AS TO THE ADMISSIBILITY OF

Application No. 26593/95
by Gerhard BARTOSCH
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 17 February 1995 by Gerhard BARTOSCH against Austria and registered on 27 February 1995 under file No. 26593/95;

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 is an Austrian national born in 1964. He is a shopkeeper and resides in Linz. Before the Commission the applicant is represented by Mr. K. Krückl, a lawyer practising in Linz. The facts of the case, as they have been submitted by the applicant, may be summarised as follows.

The applicant owns a gift shop in Linz. It is situated in an arterial road with heavy traffic lacking any attraction for tourists.

In 1992 the Upper Austria Regional Government (Landesregierung) adopted Regulations on Groups of Compulsory Contributions (Beitragsgruppenordnung) under the Upper Austria Tourism Act. The area where the applicant's shop is located was thereby classified as zone 1 (likewise other parts of the town which are regularly visited by tourists) on the ground that many cyclists coming to Linz passed that way. The applicant thus became liable to pay, pursuant to Section 41 of the Tourism Act, a compulsory contribution of 0,05 per cent of the sales in his shop, the minimum amount of the contribution being 400 Austrian schillings.

On 17 August 1993 the applicant was charged a compulsory contribution of 400 Austrian schillings pursuant to Section 41 para. 3 of the Tourism Act. The contribution was increased by 10 per cent as

he had failed to pay it in time.

The applicant appealed. He alleged that cyclists visiting Linz were not interested in services provided by him and that, in view of its location, other tourists would hardly come to his shop. The applicant maintained that these facts should have been taken into consideration when he had been charged the compulsory contribution. He challenged the lawfulness and constitutionality of the legislation on which the compulsory contribution was based.

On 11 January 1994 the Upper Austria Regional Government dismissed the applicant's appeal. It held that the compulsory contribution at issue was in conformity with Section 41 para. 3 of the Upper Austria Tourism Act. It further held that it was unusual that a shopkeeper does not profit from tourism, and that such a fact could be verified in exceptional cases only. The Government considered, with reference to the Constitutional Court's case-law, that for the purpose of proper conduct of administration it was justified not to take into account such unusual cases.

The applicant lodged a complaint with the Constitutional Court (Verfassungsgerichtshof). He alleged a violation of his right to equality before the law in that the Regulations on Groups of Compulsory Contributions violated the principle of equality. He maintained, in particular, that no increase in sales due to tourism could be established in the street where his shop was located.

On 28 November 1994 the Constitutional Court refused to deal with the applicant's complaint. It held that the complaint lacked sufficient prospects of success and that the case was not excluded from the jurisdiction of the Administrative Court (Verwaltungsgerichtshof). The Constitutional Court referred to its earlier case-law according to which it is justified, for the purpose of proper conduct of administration, to assess the extent to which tradesmen profit from tourism on an average basis. Furthermore, according to the case-law invoked by the Constitutional Court, the requirement of clarity and effectiveness of legal rules justifies that uniform regulations have unequal effects on different individuals unless such inequality is excessive.

COMPLAINTS

The applicant complains about the compulsory contribution which he had to pay under the Tourism Act. In particular, he complains that the authorities concerned did not take into consideration that he does not profit from tourism to the same extent as shopkeepers in areas that are frequented by tourists. He alleges a violation of Article 1 of Protocol No. 1 and of Article 14 of the Convention.

The applicant further alleges a violation of Article 6 of the Convention in that his obligation to pay a compulsory contribution was not determined by a tribunal.

THE LAW

1. The applicant complains about the contribution which he had to pay under the Tourism Act. He alleges a violation of Article 1 of Protocol No. 1 (P1-1) which provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary

to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Commission recalls that the second paragraph of Article 1 of Protocol No. 1 (P1-1) confirms that States may levy taxes and other contributions. It is for national authorities, on the basis of their assessment of political, economic and social needs, to decide on the levying of taxes or other contributions. Furthermore, the levying of a tax or other contribution would only be in violation of the right to peaceful enjoyment of possessions if the person concerned was saddled with an intolerable burden or if it fundamentally interfered with his or her financial situation (cf. No. 11036/84, Dec. 2.12.85, D.R. 45 pp. 211, 222; No. 13013/87, Dec. 14.12.88, D.R. 58 pp. 163, 186).

In the present case the applicant was charged 400 Austrian schillings, i.e. the minimum compulsory contribution due in the category under which his trade falls. This contribution was increased by 10 per cent as the applicant had failed to pay it in time. The Commission has not been provided with any information that would permit to conclude that these obligations affect the applicant's guarantee of ownership or interfere with his financial situation to such an extent that this could be considered disproportionate or an abuse of the Contracting Party's right to levy taxes or other contributions.

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 alleges that he is a victim of discrimination in violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (Art. 14+P1-1) in that his shop falls under the same category, as regards compulsory contributions under the Tourism Act, as other shops whose keepers profit from tourism to a considerably larger extent. Article 14 (Art. 14) of the Convention provides as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission finds that the applicant has failed to substantiate his complaint. In particular, he has not shown that in respect of his obligation to pay a compulsory contribution he was treated less favourably than other persons being in a comparable position (cf. Eur. Court HR, Van der Mussele judgment v. Belgium of 23 November 1983, Series A no. 70, p. 22, para. 46).

Even assuming that comparable situations existed, the Commission considers that the difference in treatment resulting from assessment on an average basis of the extent to which shopkeepers within a certain area profit from tourism is reasonably justified by the need for proper conduct of administration and also for clarity and effectiveness of legal rules.

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.

3. Finally, the applicant complains that his obligation to pay a compulsory contribution under the Tourism Act was not determined by a tribunal established by law. He alleges a violation of Article 6 (Art. 6) of the Convention which reads, 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 ... by an independent and impartial tribunal established by law." ...

The Commission does not consider it necessary to examine whether Article 6 (Art. 6) of the Convention is applicable to the applicant's case as this part of the application is in any event inadmissible for the following reasons.

Under Austrian law the applicant could have requested that the decision of the Upper Austria Regional Government concerning his obligation to pay a compulsory contribution be reviewed by the Administrative Court but he did not avail himself of this opportunity. In these circumstances, the Commission considers that the applicant's right of access to a court as guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention was not affected.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber