AS TO THE ADMISSIBILITY OF

Application No. 17285/90
by Dagmar INSAM
against Austria

The European Commission of Human Rights sitting in private on 15 January 1994, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

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 2 October 1990 by Dagmar INSAM against Austria and registered on 15 October 1990 under file No. 17825/90;

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 5 June 1992 and the observations in reply submitted by the applicant on 28 July 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1945. She lives in Graz and is represented before the Commission by Mr. F. Insam, a lawyer practising in Graz.

The particular circumstances of the case

The facts of the case, as submitted by the parties and apparent from the documents submitted, may be summarised as follows:

The applicant bought a firm (Unternehmen) from the liquidator of

an insolvent limited company. She then brought proceedings in her own name and in the name of the firm against three former managers of the company. At a hearing before the Vienna Commercial Court (Handelsgericht) on 7 July 1988, the question was discussed whether formal approval of the applicant's action by the shareholders was required under Section 35 (1) of the Limited Companies Act (Gesetz über Gesellschaften mit beschränkter Haftung). The applicant and her co-plaintiff were ordered to produce any declarations or other documents within 14 days. The proceedings were then declared closed. According to the trial record, it was accepted by the parties that there was no need to discuss the contents of the documents. On 18 July 1988 the plaintiffs submitted declarations by the shareholders and the liquidator under Section 35 (1) of the Limited Companies Act. The declarations were dated 12 and 13 July 1988. With the declarations the plaintiffs submitted a request for the proceedings to be re-opened. On 14 September 1988 the Vienna Commercial Court rejected the plaintiffs' claims. It found, inter alia,

- that the applicant had no right to discovery of the company records prepared by the former managers,

- that the Court need not re-open the oral hearings in the proceedings because the applicant had renounced the possibility of having discussion on the declaration by the shareholders,

- that after the oral proceedings had terminated, it was no longer possible to bring further evidence before the Court, and

- that the substantive claims should be rejected.

In its reasons, the Court noted in particular that the declaration of the shareholders and the liquidator were dated after the oral hearing had been closed and accordingly, pursuant to Section 35 of the Companies Act, a vital formal condition for bringing the proceedings was not present. The Court referred to the German case-law in the matter, as Austrian decisions were not conclusive.

After an oral hearing on 26 January 1989 the Vienna Court of Appeal (Oberlandesgericht), in two separate decisions of the same date (one concerning the plaintiffs' appeal against the substantive judgment (Berufung), the other concerning the appeal against the procedural decisions (Rekurs)), rejected the plaintiffs' appeal concerning the re-opening of the oral hearing and allowed their appeals as to the remainder of the decision of 14 September 1988. The proceedings were only to recommence before the first instance court after the Court of Appeal's decision had become final. Before the Court of Appeal's decisions became final, the parties had made a further appeal (Revision) to the Supreme Court (Oberster Gerichtshof) which, on 8 February 1990, dealt with the interlocutory matters and gave a partial decision on the merits of the case.

The Supreme Court confirmed that a declaration by the shareholders was a formal pre-condition to bringing proceedings in the name of a company, even a company in liquidation, so that in the absence of such a declaration at the beginning of the proceedings, or at the latest, during the oral proceedings, the claim was bound to fail. Accordingly, there was no need for further evidence, and the case was ready for a final decision as regards the requests for compensation and for declaratory relief. The Supreme Court was able to determine the substantive issues by virtue of Article 519 para. 2 of the Code of Civil Procedure (Zivilprozeßordnung).

Relevant Domestic Law

Section 35(1)(6) of the Limited Companies Act (Gesetz über Gesellschaften mit beschränkter Haftung) states that a shareholders' declaration is required for a company to bring a claim for damages

against its managers.

Article 502 para. 4 of the Code of Civil Procedure provided, at the relevant time, as follows:

> " If a further appeal is not inadmissible for the grounds set out in paras. 2 and 3 above, it is in any event only admissible where
>
> 1. the decision turns on a question of substantive or procedural law which is of particular importance for the preservation of legal consistency, legal certainty or the development of the law, for example because the appeal court diverges from the case-law of the Supreme Court or because such case-law does not exist or is not uniform, or
>
> 2. the matter determined by the appeal court exceeds AS 300,000 in money or money's worth."

The final sentence of Article 519 para. 2 of the Code of Civil Procedure provides that the Supreme Court may take a decision on the merits of a case if the matter is ready for a decision.

At the time of the judgments and decisions in the present case, Section 15 of the Supreme Court Act (Gesetz über den Obersten Gerichtshof) provided as follows:

> "(1) Decisions of the Supreme Court of general importance shall be officially published ...
>
> (2) Professors who teach legal subjects at inland universities shall be given access at their request and for scientific purposes to the decisions of the Supreme Court. ..."

On 28 June 1990 the Constitutional Court (Verfassungsgerichtshof) quashed Section 15 (2) of the Supreme Court Act in norm control proceedings (G 67/90). It found that the way in which Section 15 was worded clearly intended to exclude categories of persons who were not mentioned from having access to Supreme Court decisions. The Constitutional Court recalled that one of the Supreme Court's functions was to ensure legal certainty and uniformity, and that access to Supreme Court decisions was a pre-condition for such a function: without adequate access, appeals could not be properly made (especially in the light of the - amended - provisions of Article 502 para. 1 of the Code of Civil Procedure that a further appeal (Revision) could only be made in the majority of cases where an important question of law was involved), and the provision therefore contravened the principle of the rule of law. The Constitutional Court noted that with the quashing of Section 15(2), which was to take effect on 31 May 1991, the limitation on access to the Supreme Court's decisions fell away.

COMPLAINTS

The applicant complains that she had no fair chance to answer the view of the judge at first instance that a declaration by shareholders was a formal pre-condition for bringing proceedings in the name of a company. She also complains that no hearing took place before the Supreme Court, that the proceedings were not public and that the judgment, which was served on the applicant in writing, was not "publicly pronounced". The applicant alleges a violation of Article 6 para. 1 of the Convention.

The applicant also alleges a violation of Article 1 of Protocol No. 1 to the Convention in that she paid 1.26 million schillings for the firm which she bought from the limited company, but that because of the decisions of the court, she was unable to use that firm in order to institute proceedings against the former managers, as she had intended.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 October 1990 and registered on 15 October 1990.

On 20 February 1992 the Commission decided to invite the parties to submit written observations on the admissibility and merits of certain issues under Article 6 para. 1 of the Convention.

The Government's observations were submitted on 5 June 1992, with a correction on 1 July 1992. The applicant's observations in reply were submitted on 28 July 1992. The applicant submitted an English translation of her observations on 18 August 1992, and the Government submitted a translation of their observations on 12 October 1993.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention in several respects. She alleges that the lack of an oral hearing before the Supreme Court did not comply with the provision. Article 6 para. 1 (Art. 6-1) provides, so far as relevant, as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly ...".

The Government submit that the Commission is prevented from considering this complaint by virtue of the Austrian reservation to Article 6 (Art. 6) of the Convention. They further consider that, because Article 526 para. 1 of the Code of Civil Procedure enables appeal courts to take such investigations as necessary, the applicant has failed to exhaust domestic remedies because she failed to request such investigations. Finally, the Government consider that although the Supreme Court took a final decision on part of the merits of the case, it did so only because, once it had found that a declaration pursuant to Section 35 (1) (6) of the Limited Companies Act was necessary and had not been made before the close of the proceedings, it was in a position to determine the merits of the case by reference to the question of law it had to decide. They also point out that a hearing did take place at first and second instance. Accordingly, they consider that Article 6 (Art. 6) of the Convention did not require an oral hearing before the Supreme Court.

The applicant submits that the Austrian reservation to Article 6 (Art. 6) of the Convention does not comply with Article 64 (Art. 64), principally because it does not supply a "brief statement of the law concerned" by not referring to Article 509 para. 1 and Article 526 para. 1 of the Code of Civil Procedure, which permit the Supreme Court to take decisions without oral hearings. She considers that the complaint cannot be inadmissible for non-exhaustion of domestic remedies as she stated in her appeal against the decision of the Vienna Court of Appeal that the court of first instance had wrongly stated that she had "renounced" the possibility of discussing the documents to be produced, and that this relates to the question of a fair hearing. Finally, she considers that the question determined by the Supreme Court did indeed cover matters of fact, and points to the difference between the property interests in the shares of a company and the property interests in the assets of a company (which she had purchased).

The Commission is not required in the present case to determine the effect of the Austrian reservation to Article 6 (Art. 6) of the Convention on the proceedings nor to assess whether the applicant has exhausted domestic remedies in this respect as the complaint is in any

event inadmissible for the following reasons.

The Commission recalls that the way in which Article 6 (Art. 6) applies to hearings before courts of appeal depends on the special features of the proceedings (cf., for example, Eur. Court H.R., Fejde judgment of 29 October 1991, Series A no. 212-C, p. 67, para. 26). In certain circumstances the complete absence of an oral hearing at any instance may be compatible with Article 6 para. 1 (Art. 6-1) of the Convention (cf. Eur. Court H.R., Schuler-Zgraggen judgment of 24 June 1993, Series A no. 263, para. 58). In the present case an oral hearing was held both at first and at second instance. The Supreme Court, dealing with the further appeals of the parties from the second instance decisions (Rekurse) found that a formal condition for the applicant's action to succeed had not been met, and it gave a judgment on the merits pursuant to Article 519 para. 1 (2) of the Code of Civil Procedure. Whilst questions of fact will be relevant on such appeals, it remains the case that such appeals in principle deal with questions of law. Although the Supreme Court in the present case took a decision on the merits of the case (which distinguishes this case from the Sutter case, Eur. Court H.R., Sutter judgment of 22 February 1984, Series A no. 74, p. 13, para. 30), no new arguments were brought, and the alternative would have been for the Supreme Court to have made its finding on the law and to have remitted the case to a lower court for a final decision. Such a course would however have led to a wholly unnecessary prolongation of the proceedings.

The Commission finds that in the circumstances of the present case, Article 6 (Art. 6) of the Convention did not require an oral hearing before the Supreme Court.

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 also alleges a violation of Article 6 (Art. 6) of the Convention in that the judgment of the Supreme Court was not pronounced publicly, but merely sent to the parties.

The Government submit in this respect that the case is comparable with the Sutter case (above-mentioned Sutter judgment of 22 February 1984, pp. 14-15, paras. 31-34), in that application could be made by anyone who could establish an interest for permission to inspect the case-file under Article 219 para. 2 of the Code of Civil Procedure. They consider that the applicant's right to public pronouncement of the Supreme Court's decision cannot have been violated as it was served on her in writing.

The applicant underlines that in the decision of the Constitutional Court (Verfassungsgerichtshof) of 28 June 1990 quashing Section 15 (2) of the Supreme Court Act, the Constitutional Court accepted that it was very difficult to establish sufficient interest for permission to consult the case-file to be granted.

The Commission notes that the limitations on access to Supreme Court judgments have now been removed by the judgment of the Constitutional Court of 28 June 1990, which quashed Section 15 (2) of the Supreme Court Act with effect from 31 May 1991, so that access to the decision in the present case is now possible for interested members of the public.

Given the subsequent possibility of access to the decision, the Commission finds 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 that she was unable to answer the view of the trial judge at first instance that a shareholders'

declaration was a formal pre-condition for the proceedings.

The Commission notes that the trial record states that the question of the necessity of such a declaration was discussed, and that the parties agreed that it was not necessary to discuss the contents of such declaration. The oral proceedings were then closed.

The Convention does not guarantee the right to further discussion of a particular issue after the closure of proceedings, and it appears that the question of whether a declaration was at all necessary was discussed before the first instance judge. The question of the contents of such a declaration, or the date on which it had to be made, appears indeed not to have been raised, but the Commission finds no indication that the applicant could not have raised it at the trial if she had wished.

The Commission finds this part of the application manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant also alleges a violation of Article 1 of Protocol No. 1 (P1-1) to the Convention in that she was unable to carry out her intentions with the assets she had bought because of the decisions in the case.

The Commission recalls that the applicant was unsuccessful in her action because a formal pre-condition for such an action, namely the requisite declarations under the Limited Companies Act, was not met at the appropriate time. The Convention does not prevent regulation of access to court provided certain criteria are met (cf the Fayeds v. the United Kingdom, No. 17191/90, Comm. Report 7.4.93), and the Commission finds that the limitation in the present case was not arbitrary or disproportionate to the aim of regulating access to court and protecting retired managers of companies from late claims concerning their responsibilities as such managers. Accordingly, even assuming that the decisions in the present case constitute an interference with the applicant's right to peaceful enjoyment of her possessions, the Commission finds that that interference was a control of property in accordance with the general interest, in conformity with Article 1 of Protocol No. 1 (P1-1).

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.

For these reasons, the Commission by a majority

DECLARES INADMISSIBLE the complaints concerning the proceedings before the Supreme Court, and unanimously

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)