AS TO THE ADMISSIBILITY OF

Application No. 26601/95
by Hans-Christian LEININGEN-WESTERBURG
against Austria

The European Commission of Human Rights sitting in private on 20 January 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION

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 23 December 1994 by Hans-Christian LEININGEN-WESTERBURG against Austria and registered on 1 March 1995 under file No. 26601/95;

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 applicant, born in 1945, is an Austrian national residing in Pressbaum. In the proceedings before the Commission he is represented by Mr. W. Strigl, a lawyer practising in Vienna.

A. The particular circumstances of the case

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

The applicant acted as presiding judge in the jury trial against Udo Proksch, a most spectacular criminal case arousing great public interest. On 11 March 1991 the jury found Proksch guilty of murder and attempted murder in that he had sunk the ship "Lucona". In spring 1993, after the judgment had become final, the applicant met with a journalist, who had written a widely read book entitled "The Lucona case". The applicant had asked for this meeting as he wanted to ascertain whether certain rumours were true according to which the journalist had written a script for a film about the Lucona case, in which a distorted picture was given of the presiding judge. The applicant and the journalist, who did not make any notes during the whole conversation and did not record it either, first spoke about the issue of the film and then continued to talk about the previous proceedings against Proksch.

Shortly afterwards, the journalist published a book entitled "The network of power" ("Das Netzwerk der Macht"). The last chapter refers to his conversation with the applicant. The journalist reports that the applicant told him that in no other case had so many people tried to intervene. At first there were two groups, those who wanted to protect Proksch and those who wanted to have him convicted. Whereas his protectors disappeared after the opening of the trial, the second group continued to exert pressure on him. According to the report, the applicant then explained his feelings as regards the prosecutors. One of them allegedly came to him and suggested that he need not make a big fuss in this case, as the accused was guilty anyway. Even the counsel for the insurance company, which was a private party to the proceedings, came to tell him that Proksch should get a life sentence. Then the report states that upon being asked why he disliked Judge L., one of the two other professional judges who sat in the Proksch case, the applicant replied as follows:

<German>

"Der L. sitzt im Buffet und sagt: 'Der Leiningen ist bestochen!'

Dann holt der Proksch-Richter tief Atem und fügt hinzu: 'Ausgerechnet der L. sagt das, der kleine Scheißer, von dem jeder im Haus weiß, daß - wenn es einen Richter gäbe, der sich bestechen ließe!'"

<Translation>

"L. is sitting in the canteen and says: 'Leiningen has been bribed!'

Then Proksch's judge takes a deep breath and adds: 'L. of all people says that, the little turd, when everyone knows that if ever there was a judge who was open to bribery, it would be him!'"

According to the chapter, all these incidents convinced the applicant that an act of retributive justice was needed. Therefore, and because so many people in the Ministry of Justice opposed it, he had insisted on the search for the wreck of the Lucona. Then the following statement of the applicant is recorded:

<German>

"'Die Justiz', sagt Leiningen, 'ist eine Hure'. Er meint damit: Zuerst wird ein Mann wie Proksch jahrelang mit allen Mitteln auch von der Justiz beschützt.

Und dann dreht sich die Justiz auf einmal um 180 Grad und will denselben Mann mit aller Macht vernichten und es kann ihr nicht schnell genug gehen, daß er verurteilt wird, ohne Rücksicht auf Fairness und Rechtsstaatlichkeit: 'Da spiele ich nicht mit!'"

<Translation>

"'The judiciary', says Leiningen, 'is a whore'. By which he means: First a man like Proksch is protected by all means, even by the judiciary.

And then, all of a sudden, the judiciary turns round 180 degrees and with all its might wants to ruin him and cannot wait to see him convicted without regard to fairness and the rule of law: 'I am not playing this game!'"

The chapter ends with reporting some remarks by the applicant relating to Proksch's lawyers, reflecting mainly his opinion that their defence was of a poor quality.

Subsequently, disciplinary proceedings were introduced against the applicant.

On 25 November 1993 the Vienna Court of Appeal (Oberlandes-gericht) sitting as a Disciplinary Court found the applicant guilty of having breached his professional duties. The court, referring to S. 57 para. 3 of the Law on the Judiciary (Richterdienstgesetz), found that the applicant had, by saying "The judiciary is a whore" and by his remark relating to judge L., acted in a way which was likely to diminish confidence in the judiciary and lower the esteem for it. He had thereby committed a disciplinary offence and had to receive a reprimand (Verweis) in accordance with S. 104 of the Law on the Judiciary.

The court noted that the applicant had admitted to having made the incriminated statements. It also noted his defence that he had made these statements not in an interview but in the course of a private conversation and had not expected the journalist to publish them. However, the Court found that the applicant knew the journalist's involvement in the case and had to be aware that he would make use of his statements. He had, thus, failed to act with the necessary diligence.

As regards the statement "The judiciary is a whore", the court noted that the applicant had referred to numerous interventions in the proceedings against Proksch. However, as the former presiding judge he could be expected to oppose criticism relating to this case and not to make statements which created the impression that the proceedings against Proksch had not been in accordance with the law. Although his statement was a quotation it was to be qualified as a breach of professional duties, in particular as he had not referred to its source. Even if it were true that the Public Prosecutor's Office had tried to influence the proceedings against Proksch, such a suspicion had never been raised as regards the courts. The applicant's statement referred to the judiciary which was understood by the general public to include both the prosecution and the independent courts. In fact, his statement had been interpreted in the sense that Udo Proksch had

been convicted without regard to fairness and the rule of law.

As far as the second statement relating to judge L. was concerned, it lacked any objective criticism, but contained just an unqualified and disparaging allegation which was suited to lower him and the whole judiciary in public esteem.

On 4 January 1994 the applicant appealed against this decision. He submitted in particular that it was contrary to Article 10 of the Convention. The statement "The judiciary is a whore" was a quotation from Tucholsky. Taken alone it could be understood to mean that the judiciary was open to bribery. However, the disciplinary court had not had due regard to the context, which in the present case excluded such an interpretation. The relevant passage in the journalist's book explained what the applicant had meant with the incriminated statement. Moreover, the word "judiciary" which in general could refer to both the courts and the organs of the prosecution, had a specific meaning in the context of the Lucona case. It referred in this context to the representatives of the Senior Public Prosecutor's Office and the former Minister of Justice, who had protected Proksch by all means. In this respect the criticism had been confirmed by a parliamentary investigation committee. As the incriminated statement was not aimed at the courts, he had not breached his professional duties. Moreover, he had made the statement in a private confidential conversation. The journalist did not write for any newspaper and had told him that his book was ready. The applicant could, therefore, not be aware that his statements would be published.

As regards the second statement, the applicant submitted that he would not have called his colleague a "little turd" in public. The background to his remark was that he had been criticised by judge L. for his decision to have a search for the wreck of the ship "Lucona", which he, the applicant, considered to be necessary in order to prove whether or not Proksch was guilty. Other colleagues had hinted to him that judge L. had said in the canteen that he, the applicant, had been bribed, because he insisted on this search. It had to be taken into account that he had been carried away by old bitterness when talking to the journalist. Moreover, he had not had the intention to insult his colleague but had wanted to state that the whole issue was rather insignificant. Finally, it was unjust that disciplinary proceedings had been introduced against him but not against judge L.

On 1 July 1994 the Supreme Court (Oberster Gerichtshof) sitting as a Disciplinary Court dismissed the applicant's appeal.

As regards the applicant's defence that his statement had only been directed against the prosecution, the court found that the term "judiciary" meant the courts as well as the organs of the prosecution. A statement which alleged that "the judiciary" was open to bribery aimed primarily at the courts because they were called to decide whether an accused was to be convicted or to be acquitted. The incriminated statement accused the judiciary of lacking impartiality. This allegation was even more serious as it had been made by the applicant who had been the presiding judge in a spectacular case and whom everyone expected to have the knowledge of an insider. The statement itself did not express at all that he had only meant the prosecution. Article 10 para. 2 of the Convention protected the impartiality of the judiciary against excessive criticism which lacked a factual basis. As regards the applicant's defence that he had made the incriminated statements in a confidential conversation, the court found that he had in any case failed to display the diligence which

could be expected from an experienced judge when answering the provocative questions of a journalist, in particular, as he had not been caught up in this conversation unexpectedly. As regards the statement relating to his colleague it was irrelevant whether he had acted with the intention to insult him or whether he had only made a disparaging remark. Nor could the applicant's submission that judge L. had accused him of being bribable justify his remark. The Supreme Court concluded that the applicant had, thus, made statements accusing the judiciary or a specific judge of being open to bribery. They were likely to diminish the confidence of the general public, which the judiciary needed to fulfil its tasks.

B. Relevant domestic law

S. 57 of the Law on the Judiciary (Richterdienstgesetz) deals with the professional duties of a judge. Its paragraph 3, so far as relevant, reads as follows:

<German>

"Der Richter hat sich im und außer Dienst vorwurfsfrei zu benehmen und alles zu unterlassen, was das Vertrauen in die richterlichen Amtshandlungen oder die Achtung vor dem Richterstande schmälern könnte."

<Translation>

"A judge has to behave in a manner beyond reproach, whether or not he is acting in an official capacity, and must refrain from any act which might diminish confidence in judicial acts or the esteem for the judiciary."

S. 104 para. 1 of the Law on the Judiciary enumerates the following disciplinary penalties: reprimand, exclusion from promotion, transfer to another duty-station without removal allowance, retirement with reduced pension claims and dismissal.

COMPLAINTS

1. The applicant complains under Article 10 of the Convention that the decisions of the disciplinary courts violated his right to freedom of expression. He submits that his disciplinary conviction was not necessary in a democratic society for achieving any of the aims set out in paragraph 2 of this Article.

2. The applicant also complains under Article 6 para. 1 of the Convention that, in the disciplinary proceedings against him, he had neither a public hearing nor a public pronouncement of the judgment. He argues that the proceedings against him determined a criminal charge within the meaning of this Article having regard to the penalties provided for in the Law on the Judiciary.

THE LAW

1. The applicant complains under Article 10 (Art. 10) of the Convention that the decisions of the disciplinary courts violated his right to freedom of expression.

Article 10 (Art. 10), so far as relevant, 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 are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, ..., or for maintaining the authority and impartiality of the judiciary."

The Commission recalls at the outset that the Convention guarantees in principle extend to civil servants (Eur. Court HR, Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 22-23, para. 43).

The Commission considers that the decisions complained of, in which the applicant was found guilty of having breached his professional duties, constituted an interference with his right to freedom of expression.

This interference was prescribed by law, namely by the Law on the Judiciary, and served a legitimate aim, namely to maintain the authority of the judiciary and to protect the reputation of others.

As regards the necessity of the interference, the Commission recalls that the adjective "necessary" implies a "pressing social need". When assessing whether the interference complained of falls within the margin of appreciation enjoyed by the Contracting States, the Convention organs have to determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" (Eur. Court HR, Barthold v. Germany judgment of 25 March 1985, Series A no. 90, pp. 24-25, para. 55; Observer and Guardian v. United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59; Sunday Times (No. 2) v. United Kingdom judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50).

In the present case, the Vienna Court of Appeal and the Supreme Court, sitting as Disciplinary Courts, found that the applicant had breached his professional duties by saying "The judiciary is a whore" and by making a disparaging remark about a colleague in a conversation with a journalist relating to a spectacular jury trial in which the applicant had acted as presiding judge. They found that the first statement accused the judiciary of lacking impartiality and insinuated that the courts were open to bribery. The statement relating to the applicant's colleague was insulting and unqualified and also accused the latter of being open to bribery. Taking into account that the applicant knew the journalist's involvement in the case and that he had not been caught up in this conversation unexpectedly, he had failed to act with the diligence which could be expected of an experienced judge. As former presiding judge in the proceedings discussed, he should rather have opposed criticism instead of creating the impression that the proceedings had not been in accordance with the law. The courts noted the applicant's defence that the first statement had only been directed against the prosecution and that he had referred to numerous interventions in the proceedings at issue. However, the words used by the applicant could be understood as referring not only to the prosecution but also to the courts, although, in the instant case, there had never been any suspicion that the courts lacked impartiality. The Supreme Court, referring to Article 10 para. 2 (Art. 10-2) of the

Convention, found that it protected the judiciary against excessive criticism which lacked a factual basis.

The Commission finds that the interference complained of can be considered to be proportionate to the legitimate aims pursued and that the applicant's remarks, in particular the one about his colleague being open to bribery, go far beyond a normal criticism and that they are able to undermine the credibility of the judiciary. The domestic courts had regard to all the circumstances of the case, in particular to the fact that the applicant, though an experienced judge, had made the incriminated remarks in a conversation with a journalist and that he ought to have been aware of the risk they they will be published. Moreover, only the mildest disciplinary sanction, a reprimand, was imposed. The Commission finds that the reasons adduced by the disciplinary courts can be regarded as being "relevant" and "sufficient" to justify this sanction. Having regard to the margin of appreciation of the member States, which goes hand in hand with a European supervision, the disciplinary courts' decisions reprimanding the applicant do not appear to be arbitrary. Accordingly, the interference complained of can be regarded 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 complains under Article 6 (Art. 6) of the Convention that, in the disciplinary proceedings against him, he had neither a public hearing nor a public pronouncement of the judgment. He argues that the proceedings against him determined a criminal charge within the meaning of this Article having regard to the penalties provided for in the Law on the Judiciary.

Article 6 para. 1 (Art. 6-1), so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal ... . Judgment shall be pronounced publicly ... "

The Commission recalls that the question whether disciplinary proceedings against civil servants involve the determination of a criminal charge depends on the qualification of the act in domestic law, the nature of the offence and the punishment the accused risked to incur (cf. No. 13877/88, Dec. 17.5.90, D.R. 65 p. 279, 284; Eur. Court HR, Ravnsborg v. Sweden judgment of 23 March 1994, Series A no. 283-B, p. 28 et seq., paras. 30-35).

In the present case, the contested proceedings were classified as disciplinary under Austrian law and related to the breach of professional duties. The sanctions the applicant risked to incur ranged from a reprimand, which was actually imposed on him, to retirement with reduced pension claims or dismissal. In this context the Commission recalls that in the case of Kremzow v. Austria (No. 16417/90, Dec. 7.11.90, D.R. 67 p. 307, 309) it has held that even the withdrawal of rights connected with the professional status of a civil servant including the loss of pension rights was a typical sanction of disciplinary law. Thus, the disciplinary proceedings at issue did not concern the determination of a "criminal charge" against the applicant.

The Commission notes that the applicant's argument was limited to the criminal aspect of Article 6 (Art. 6) of the Convention. However, even assuming that disciplinary proceedings against a judge, which can lead to his retirement with reduced pension claims or dismissal, might involve a determination of his "civil rights" within the meaning of Article 6 (Art. 6), the Commission observes that, in the present case, such measures were not at stake.

In conclusion, the Commission finds that Article 6 (Art. 6) is not applicable to the disciplinary proceedings against the applicant.

It follows that this part of the application must be rejected under Article 27 para. 2 (Art. 27-2) of the Convention, as being incompatible ratione materiae with the provisions of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

H.C. KRÜGER Secretary to the Commission	S. TRECHSEL President of the Commission