EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 26999/95

R. W.-L.

against

Austria

REPORT OF THE COMMISSION

(adopted on 3 March 1999)

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is an Austrian citizen, born in 1953 and resident in Vienna. He was represented before the Commission by Mr. Michael Gnesda, a lawyer practising in Vienna.

3. The application is directed against Austria. The respondent Government were represented by their Agent, Ambassador F. Cede, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

4. The case concerns the applicant's complaint that, in criminal proceedings against him, the presiding judge made statements which cast doubt on his impartiality and violated the presumption of innocence. The applicant invokes Article 6 of the Convention.

B. The proceedings

5. The application was introduced on 22 March 1995 and registered on 7 April 1995.

6. On 16 October 1996 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on the admissibility and merits of the applicant's complaints that the presiding judge made statements which cast doubt on his impartiality and violated the presumption of innocence.

7. The Government's observations were submitted on 8 January 1997. The applicant replied on 10 March 1997.

8. On 14 January 1998 the Commission declared admissible the applicant's complaints that the presiding judge made statements which cast doubt on his impartiality and violated the presumption of innocence. It declared inadmissible the remainder of the application.

9. The text of the Commission's decision on admissibility was sent to the parties on 28 January 1998 and they were invited to submit such further information or observations on the merits as they wished. No such observations were received.

10. After declaring the case admissible, the Commission, acting in accordance with former Article 28 para. 1 (b) of the Convention , also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties'

reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

11. Pursuant to the entry into force of Protocol No. 11 to the Convention on 1 November 1998, the application was transferred to the Commission sitting in plenary.

C. The present Report

12. The present Report has been drawn up by the Commission in pursuance of former Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. S. TRECHSEL, President
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
J.-C. GEUS
Mrs J. LIDDY
MM L. LOUCAIDES
M.P. PELLONPÄÄ
M.A. NOWICKI
B. CONFORTI
N. BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIĆ
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM. R. NICOLINI
A. ARABADJIEV

13. The text of this Report was adopted on 3 March 1999 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with former Article 31 para. 2 of the Convention.

14. The purpose of the Report, pursuant to former Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15. The Commission's decision on the admissibility of the application is annexed hereto.

16. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17. Since 1974 the applicant was working as a civil servant in the technical services department of the Vienna Municipality. Since 1980 he was deployed to the Vienna Transport Authority (Verkehrsamt Wien) where he served as an examiner for the drivers test.

18. In 1993 the Vienna Regional Criminal Court (Landesgericht für Strafsachen) opened criminal proceedings against the applicant on suspicion of abuse of authority (Amtsmißbrauch) and of accepting presents as a civil servant (Geschenkannahme durch Beamte). He was accused, together with others, of having received money for allowing the driving instructors of two driving schools to manipulate the examination papers for the drivers test in a way which allowed their candidates to obtain the questions which they had chosen beforehand. Further, he was accused of having taken money and other presents for drivers tests which had been carried out correctly. In these and the following proceedings the applicant was represented by counsel.

19. On 22 February 1993 the Public Prosecutor's Office (Staatsanwaltschaft) filed the indictment charging the applicant with abuse of authority by having carried out manipulated drivers tests between early 1991 and 15 January 1993 and with having received presents as a civil servant during the same period of time. The total sum of money received in relation to these charges was estimated at ATS 96,000.

20. On 19 January 1994 the Vienna Regional Criminal Court, sitting as a court of two professional and two lay judges (Schöffengericht), opened the trial against the applicant.

21. At the beginning of the hearing the applicant admitted that he had received money from driving instructors after having carried out drivers tests. However, upon being questioned by the presiding judge, he denied that the amount received was as high as he had previously admitted. Thereupon, the presiding judge informed him that a confession was an important mitigating circumstance and that the sentence in case of a conviction could be so severe that it would entail his removal from office (Amtsverlust). The applicant maintained his statement.

22. According to the minutes, the presiding judge thereupon stated that, thus, the applicant risked being removed from office.

23. According to the applicant, the presiding judge stated "In that case, you will have to go polish shoes" ("Dann werden Sie Schuhe putzen gehen müssen"). The Government refer to the formulation in the Regional Court's decision of 30 May 1994 on the applicant's request for a rectification of the minutes (see below), namely that "the presiding judge had stated that the applicant risked 'to go polish shoes'". However no such remark was entered in the minutes.

24. Immediately after the above statement, the applicant's counsel challenged the presiding judge for bias. After having discussed the matter in private for a few minutes, the court dismissed this motion finding that the presiding judge was not biased.

25. In the further course of the hearing the applicant's counsel requested the taking of evidence, inter alia in order to show that the applicant, when serving as an examiner at the Vienna Transport Authority, had to be considered as an independent technical expert and not as a civil servant or, in the alternative, that he was not aware that he was acting as a civil servant and had, thus, not acted intentionally. The court dismissed these requests.

26. On 18 March 1994 the applicant filed a request for rectification of the minutes. He claimed in particular that the presiding judge, in the context of the retraction of his full confession, had told him that he risked a sentence which was so severe that he would be removed from office and that "in that case, he will have to go polish shoes". However, the minutes did not record this statement.

27. On 21 March 1994 the Regional Court held a further hearing. Towards the end of the hearing the applicant's counsel repeated his requests for the taking of evidence and also requested the hearing of one further witness.

28. In this context, the presiding judge stated that he was "increasingly gaining the impression that defence counsel had not understood the indictment". According to the minutes, the applicant's counsel requested that the respective statement be recorded and challenged the presiding judge for bias on the ground that such a statement was contrary to an impartial way of conducting the proceedings.

29. After having deliberated in private for five minutes the court dismissed this motion, finding that there was no appearance that the presiding judge was biased. Further, it dismissed the applicant's requests for the taking of evidence.

30. At the close of the hearing, the Vienna Regional Criminal Court found the applicant guilty of the above charges and convicted him of abuse of authority and of having accepted presents as a civil servant and sentenced him to fourteen months' imprisonment, of which eleven months were suspended on probation. Further, it noted that the applicant had received altogether ATS 65,000 in the context of these offences but - for reasons of equity - found that the imposition of a fine of ATS 50,000 was sufficient.

31. The court found that a civil servant within the meaning of the Criminal Code (Strafgesetzbuch) was anyone who was appointed as an organ of the State and had to carry out acts of State jurisdiction. The carrying out of drivers tests was such an act. The applicant, when serving as an examiner, had to decide whether a candidate had shown the required faculties for being granted a drivers licence. He had abused his authority in that he had allowed driving instructors of two driving schools to manipulate the examination papers in a way that their candidates obtained questions they had chosen beforehand. Moreover, he had also accepted money and other presents for drivers tests which had been carried out correctly. When fixing the sentence, the court considered as a mitigating circumstance the applicant's confession before the police. However, it noted that no particular weight was to be attached to this confession as the applicant had retracted it at the trial and had constantly held the view that he had not received money for manipulating examinations but only because he was a lenient and fair examiner. As he thereby displayed a lack of consciousness of guilt, only part of the sentence was suspended on probation.

32. On 30 May 1994 the Regional Court dismissed the applicant's request for rectification of the minutes. It noted that the minutes were not a verbatim record of the statements made but only had to reflect their contents. It was correct that the presiding judge had stated that the applicant risked "to have to go polish shoes", however, this colloquial explanation had been meant to make it clear to the applicant in a drastic manner what kind of a sentence he risked in case of his conviction without the mitigating circumstance of a full confession.

33. On 29 June 1994 the applicant lodged a plea of nullity and an appeal (Nichtigkeitsbeschwerde und Berufung) against the above judgment. He claimed in particular that the presiding judge had been biased. He had stated, on 19 January 1994, at the very beginning of the trial, when the applicant had repeated his earlier confession as regards the fact of having received money, but had retracted it as regards the amounts received, “In that case, you will have to go polish shoes”, meaning that without the mitigating circumstance of a full confession he risked a sentence which would entail his removal from office. In these circumstances the statement not only lacked objectivity, but was likely to intimidate the applicant. On 21 March 1994 the presiding judge had, after the applicant's counsel had made a request for the taking of evidence, stated that he increasingly gained the impression that the latter had not understood the indictment. Moreover, the applicant complained that the court had dismissed his motions challenging the presiding judge for bias without giving reasons. Further, the applicant complained that the court had dismissed his requests for the taking of evidence.

34. On 22 September 1994 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity and his appeal.

35. It found that the refusal of the applicant's motions challenging the presiding judge for bias did not necessitate lengthy explanations. The contested statements were not such as to cast doubt on the presiding judge's impartiality. The caution that the retraction of a confession removed an important mitigating circumstance and might lead to a more severe sentence was as such legitimate, although the drastic wording was contrary to S. 52 para. 2 of the Rules of Procedure for the Courts of First and Second Instance (Geschäftsordnung der Gerichte erster und zweiter Instanz -

hereinafter Courts' Rules of Procedure). The statement directed towards the applicant's counsel had been impolite and was also contrary to the said provision, but did not warrant the conclusion that the presiding judge was biased.

36. As regards the refusal of the applicant's requests for the taking of evidence, the Supreme Court found that they had concerned questions of law, namely the question whether he was a civil servant, which had to be decided by the court. As far as the applicant had wanted to prove that he was not aware of being a civil servant and had thus not acted intentionally, the request was irrelevant. For acting intentionally, it was sufficient that the applicant was aware that the granting of drivers licences was an act of State jurisdiction and that he as an examiner held an official function. The Regional Court's findings of fact supported the conclusion that the applicant had acted intentionally.

37. On 26 September 1994 the Vienna Municipality, referring to S. 27 para. 1 of the Criminal Code, took a declaratory decision stating that the applicant had been removed from office as of 22 September 1994. It noted that the applicant had been convicted and sentenced to fourteen months' imprisonment and that the judgment had become final on 22 September 1994.

B. Relevant domestic law

Criminal Code (Strafgesetzbuch)

38. S. 27 para. 1 provides that the pronouncement by a domestic court of a sentence of imprisonment of more than one year for having intentionally committed one or several offences shall, in the case of a civil servant, entail his removal from office.

Rules of Procedure for the Courts of First and Second Instance (Geschäftsordnung der Gerichte erster und zweiter Instanz)

39. S. 52 para. 2 states that parties shall be dealt with in a strictly impartial way, unless controversies shall be terminated by reference to the tasks incumbent upon the court. The judge is not supposed to enter into any arguments with the parties and their representatives, nor to issue reprimands which are unrelated to procedural behaviour, nor to express value judgments or make mocking remarks. It is prohibited to make any statements about the possible outcome of a case outside the hearings. During the hearings the judge shall refrain from making remarks about the prospective contents of the decision; the legal opinion of the judge and his view about the evidence may transpire from the way of formulating questions, from suggestions to reach a settlement; in such case, however, it must always be perceivable that the judge is prepared to rectify his opinion in the light of what turns out in the further course of the hearing.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

40. The Commission declared admissible the applicant's complaints that the presiding judge made statements which cast doubt on his impartiality and violated the presumption of innocence.

B. Points at issue

41. The following points are at issue;

- whether the applicant had a hearing by an impartial tribunal as required by Article 6 para. 1 of the Convention;

- whether the presumption of innocence as guaranteed by Article 6 para. 2 of the Convention was respected in the proceedings at issue.

C. As regards Article 6 para. 1 of the Convention

42. Article 6 para. 1, so far as relevant, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law. ..."

43. The applicant submits that, in the criminal proceedings against him on charges of abuse of authority and accepting presents as a civil servant, the presiding judge made statements which cast doubt on his impartiality. He emphasizes that the first statement "In that case, you will have to go polish shoes" was made at the very

beginning of the trial immediately after he had admitted to having received money in the context of drivers tests but had retracted his confession as regards the amounts. It had nothing to do with a correct caution of an accused by the judge but was an outright threat that if he did not fully uphold his confession including the exact sum of money received, he would with certainty receive a sentence which would entail his removal from office. The applicant also points out that the sum finally established in the judgment was considerably lower than in the indictment and that he nevertheless received a sentence which resulted in his removal from office. This confirmed his impression which had been created by the presiding judge's statement, namely that the result of the proceedings had already been determined at their very beginning. On the whole, the impugned statement put severe pressure on him and impeded his defence throughout the trial. The applicant further submits that the presiding judge's statement that he was "increasingly gaining the impression that defence counsel had not understood the indictment" also raised doubts as to his impartiality.

44. The Government contest that the impugned statements were suited to raise doubts as to the complete impartiality of the presiding judge. They concede that the presiding judge, in the context of the partial retraction of the applicant's confession stated "that the applicant risked to go polish shoes". However, they argue that the presiding judge only discharged his duties when cautioning the applicant that the withdrawal of a confession would remove a mitigating circumstance and might thus lead to a sentence which would entail his removal from office. They submit that the strong wording chosen, though inappropriate and in breach of S. 52 para. 2 of the Courts' Rules of Procedure, was only intended to make the applicant vividly aware of this possibility. As to the second statement, directed against defence counsel, the Government again concede that it was impolite and contrary to the Courts' Rules of Procedure, but argue that it has to be seen in the context of the justified refusal of counsel's requests for the taking of evidence. In conclusion, the Government, referring to case-law of the Convention organs, argue that a derogatory remark or statement anticipating the outcome of the proceedings does not constitute a violation of Article 6 as long as the accused is not prevented from conducting his defence. They argue that the applicant, despite the strong warning, pleaded not guilty and defence counsel was able to carry out his defence unimpeded. Moreover, the presiding judge did nothing in the proceedings which would justify the conclusion that he had already determined their result beforehand.

45. The Commission recalls that there are two aspects to the requirement of impartiality in Article 6 para. 1. First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (Eur. Court HR, Pullar v. the United Kingdom judgment of 10 June 1996, Reports of Judgments and Decisions 1996-III, p. 792, para. 30).

46. In the present case, the applicant alleges a lack of impartiality of the presiding judge. In this context, the Commission recalls that when it is to be decided whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (Eur. Court HR,

Remli v. France judgment of 23 April 1996, Reports 1996-II, p. 574, para. 46). The Commission further recalls that it does not as such raise doubts as to the impartiality of a judge if he advises the parties on the possible outcome of a case, as long as he does not go beyond his competence by, for example, putting undue pressure on the applicant (cf. No. 14063/88, Dec. 7.1.91, D.R. 68, p. 177 at p. 182; No. 5574/72, Dec. 21.3.75, D.R. 3, p. 10).

47. The Supreme Court, when dealing with the applicant's plea of nullity, found that both statements made by the presiding judge were inappropriate and even in breach of S. 52 para. 2 of the Courts' Rules of Procedure, but were nevertheless not suited to bear out a challenge of bias.

48. As to the first statement, the Commission notes that there is a slight discrepancy in the parties' submissions as regards its exact wording. However, the Government concede that the presiding judge, at the very beginning of the trial, when the applicant partly retracted his confession, made a remark to the effect that he "risked to go polish shoes". Further they admit, in line with the Supreme Court's finding, that the statement was not only inappropriate but in breach of the Courts' Rules of Procedure. In these circumstances, the Commission cannot subscribe to the Government's view that the impugned statement was a mere caution as to the consequences of withdrawing a confession. Moreover, it has to be borne in mind that the applicant was a civil servant and that, under Austrian criminal law, a civil servant is automatically removed from office, if he is sentenced to more than one year's imprisonment. Having regard to this context, the Commission finds that the impugned statement appears as a threat, suited to put pressure on the applicant and to create the impression that he would receive a sentence entailing his removal from office, unless he was willing to fully uphold his confession. In conclusion, the Commission finds that the applicant's fear that the presiding judge lacked impartiality can be held to be objectively justified.

49. Having regard to this conclusion, the Commission considers it unnecessary to examine whether or not the second statement, directed against defence counsel, was also such as to cast doubt on the presiding judge's impartiality.

CONCLUSION

50. The Commission concludes, by 25 votes to 2, that in the present case there has been a violation of Article 6 para. 1 of the Convention.

D. As regards Article 6 para. 2 of the Convention

51. Article 6 para. 2 reads as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

52. The applicant submits that the presumption of innocence is meant inter alia to protect an accused against a judge's partiality. He argues that the presiding judge's remark showed that he was convinced of his guilt from the very beginning of the proceedings and, therefore, was contrary to the presumption of innocence.

53. The Government submit that the presumption of innocence relates to the attitude in which judges carry out their tasks. In particular they should not approach their tasks with the assumption that the accused actually committed the crime he is charged with. They argue that there is no indication that the presiding judge nourished such an assumption, as the impugned statement is to be understood as a conditional clause, i.e. that in case of a conviction, the determination of the sentence would be influenced by the fact whether or not the confession had been maintained. Finally, the Government point out that the judgment evaluated the evidence, including the applicant's confession and its partial retraction, in an impartial manner.

54. The question which arises is whether the impugned statement of the presiding judge violated the presumption of innocence. However, having regard to its above conclusion under Article 6 para. 1, the Commission does not find it necessary to examine the applicant's complaint also under Article 6 para. 2 of the Convention.

CONCLUSION

55. The Commission concludes, unanimously that it is unnecessary to examine the applicant's complaint under Article 6 para. 2 of the Convention.

E. Recapitulation

56. The Commission concludes, by 25 votes to 2, that in the present case there has been a violation of Article 6 para. 1 of the Convention (para. 50).

57. The Commission concludes, unanimously, that it is unnecessary to examine the applicant's complaint under Article 6 para. 2 of the Convention (para. 55).

M.-T. SCHOEPFER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(or. English)

DISSENTING OPINION OF MR E.A. ALKEMA JOINED BY MRS J. LIDDY

1. The reasons why I have voted against a violation of Article 6 with regard to the lack of impartiality of the presiding judge of the Vienna Regional Criminal Court

are the following: The present application concerns judicial impartiality connected with the particular judge's personal conviction. The applicant complains notably about two incidents occurred in court: one remark by the presiding judge directed to him directly as defendant about his removal of office in case he would withdraw his confession of the indicted offences, the other remark also by the presiding judge directed to the applicant's lawyer to the effect that the latter apparently misunderstood the indictment. Both incidents were duly challenged in the instant court.

2. Were these alleged failings "capable of being redressed at a later stage of the proceedings" (see Eur. Court HR, De Haan v. the Netherlands judgment of 26 August 1997 Reports of Judgments and Decisions 1997-IV, p. 1391, para. 45)? They indeed had been submitted to the Supreme Court in the plea of nullity and the appeal lodged by the applicant. This court dealt with both incidents in substance and considered inter alia that the Regional Court's findings of fact supported its conclusion (para. 36 of the present Report). It found that the presiding judge's caution directed to the applicant was legitimate and that his statement directed to the applicant's counsel did not warrant the inference that the presiding judge was biased (para. 36). Thus the Supreme Court in the instant case had adequate competencies and exercised them in this case in such a manner that the requirements of Article 6 were met by that court itself. Consequently, as the Supreme Court has examined fully the applicant's grievances I see no reason why the applicant is to be considered as a victim in the sense of former Article 25 or - in the alternative - why the impugned incidents ought to be qualified as a violation. It may be added that, in contrast to the Eur. Court HR, Findlay v. the United Kingdom judgment of 25 February 1997, Reports 1997-I, p. 282, paras. 78-79, the Austrian judicial system did not present fundamental gaps which therefore were beyond redress in the further proceedings. In the present case - although almost equally serious for what was at stake - the challenged incidents were not structural or systemic in nature. It is precisely for the correction of these and similar alleged procedural and substantive judicial flaws that most states have a judicial system providing for appellate jurisdiction. In a similar vein former Article 26 of the Convention requires the exhaustion of such remedies as a condition for admissibility.

3. The majority, however, has preferred a more autonomous approach for the interpretation of Article 6 in the instant case. It heavily relies on the Supreme Court's observation that the challenged remarks by the presiding judge were in breach of the Courts' Rules of Procedure. It is noteworthy, though, that the majority at the same time passes over the equally authoritative interpretation of domestic law by the Supreme Court to the effect that the incidents were legitimate and no proof of judicial bias respectively. In my opinion the Supreme Court's latter judgment should prevail since the infringed procedural rule rather is a directive for judicial conduct than a binding legal norm attracting nullity in case of non-compliance. In that respect the rule differs in kind from Article 489 para. 3 of the Austrian Code of Criminal Procedure which the Austrian courts had not complied with in the case of Oberschlick v. Austria (No. 1) and which rendered the judicial impartiality in that case open to doubt (judgment of 23 May 1991, Series A no. 204, p. 23, para. 50).

4. Following - for a moment and for the sake of argument - the majority's reasoning, it is clear that in the present case a "subjective test" has to be applied to establish the impugned judicial partiality. As the European Court has repeatedly held

"the personal impartiality of a judge must be presumed until there is proof of the contrary" (Castillo Algar v. Spain judgment of 28 October 1998, para. 44, to be published in Reports 1998). In addition, political bias of the members of the court may be of relevance (see Appl. 8603/79 etc. Crociani e.a. v. Italy, D.R. 22, p. 147 at p. 200) and so may be hostility or ill will vis-à-vis the defendant (Eur. Court HR, De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 14, para. 25).

This puts the burden of proof on the applicant. Indeed he challenged the presiding judge's impartiality but in my opinion not convincingly. Firstly, when the judge voiced the opinion that the applicant would "have to polish shoes" he cautioned him in an admittedly rough manner about the consequences in penal law of the applicant's withdrawal of a previously made confession. In doing so he did not, however, express himself about the applicant's guilt. It seems doubtful whether such a non offensive colloquial manner of speaking went beyond a warning or instruction about the law and whether it could reasonably have been considered as a threat, intimidation, hostility or sign of ill will on the part of the judge. The more so, since the applicant as a defendant had been assisted by a lawyer throughout the proceedings. Similarly the remark directed to the same lawyer did not concern the applicant's guilt either but addressed primarily the lawyer's handling of the defense.

To sum up: if and to the extent that the "subjective test" is to be applied in the instant case, I do not think that the presiding judge's remarks - although robust and open to criticism - were sufficient evidence to prove judicial partiality and to justify the applicant's fears in this respect.