AS TO THE ADMISSIBILITY OF

Application No. 16487/90
by Frederick BATT
against Austria

The European Commission of Human Rights sitting in private on
8 January 1992, the following members being present:

MM.C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs.G. H. THUNE
SirBasil HALL
MM.F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs.J. LIDDY
MM.L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

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 20 February 1990
by Frederick Batt against Austria and registered on 23 April 1990 under
file No. 16487/90;

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 a British citizen born in 1964. He lives in
Colchester, Essex. The applicant is represented by Mr. K.H. Klee,
lawyer, of Innsbruck. The facts as they have been submitted by the
parties may be summarised as follows.

On 5 March 1989 the applicant was involved in a skiing accident
in Austria. He was questioned at the local police station on the same
day from 18h15 until 19h30 in the presence of an interpreter.

On 25 May 1989 the applicant received a penal notice
(Strafverfügung) dated 17 May 1989 from the Landeck District Court
(Bezirksgericht). The penal notice was in German, a language which the
applicant does not understand. The penal notice informed the applicant
that he had been found guilty of negligently causing injury
(fahrlässige Körperverletzung) and that a fine of AS 10.000 had been
imposed with the imposition of a prison sentence of 25 days in case of
non-payment. The sentence was suspended for three years. The
applicant, believing that the document related to the accident,
forwarded it to his insurance brokers who, in turn, forwarded it to

their lawyer for a translation. On 1 August 1989 the applicant discovered that the document was in fact the penal notice referred to above. The applicant instructed his insurers' solicitors and his present representative to take all possible steps to challenge the penal notice. As the 14 day time-limit for entering an objection (Einspruch) to the penal notice had long since passed, the applicant's representative on 16 August 1989 applied for leave to file an objection out of time (Wiedereinsetzung in den vorigen Stand) on the ground that the 14 day time-limit had been missed through no fault of the applicant's as he had not understood the penal notice. On 13 September 1989 the Landeck District Court rejected the application on the ground that, although the applicant had not been able to comply with the 14 day time-limit because he did not have adequate knowledge of German, it had not been established that the application had been brought within 14 days of the applicant's actual notice of the contents of the penal notice. In particular, the court found that a bald statement in the application that the time-limit had been complied with, coupled with the fact that on 10 August 1989 the applicant actually knew of the contents of the notice, was not sufficient to comply with the requirement that an applicant had to show when he acquired knowledge of the contents of the notice, Accordingly, it could not be assumed that the time-limit had been complied with.

The Landeck District Court stated that no appeal lay against its decision.

On 28 September 1989 the applicant applied, again to the Landeck District Court, for the penal notice to be re-served with a certified translation. He referred to Article 6 para. 3 of the Convention. The Court found, on 3 October 1989, that as Article 6 of the Convention was not directly applicable in Austria, and as no specific provision required an English translation of the penal notice, the penal notice had been validly served. The application was rejected.

The applicant appealed to the Innsbruck Regional Court(Landesgericht). The appeal was rejected on 17 November 1989. The
Regional Court accepted that since 1972 the Supreme Court (Oberster Gerichtshof) had regarded Article 6 as directly applicable, but found that Article 6 para. 3 (a) and (e) provided guidelines for the formal trial, and did not need to be observed at an earlier stage of the proceedings.

Relevant domestic law

Code of Criminal Procedure

(German)

"S. 364. (1) Wider die Versäumung der Frist zur Anmeldung eines Rechtsmittels gegen ein Urteil kann das zur Entscheidung über das Rechtsmittel berufene Gericht dem Beschuldigten die Wiedereinsetzung in den vorigen Stand erteilen, sofern er:
1. nachzuweisen vermag, dass es ihm durch unabwendbare Umstände ohne sein oder seines Vertreters Verschulden unmöglich gemacht wurde, die Frist einzuhalten,
2. um die Wiedereinsetzung innerhalb von vierzehn Tagen nach dem Aufhören des Hindernisses ansucht und
3. die Anmeldung zugleich anbringt."

(Translation)

"364. (1) An appeal court may grant an application for leave to file an appeal out of time where an accused:
1. is able to prove that unavoidable circumstances prevented him from complying with the time-limit and that neither he nor his representative was at fault;

2. requests leave to file an appeal out of time within fourteen days after the disability falls away, and
3. files his notice of appeal at the same time."

COMPLAINTS

The applicant complains that the failure to serve a translation of the penal notice amounts to a violation of Article 6 para. 3 (a) and (e) of the Convention. He points out that in the case of Can (Eur. Court H.R., Can judgment of 13 September 1979, Comm. Rep. 12 July 1984, Series A no. 96, p. 14) the Commission found that Article 6 para. 3 (b) and (c) applied to investigation proceedings, and he asks how an accused can possibly be expected to prepare his defence when he does not understand the allegation.

PROCEEDINGS BEFORE THE COMMISION

The application was introduced on 20 February 1990 and registered on 23 April 1990.

On 11 October 1990 the Commission decided to give notice of the application to the Austrian Government and to invite them to submit observations in writing on the admissibility and merits of the application.

The Government submitted their observations on 21 December 1990 and the applicant submitted his observations in reply on 5 March 1991.

THE LAW

1.The applicant alleges a violation of Article 6 para. 3 (a) and (e) (Art. 6-3-a, 6-3-e) of the Convention by virtue of the failure of the Austrian authorities to serve a translation of the penal notice of 17 May 1989.

The Government consider that the applicant has not exhausted domestic remedies in two respects. First, they note that the Landeck District Court rejected the application for leave to file an objection out of time, not because the applicant had been properly served with the penal notice, but because he had failed to comply with the requirement that he show on what date the disability ceased to apply. Secondly, they point out that the Landeck District Court's statement that no appeal lay against its decision of 13 September 1989 was in fact inaccurate and an appeal would have lain to the Innsbruck Regional Court. They consider that the function of the rule on exhaustion of domestic remedies is to enable superior courts to remedy inter alia errors of law by inferior courts, and the Landeck District Court's statement that no appeal lay was such an error of law.

The applicant replies that, by stating that he brought his application for leave to file an objection out of time within the fourteen days' time-limit, together with reference to a date within fourteen days of the date of submission of the application, he exercised sufficient care in submitting the application: had any doubts been raised in the court's mind, it should have asked for further details. The applicant further considers, notwithstanding a decision (referred to by the Government) of the Supreme Court to the contrary, that the Landeck District Court's statement that no appeal lay against its decision was correct, or at least arguable on the ordinary wording of the relevant provisions of the Code of Criminal Procedure. Moreover, he insists that his application of 28 September 1989 for the penal notice to be re-served with a translation - made within fourteen days of receipt of the decision of 13 September 1989 - should have been regarded by the Regional Court as an appeal against the decision of 13 September. The applicant considers that he has exhausted domestic remedies.

The Commission finds that the question of non-exhaustion of domestic remedies in connection with the applicant's unsuccessful application for leave to file an objection out of time is so closely linked with the substantial complaint relating to acces to court that it will consider the complaint in that context later. The Commission also considers that the applicant should not be prejudiced for a failure to appeal against a statement in a judgment that no appeal lay against the judgment, regardless of whether the statement was accurate or not.

2.The Commission has considered the case first in the context of the question whether the applicant had sufficient access to court.

Article 6 para. 1 (Art. 6-1) of the Convention provides, so far as relevant, as follows:

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

The Government question whether Article 6 (Art. 6-1) of the Convention applies at all to proceedings such as those in the present case, but maintain that, even if it does, Article 6 para. 1 (Art. 6-1) cannot permit a defendant to remain totally passive. If an objection can be made within fourteen days, ample opportunity is given to defendants to have full proceedings before a court complying with Article 6 (Art. 6) of the Convention. This is the case even where a defendant, through no fault of his own, cannot comply with the fourteen-day time-limit, as the courts are ready to give leave to file an objection out of time provided a defendant shows when the disability ceased to apply and that he has applied within fourteen days from that moment.

The applicant considers that the possibility of applying for leave to file an objection out of time does not answer his complaints as it leads to considerable complications, as the present case shows.

The Commission recalls that the right of access to court is a constituent element of the right to a fair trial, as guaranteed in Article 6 para. 1 (Art. 6-1) of the Convention. This right is, however, not absolute, but is subject to implied limitations. Criminal proceedings providing for a waiver of the right to have one's case dealt with by a tribunal in a full trial have advantages for the individual concerned as well as for the administration of justice, and they do not in principle offend against the Convention (c.f. Eur. Court H.R. 5, Deweer judgment of 27 February 1980, Series A no. 35 p. 25, para. 49). It may be in an individual's own interests not to stand trial in public.

The Commission considers that penal order proceedings do not of themselves affect the right of an accused to a fair hearing before a court, provided he can effectively object to the penal order and thereby bring about a normal trial.

Responsibility for the institution and conduct of criminal proceedings lies in principle with the competent authorities themselves, and it cannot be expected of a defendant that he contribute towards his own conviction. Thus, where communication of a penal order is relevant for the calculation of the time-limit for filing objections, an issue may arise under Article 6 para. 1 (Art. 6-1) of the Convention as to access to court. Strict conditions must govern the service of the penal order on the person concerned. Adequate safeguards must be provided for persons who, through no fault of their own, have been prevented from complying with the time-limit (cf. Hennings v. the Federal Republic of Germany, Comm. Report 30.5.91). In the present case, the Commission must consider whether the safeguards provided by the Austrian system in the case of the applicant

were adequate.

The Commission notes that the time-limit under Austrian law for filing an objection to a duly served penal order is fourteen days. By virtue of Article 364 of the Code of Criminal Procedure a court can grant an application for leave to file an objection out of time provided that an applicant shows that he was unable to comply with the time-limit through no fault of his own, that he makes his objection within fourteen days from the moment the disability falls away, and that he files his objection at the same time.

The applicant in fact brought his application for leave to file an objection out of time within fourteen days of finding out the nature of the penal order. However, his Austrian lawyer failed to include in the application an indication of when the applicant actually received notice of the meaning of the penal order, and the application was refused for this reason.

In the circumstances of the present case, given that there are no objections in principle to the existence of a system of penal notices provided that adequate safeguards exist, the Commission finds that the applicant's access to court was not unfairly barred, the application for leave to file objection out of time having been rejected for reasons compatible with those adequate safeguards.

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.The applicant also alleges violations of Article 6 para. 3(a) and (e) (Art. 6-3-a, 6-3-e) of the Convention which provide, so far as relevant, as follows:

"3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
...

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

As to whether the applicant was informed promptly and in a language which he understood of the accusation against him, the Government consider that the interview at the police station on 5 March 1989 must have made abundantly clear to the applicant - in English - that he was being questioned about the incident. In this respect the Government also consider that Article 6 para. 3 (e) (Art. 6-3-e) of the Convention, if applicable, was complied with. In any event, they consider that Article 6 para. 3 (e) (Art. 6-3-e) is not relevant in cases where inability to understand a penal notice will be accepted as a good ground for granting leave to file an objection out of time.

The applicant considers that he was not properly informed of the charges against him, and regards the presence of an interpreter at the police station on 5 March 1989 as irrelevant: he did not receive, from the Austrian authorities, in English, any information concerning the penal order itself. There was no reason for the applicant to suppose that the questioning at the police station would lead to criminal proceedings - and indeed, the police at the police station did not have authority to institute those proceedings which were eventually taken up. Moreover, given that penal notices are very short, it would not cause too many problems to attach a translation.

The Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of these provisions as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the Commission has found that adequate access to court was provided by the Austrian authorities. If the applicant had availed himself of this access fully, that is, if he had stated in his application for leave to file an objection out of time the date on which he became aware of the contents of the penal notice, he would have been entitled to proceedings in which Article 6 (Art. 6) would have been applied. In these proceedings, the applicant could have raised the question of whether he had been or should have been furnished with a translation of the penal notice, and indeed, the applicant may have been acquitted, in which case he could no longer claim to be a victim of a violation of the Convention. Accordingly, the applicant has not exhausted the remedies available to him under Austrian law. Moreover, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting domestic remedies at his disposal. In particular, his express request for a translation of the penal notice does not amount to such a special circumstance because, had the applicant fully availed himself of the access to court, he may have been acquitted in any event.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies in this respect, and this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)