirmed by the German courts, imposing obligations upon the applicant organisation to prevent statements denying, or putting into question, the persecution of Jews under the Nazi regime. The applicant organisation asserts in particular that statements denying the persecution of Jews under the Nazi regime, in particular the denial of the existence of gas chambers were protected by the Convention as statements or opinions relating to contemporary history. In this respect, the applicant organisation maintains that, according to scientific research, the gas chambers in Auschwitz were not authentic. However, the German authorities had incorrectly linked the obligations

imposed upon the applicant organisation to such statements, although the subject of the meeting was a critical discussion of anti-German atrocity propaganda and its importance in the political and psychological manipulation.

THE LAW

The applicant organisation complains about the decision of the Munich Municipality of 8 May 1991, as confirmed by the German courts, imposing obligations in respect of a meeting organised by the applicant organisation. The applicant organisation invokes Article 10 (Art. 10) of the Convention.

Article 10 (Art. 10) of the Convention states, so far as relevant:

"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 constituted an interference with the exercise, by the applicant organisation, of the right to freedom of expression in respect of the preparation and conduct of a political meeting. Such interference is in breach of Article 10 (Art. 10), unless it is justified under paragraph 2 of Article 10, 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 Assembly Act and the Penal Code. These provisions are accessible to the general public, and, taking into account the case-law of the German courts on questions of incitement to hatred and insult, the criminal nature of statements amounting to a denial of the persecution of Jews was clearly foreseeable to the applicant organisation.

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, to which the Assembly Act referred, and their application in the present case, aimed to secure the peaceful coexistence of the population in **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 has carefully examined the findings of the Municipal Office in its decision of 8 May 1991 as regards the risk that statements constituting criminal offences would be made in the course of the meeting organised by the applicant organisation. The applicant organisation, in the domestic proceedings as well as in the proceedings before the Commission did not argue that there was no such risk. The German administrative courts and the Federal Constitutional Court, in detailed decisions, confirmed that the statements at issue were commonly known untrue factual allegations and not protected by the freedom of expression. The Constitutional Court also considered the whole of the intended discussion at the meeting in question and found that the obligations imposed were lawful and met the stricter requirements as regards preventive measures.

The Commission finds that statements denying or calling into question the persecution of Jews under the Nazi regime in the context of a discussion of "anti-German atrocity propaganda" run counter one of the basic ideas of the Convention, as expressed in its preamble, namely the foundation of justice and peace.

The public interests in the prevention of crime and disorder in the German population due to incriminating statements denying the persecution of Jews under the Nazi regime, and the requirements of protecting the reputation and rights of Jews, outweigh, in a democratic society, the freedom of the applicant organisation to hold a meeting without being obliged to take steps in order to prevent such statements. In this respect, the Commission took into account that the Munich Municipality opted for imposing such obligations on the basis of considerations of proportionality. Moreover, as to the preventive nature of the interference at issue, the Commission notes the high probability of punishable statements of the above kind, given the subject of the discussion and the participation of Mr. Irving.

In these circumstances, there were relevant and sufficient reasons for the interference concerned. The decision of the Munich Municipality of 8 May 1991, as confirmed by the administrative courts and the Federal Constitutional Court, 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 organisation's right under Article 10 (Art. 10) of the Convention.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber

(M.F. BUQUICCHIO)

President of the First Chamber

(C.L. ROZAKIS)