COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF BÖNISCH v. AUSTRIA

(Application no. 8658/79)

JUDGMENT

STRASBOURG

6 May 1985

In the Bönisch case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. J. CREMONA,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. B. WALSH,
Mr. R. BERNHARDT,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 January and 22 April 1985;

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Republic of Austria ("the Government") on 16 July and 21 August 1984, respectively, within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 8658/79) against the Republic of Austria lodged with the Commission on 18 June 1979 by Mr. Helmut Bönisch, a German national, under Article 25 (art. 25) of the Convention.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). Their object was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention.

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* Note by the Registrar: The case is numbered 6/1984/78/122. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

2. In response to the inquiry made in accordance with Rule 33 para. 3 (b) of the Rules of Court, the Agent of the Government of the Federal Republic of Germany advised the Registrar, on 30 July 1984, that her Government did not intend to participate in the proceedings.

The applicant, on the other hand, stated that he wished to participate in the proceedings pending before the Court and designated the lawyer who would represent him (Rules 30 and 33 para. 3 (d)).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, President of the Court (Rule 21 para. 3 (b)). On 2 August 1984, the President drew by lot, in the presence of the Registrar, the names of the five other members of the Chamber, namely Mrs. D. Bindschedler-Robert, Mr. D. Evrigenis, Mr. F. Gölcüklü, Mr. E. García de Enterría and Mr. B. Walsh (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr. Evrigenis and Mr. García de Enterría, who were prevented from taking part in the consideration of the case, were replaced by Mr. J. Cremona and Mr. R. Bernhardt, substitute judges (Rule 24 para. 1).

4. Having assumed the office of President of the Chamber (Rule 21 para. 5), Mr. Wiarda consulted, through the Deputy Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for Mr. Bönisch regarding the need for a written procedure (Rule 37 para. 1). On 17 September 1984, he directed that the Agent and the lawyer should each have until 15 December 1984 to file a memorial and that the Delegate should be entitled to reply in writing within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid pleadings should last be filed.

The Registrar received the applicant's memorial on 17 December and the Government's memorial on 28 December 1984.

On 3 January 1985, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearings. On the same date, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, the President directed that the oral proceedings should open on 21 January (Rule 38). He had previously granted the applicant leave to use the German language at the hearings (Rule 27 para. 3).

On 17 January, the Commission transmitted to the Registrar a number of documents whose production the Registrar had requested on the instructions of the President.

5. Meanwhile, on 26 November 1984, the applicant had sent the Registrar a letter requesting that the President recommend the Government to suspend, until delivery of the Court's judgment in the instant case, execution of fines imposed on him in Austria (Rule 36 and paragraph 19 below). The President thereupon contacted the Government, who replied on

17 December that they had no comments to make. On 19 December, although he took the view that recovery of the fines in question did not constitute a serious and irreparable measure, Mr. Wiarda, acting through the Registrar and without prejudice to the Court's ultimate decision on the merits of the case, expressed the wish that the Austrian authorities should consider the possibility of suspending execution. The Permanent Representative of Austria to the Council of Europe notified the Registrar on 11 January 1985 that this wish had been brought to the attention of the responsible authorities.

6. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government
  Mr. H. TÜRK, Legal Adviser,
  Ministry of Foreign Affairs, *Agent*,
  Mrs. G. KABELKA, Staatsanwältin,
  Federal Ministry of Justice,
  Mr. G. LINDNER, Ministerialrat,
  Federal Ministry of Health and Protection of the Environment, *Advisers*;
- for the Commission
  Mr. H. SCHERMERS, *Delegate*;
- for the applicant
  Mr. D. ROESSLER, Rechtsanwalt,
  Mrs. B. THALER, Rechtsanwältin, *Counsel*.

The Court heard addresses and replies to its questions from Mr. Türk, Mrs. Kabelka and Mr. Lindner for the Government, Mr. Schermers for the Commission and Mr. Roessler for the applicant. The various speakers also produced to the Court several documents.

The applicant lodged three further documents on 19 February.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant, who is a citizen of the Federal Republic of Germany born in 1936, lives in Vienna. He runs a firm that specialises in meat smoking. He bought the production plant from the firm Krizmanich GmbH, which was thereafter called Bönisch GmbH, following the death of Mr. Krizmanich in 1975.

A. Background

8. Mr. Krizmanich had been reported under the then applicable legislation to the prosecuting authorities by the Federal Food Control Institute (Bundesanstalt für Lebensmitteluntersuchung - "the Institute") for suspected offences resulting from the technique he used for smoking meat. In 1973, during the course of these proceedings, the Medical Faculty of the University of Vienna had been asked to draw up an expert report (Fakultätsgutachten). In this report, the maximum quantity permissible in smoked meats of a carcinogenic substance called benzopyrene 3.4 was stated to be one part per (American) billion ("ppb").

9. After Mr. Bönisch had bought the firm, similar complaints were lodged with the prosecuting authorities. These led to the prosecution of the applicant before the District Criminal Court of Vienna (22 May 1975 and 27 January 1977) and before the Regional Court of Vienna (28 October 1976). Basing themselves mainly on the expert opinions of the Director of the Institute (see paragraph 20 below), these courts came to the conclusion that the products prepared with the impugned smoking technique were dangerous to health because they contained an excessive quantity - more than one ppb - of benzopyrene 3.4 and that their distribution consequently constituted an infringement of section 56(2) of the Food Act 1975 ("the 1975 Act"). It was further found that the products were adulterated (verfälscht) by reason of an excessive water content not apparent to the consumer, whereby they also contravened section 63 (1), no. 1, of the 1975 Act. Mr. Bönisch was accordingly convicted. His appeals against these decisions, which are not in issue in the present case, were unsuccessful.

B. Proceedings prompting the present case

1. The first proceedings

10. In October 1976, the Market Office of the City of Vienna drew two samples of smoked meat from the production of the Bönisch company, leaving two counter-samples from the same pieces to the applicant (see paragraph 20 below). The Institute was entrusted with carrying out the analysis of these samples. In its analysis, which was carried out on 19 October 1976, the Institute found a benzopyrene concentration of 2.7 and 3.0 ppb respectively and an excessive water content. The samples were therefore described as being dangerous to health and adulterated. This opinion by the Institute, which had been drafted on 28 November 1976 by the Director of the Institute, amounted to the lodging of a complaint (Anzeigegutachten); it was transmitted by the Market Office to the prosecuting authorities with a view to the institution of criminal proceedings.

11. The case came before the same judge of the Regional Court who in 1976 had dealt with an earlier case against the applicant (see paragraph 9 above). Pursuant to section 48 of the 1975 Act, he again appointed the Director of the Institute as expert in order to hear him in connection with the opinion submitted. On 17 April 1978, Mr. Bönisch challenged both the judge and the expert; in his contention, the conduct of the proceedings had shown that both were biased against him and resolved to disregard his rights of defence, in particular the right - guaranteed by Article 6 (art. 6) of the Convention - to the attendance and examination of witnesses and experts for the defence under the same conditions as those for the prosecution. In addition, the applicant asked for the hearing of several experts.

On 26 April 1978, the President of the Regional Court rejected the challenge concerning the investigating judge on the ground that it was unfounded. However, he did not formally examine the challenge concerning the expert, who in fact took part in the proceedings.

12. On 29 June 1978, at the request of Mr. Bönisch, the Regional Court heard as witness Mr. Prändl, the Director of the Institute for Meat Hygiene and Technology of the Veterinary University of Vienna. According to written evidence submitted by this Institute after analysis of the two counter-samples, the concentration of benzopyrene was only 0.75 ppb and 0.12 ppb respectively, and there was accordingly no reason for any objections.

In reply to questioning by both the judge and the expert, the witness explained in detail the method of analysis applied by his Institute, which was very similar to that used by the German Federal Institute for Meat Research.

The expert thereafter developed his personal opinion. As regards the benzopyrene concentration, he pointed out that the method employed by the Federal Food Control Institute was subject to criteria which were especially stringent and rigorously controlled; its degree of accuracy was maximised and the margin of error did not exceed 20 per cent. On the other hand, he criticised the method used by the witness; in his view, the margin of error had to be considerable as the results obtained from each of the two counter-samples differed greatly, whereas the Institute's analysis showed analogous results in both instances. He emphasised that the products made by Mr. Bönisch's firm showed a water content of 3.6 per cent, whereas, according to the Food Code (Codex Alimentarius Austriacus), it should not have exceeded 1.8 per cent.

On his side, Mr. Bönisch, who was not represented by a lawyer, stated that a water content below 1.8 per cent was technically unattainable and requested the hearing of a meat and sausage expert on this point. The Regional Court however refused this, on the ground that black smoking was forbidden if the water content could not be limited to the required level.

13. In a judgment delivered the same day (29 June 1978), the Regional Court found the applicant guilty of offences under section 56(1), nos. 1 and 2, and section 63(1), no. 2, of the 1975 Act and accordingly sentenced him to two months' imprisonment. It particularly stressed that, at the time of the takeover of the firm, the Institute had informed Mr. Bönisch of the requirements of the Food Code, that the applicant was aware of the criminal proceedings instituted against his predecessor and that, moreover, he too had been the subject of criminal proceedings for the same reasons but had nonetheless continued his production without changing method.

The Regional Court considered that the expert opinion of the Director of the Institute was conclusive and that there were no doubts as to the reliability of his findings. It shared his view that the different results at which the Institute for Meat Hygiene and Technology of the Veterinary University had arrived were erroneous. Even allowing for a margin of error of 20 per cent in the Institute's findings, it held that the concentration of benzopyrene in the applicant's products was by far in excess of the permissible level (1 ppb). The carcinogenic effects of this substance were found to have been established by the Medical Faculty (see paragraph 8 above); the evidence to the contrary adduced by the applicant - in particular letters from two German experts and a publication written by three other experts - did not seem convincing to it.

14. Mr. Bönisch appealed. In essence, he took issue with the Director of the Institute for not having adhered to the opinion of his colleagues, which - in Mr. Bönisch's view - nevertheless reflected the prevailing view, and submitted that the Director was biased. He also raised objections of principle against the appointment as court expert of the very person who had reported the case to the prosecuting authorities, and complained that this person had been heard as a court expert whereas Mr. Prändl had appeared as a mere defence witness; this seemed to him contrary to the requirements of Article 6 (art. 6) of the Convention. In addition, he requested the hearing of several experts.

The Vienna Court of Appeal rejected the appeal on 19 December 1978. As to the carcinogenic effects of benzopyrene, it noted that the Regional Court had based its decision on the opinion of the Medical Faculty, which, according to settled case-law, could not be contested. Apart from that, the Regional Court had extensively dealt with all relevant aspects of the case before holding that the products made by the applicant were adulterated and dangerous to health. The findings of the Regional Court were not open to doubt as they were based on the detailed explanations of the expert. As the latter had already refuted Mr. Bönisch's arguments, it was not necessary to take any additional evidence on the adulterated and dangerous character of the said products. In particular, the Court of Appeal ruled out the hearing of a counter-expert since the expert opinion obtained in the first-instance proceedings was not tainted with any defects (Articles 125 and 126 of the

Code of Criminal Procedure). Finally, it rejected the challenge of the Director of the Institute as expert (Article 120 of the same Code).

2. The second proceedings

15. Following analysis of samples taken in October 1977 and May 1978 from products made by the applicant's firm, the Institute once more found an excessive concentration of benzopyrene (6.1 ppb) and an undeclared high water-content.

Criminal proceedings were accordingly instituted against the applicant before the Vienna Regional Court. The case came before the same judge as before, who again appointed the Director of the Institute as expert pursuant to section 48 of the 1975 Act.

16. Hearings were held on 20 September 1979. Invoking Article 6 (art. 6) of the Convention, Mr. Bönisch unsuccessfully challenged the expert. The Regional Court pointed out that the 1975 Act required the appointment of an expert from the staff of the Institute; it added that even though the Director had previously given opinions unfavourable to applicant, this did not substantiate the challenge.

The expert then presented his report. When the Regional Court examined him on recent research said to support the views of the applicant, he acknowledged that this research had arrived at less emphatic results on the carcinogenic effects of benzopyrene; but, according to him, this did not cause the opinion of the Medical Faculty to lose any of its validity in the particular circumstances. In reply to defence counsel's questions, he explained the method for analysing foodstuffs used by the Institute, which made it possible to detect 80 per cent of benzopyrene; he conceded that this method differed from the one used by the German Institute, but declared himself not to be bound by the findings of a foreign authority. The defence asked for the hearing of witnesses on the subject; the Regional Court did not accede to this request, considering itself sufficiently informed through the opinions of the Medical Faculty and the expert from the Institute.

17. On the same day (20 September 1979), the Regional Court found the applicant guilty of offences against sections 56 and 63 of the 1975 Act. For reasons almost identical to those stated in the judgment of 29 June 1978 (see paragraph 13 above), it sentenced him to one month's imprisonment.

18. Mr. Bönisch appealed from this decision on grounds similar to those pleaded in the first proceedings (see paragraph 14 above).

The Vienna Court of Appeal dismissed the appeal on 20 May 1980. In its view, the appointment of a particular person as expert was not prohibited unless the person lacked competence to give evidence as a witness (Article 152(1), no. 1, of the Code of Criminal Procedure); apart from this, the applicant had failed to adduce any reasons casting doubt on the impartiality and professional qualifications of the Director of the Institute. Whilst the Director had admittedly already formulated opinions unfavourable to the

applicant on several occasions, this did not warrant his being challenged, as the Regional Court had rightly noted. As regards the alleged violation of Article 6 para. 1 (art. 6-1) of the Convention, the Court of Appeal emphasised that section 48 of the 1975 Act required that the official of the Institute who had analysed the samples taken or drawn up the report should be appointed as expert. Rejecting the request for counter-expertise made by Mr. Bönisch, the Court of Appeal reiterated, as far as the remaining issues were concerned, the reasoning contained in its judgment of 19 December 1978 (see paragraph 14 above).

19. On 28 February 1984, the Federal President, exercising his power to grant a pardon, commuted the two prison sentences imposed on the applicant to fines of 30,000 and 15,000 Schillings (see paragraphs 13 and 17 above).

II. THE RELEVANT AUSTRIAN LEGISLATION AND CASE-LAW

A. The 1975 Act

20. Under the terms of the 1975 Act, the Market Office of a city shall periodically draw samples of foodstuffs and send them for analysis to the Institute (section 43), making available a sealed counter-sample to be used by any private expert that the firm subjected to control might wish to consult. This expert must possess special professional qualifications and have a special authorisation from the Federal Ministry of Health (sections 47 and 50).

Several members of the Institute's staff are involved in the examination of the samples, for which purpose standard scientific techniques are employed. The various results are submitted to the Director of the Institute, who draws up a report.

If the Institute has cause to suspect the commission of an offence, it must state so in its report and notify the responsible authorities (section 44). In practice, the report (Anzeigegutachten) is sent to the Market Office, which in such cases transmits it to the public prosecutor's department. The prosecuting authorities have to decide whether or not criminal proceedings should be brought, but they usually adhere to the Institute's opinion.

21. Whilst the provisions of the Code of Criminal Procedure are applicable in such cases, section 48 of the 1975 Act involves a derogation from them in so far as expert evidence is concerned:

> "If the court has doubts concerning the findings or the opinion of a Federal Food Control Institute or if it considers that such findings or opinion need to be amplified or if justifiable objections have been raised in respect thereof, it shall hear as expert the official of the said Institute who carried out the analysis or drew up the report for the purpose of explaining and supplementing the findings or the report ... In all other

respects, expert evidence shall be governed by the provisions of the Code of Criminal Procedure ..."

Under Article 120 of the said Code, the prosecuting authorities and the accused are to be informed of the names of the experts appointed by the court; should they raise valid objections, other experts are to be consulted.

Thus, the court is bound to appoint one of the Institute's officials who carried out the analysis or formulated the opinion. This official may be the person who drew up the report which served as the complaint prompting the criminal proceedings; such a circumstance is not capable of giving cause for a challenge. Should there be other grounds, such as a personal bias against the accused, the expert may be replaced by another official of the Institute who took part in the analysis and in the drafting of the opinion.

If any doubts persist or if the findings of these experts "are unclear, vague, contradictory", etc. (Articles 125 and 126 of the Code of Criminal Procedure), the court may call another expert.

Under the terms of Article 149 of the same Code, only the prosecutor and the defence counsel or the accused are entitled to put questions to witnesses and experts. Nevertheless, the court may authorise experts to examine witnesses and the accused. Witnesses, on the contrary, do not have this possibility.

B. Public discussion on the 1975 Act and the practice followed

22. The provisions of the 1975 Act, as well as certain practices followed by the courts and the Institutes, have been the subject of controversy in academic writings and on the occasion of an enquiry organised in 1977 by the Federal Ministry of Justice. The matter was debated in Parliament prior to the passing of the Act and subsequently in 1978 when a proposed amendment to section 48 was examined (see paragraph 21 above). This amendment, which was not in fact adopted, provided that both the Institute's expert and any private expert called by the accused were to be heard only as witnesses and that, in case of doubt, an independent expert should be appointed.

The receipt by Institute officials of certain bonus payments also gave rise to some discussion which subsequently provoked their discontinuance (see paragraphs 64-66, 74, 81-83 and 122-125 of the Commission's report, paragraph 7 of the applicant's memorial and point C of the Government's memorial).

PROCEEDINGS BEFORE THE COMMISSION

23. Mr. Bönisch had lodged a first application (no. 8141/78) relating to the facts mentioned in paragraph 9 above. The Commission declared this application inadmissible on 4 December 1978.

24. In his second application of 18 June 1979 (no. 8658/79), Mr. Bönisch reiterated some of the complaints made in his previous application. He alleged, inter alia, that the proceedings taken against him had violated two provisions of Article 6: paragraph 1, in that they had not provided a fair trial, and paragraph 3 (d) (art. 6-1, art. 6-3-d), by reason of the inequality of treatment between the Institute's expert and the defence's expert, who had been heard only as a witness.

25. The Commission declared the application admissible on 14 July 1982.

In its report of 12 March 1984 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a breach of Article 6 para. 3 (d) (art. 6-3-d) in the two proceedings complained of and of Article 6 para. 1 (art. 6-1) in the first proceedings.

The full text of the Commission's opinion is reproduced as an annex to the present judgment.

AS TO THE LAW

26. The applicant claimed to have been the victim of a breach of paragraphs 1, 2 and 3 (d) of Article 6 (art. 6-1, art. 6-2, art. 6-3-d), which provide:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... .
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ... ."

In the applicant's submission, this breach resulted from the dominant position enjoyed by the Director of the Institute, who had been appointed as expert by the Vienna Regional Court in the two proceedings in issue, as

well as from the legal system ensuing from the combined application of sections 44 and 48 of the 1975 Act.

27. With regard to the second allegation, the Court would refer to its settled case-law to the effect that, in proceedings originating in an individual application, it has to confine its attention, as far as possible, to the issues raised by the concrete case before it (see, inter alia, the Adolf judgment of 26 March 1982, Series A no. 49, p. 17, para. 36). The Court's task is thus not to review in abstracto under the Convention the domestic law complained of, but to examine the manner in which that law has been applied to the applicant (see, inter alia, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 19, para. 41 in fine, and the above-mentioned Adolf judgment, loc. cit.).

I. ALLEGED BREACH OF ARTICLE 6 PARAS. 1 AND 3 (D) (art. 6-1, art. 6-3-d)

28. The Commission based the main part of its reasoning on paragraph 3 (d) of Article 6 (art. 6-3-d). At the hearings on 21 January 1985, the Delegate of the Commission, being of the view that the right to a fair trial had not been respected, suggested however that the Court might alternatively rely on paragraph 1 (art. 6-1). The Government disputed this conclusion.

29. Read literally, sub-paragraph (d) of paragraph 3 (art. 6-3-d) relates to witnesses and not experts. In any event, the Court would recall that the guarantees contained in paragraph 3 (art. 6-3) are constituent elements, amongst others, of the concept of a fair trial set forth in paragraph 1 (art. 6-1) (see, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 15, para. 32, the Goddi judgment of 9 April 1984, Series A no. 76, p. 11, para. 28, and the Colozza judgment of 12 February 1985, Series A no. 89, p. 14, para. 26). In the circumstances of the instant case, the Court, whilst also having due regard to the paragraph 3 (art. 6-3) guarantees, including those enunciated in sub-paragraph (d) (art. 6-3-d), considers that it should examine the applicant's complaints under the general rule of paragraph 1 (art. 6-1) (see, as the most recent authority, the above-mentioned Colozza judgment, loc. cit.).

30. The Government stressed that under Austrian law an "expert" was a neutral and impartial auxiliary of the court, appointed by the court itself, and that the application of section 48 of the 1975 Act did not in any way detract from that. In the applicant's submission, the Director of the Institute could not be regarded as an "expert" in the classic sense of the term; the applicant shared the Commission's opinion that such an expert was properly to be described as a "witness against the accused" (Article 6 para. 3 (d)) (art. 6-3-d).

31. As far as domestic law is concerned, it is not for the Court to depart from the definition which the Government have furnished of the notion of "expert". However, in order to assess the role played in the particular circumstances by the Director of the Institute, the Court cannot rely solely on the terminology employed in the Austrian legislation but must have regard to the procedural position he occupied and to the manner in which he performed his function.

In this connection, the Director had drafted the Institute's reports, the transmission of which to the prosecuting authorities had set in motion the criminal proceedings against Mr. Bönisch (see paragraphs 10 and 15 above). Thereafter he was designated as expert by the Vienna Regional Court in pursuance of section 48 of the 1975 Act (see paragraphs 11 and 15 above); under the terms of this section, he had the duty of "explaining and supplementing the findings or the opinion" of the Institute (see paragraph 21 above).

32. It is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert when it was his report that in fact prompted the bringing of a prosecution. In the present case, appearances suggested that the Director was more like a witness against the accused. In principle, his being examined at the hearings was not precluded by the Convention, but the principle of equality of arms inherent in the concept of a fair trial (see, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 28) and exemplified in paragraph 3 (d) of Article 6 (art. 6-3-d) ("under the same conditions" - see, mutatis mutandis, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 39, para. 91) required equal treatment as between the hearing of the Director and the hearing of persons who were or could be called, in whatever capacity, by the defence.

33. The Court considers, as did the Commission, that such equal treatment had not been afforded in the two proceedings in issue.

In the first place, the Director of the Institute had been appointed as "expert" by the Regional Court in accordance with Austrian law; by virtue of that law, he was thereby formally invested with the function of neutral and impartial auxiliary of the court. By reason of this, his statements must have carried greater weight than those of an "expert witness" called, as in the first proceedings, by the accused (see paragraphs 12 and 13 above), and yet his neutrality and impartiality were, in the particular circumstances, capable of appearing open to doubt (see paragraph 32 above).

In addition, various circumstances illustrate the dominant role that the Director was enabled to play.

In his capacity of "expert", he could attend throughout the hearings, put questions to the accused and to witnesses with the leave of the court and comment on their evidence at the appropriate moment (see paragraph 21 above).

The lack of equal treatment was particularly striking in the first proceedings, by reason of the difference between the respective positions of the court expert and the "expert witness" of the defence. As a mere witness, Mr. Prändl was not allowed to appear before the Regional Court until being called to give evidence; when giving his evidence, he was examined by both the judge and the expert; thereafter he was relegated to the public gallery (see paragraph 12 above). The Director of the Institute, on the other hand, exercised the powers available to him under Austrian law. Indeed, he directly examined Mr. Prändl and the accused.

34. In addition, as the applicant experienced in his case, there was little opportunity for the defence to obtain the appointment of a counter-expert (see paragraphs 11, 14, 16 and 18 above).

If the competent court has need of clarification in respect of the Institute's opinion, it must first hear a member of the Institute's staff (section 48 of the 1975 Act); the court may not have recourse to another expert except in the contingencies referred to in Articles 125 and 126 of the Code of Criminal Procedure (see paragraph 21 above), none of which obtained in the present case.

35. Consequently, there has been a breach of Article 6 para. 1 (art. 6-1).

This conclusion dispenses the Court from giving a separate ruling on the alleged violation of paragraph 3 (d) of Article 6 (art. 6-3-d) and from examining the Commission's argument as to the possible incidence of the system of bonus payments on the impartiality of Institute officials summoned to testify as experts (section 48 of the 1975 Act - see paragraph 22 above).

II. ALLEGED BREACH OF ARTICLE 6 PARA. 2 (art. 6-2)

36. In his memorial of 17 December 1984, Mr. Bönisch contended that the facts of the case also fell within the ambit of Article 6 para. 2 (art. 6-2), in that there had been a reversal of the burden of proof contrary to the rule of the presumption of innocence.

The Government and the Commission were agreed in viewing this complaint as inadmissible on the ground that it had not been previously pleaded before the Commission.

37. The Court rejects the objection. Even though the complaint in question was not mentioned in the applicant's written and oral arguments before the Commission, it has an evident connection with the complaints he did make (see, amongst others, mutatis mutandis, the above-mentioned Delcourt judgment, Series A no. 11, p. 20, para. 40, and the Handyside judgment of 7 December 1976, Series A no. 24, p. 30, para. 66). The Court thus has jurisdiction to entertain the matter, subject to taking into consideration possible preliminary objections such as non-exhaustion of domestic remedies. However, having already found a violation of Article 6

para. 1 (art. 6-1), the Court sees no useful purpose in also ruling on the merits of this complaint.

III. APPLICATION OF ARTICLE 50 (art. 50)

38. At the hearings on 21 January 1985, the applicant lodged a number of documents setting out his claims for just satisfaction.

Since the Government have not yet commented on these claims, the question is not ready for decision. Accordingly, it is necessary to reserve the matter and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and Mr. Bönisch (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 6 para. 1 (art. 6-1);

2. Holds that it is not necessary to examine the applicant's complaint concerning Article 6 para. 2 (art. 6-2);

3. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Government to submit, within the forthcoming two months, their written comments on the said question and, in particular, to notify the Court of any agreement reached between themselves and the applicant;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 6 May 1985.

Gérard WIARDA
President

Marc-André EISSEN
Registrar