AS TO THE ADMISSIBILITY OF

Application No. 23085/93
by Ilse BAUMGARTNER and Others
against Austria

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

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 16 August 1993 by Ilse BAUMGARTNER and Others against Austria and registered on 14 December 1993 under file No. 23085/93;

Having regard to the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 5 December 1994 and the observations in reply submitted by the applicants on 10 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

The applicants, whose names are annexed to this report, were at the relevant time employees of a limited company with seat in Vienna.

In the proceedings before the Commission, the applicants are represented by Mr. Georg Grießer, a lawyer practising in Vienna.

On 11 January 1993 composition with creditors proceedings (Ausgleichsverfahren) were instituted with regard to the applicants' employer company.

In the context of these proceedings the employer company requested the Vienna Commercial Court (Handelsgericht) for permission to terminate the contracts of employment of sixty-eight employees, including the applicants, in accordance with SS. 20 b and c of the

Composition with Creditors Act (Ausgleichsordnung).

On 22 February 1993 the Vienna Commercial Court granted this permission without hearing the applicants. The Court found that the further employment of the applicants would endanger the composition with the employer's creditors while the applicants would not suffer disproportionate damage, as they were due to receive compensation under the Insolvency (Continued Payments) Act (Insolvenz-Entgelt-sicherungsgesetz). The applicants appealed against this decision. They contested the court's assessment as regards the damage they would suffer from the application of SS. 20 b and c of the Composition with Creditors Act. In particular, they submitted that their claims resulting from the premature termination of their employment would not be fully covered by the Insolvency (Continued Payments) Act.

On 15 March 1993 the employer company, in pursuance of the Court's permission and in accordance with the periods of notice provided for by law, gave the applicants notice of the termination of their contracts of employment which became effective on 26 April, 15 May, 15 June, 15 July or 15 August 1993 respectively. If S. 20 of the Employees Act had been applicable, twenty of the applicants could have only been dismissed 15 days later, eleven applicants only 45 days later, three applicants 64 days and seven applicants only 75 days later.

The applicants did not lodge any action against their dismissal with the Labour Court, considering that their dismissal was justified due to business requirements (S. 105 of the Industrial Relations Act) in view of the composition with creditors proceedings and the subsequent bankruptcy proceedings.

On 23 March 1993 the Vienna Commercial Court rejected the appeal lodged by the applicants against its decision of 22 February 1993. It noted that, according to S. 20 b para. 2 of the Composition with Creditors Act, no remedy was available against the permission to terminate contracts of employment.

On 24 March 1993 the Vienna Commercial Court opened subsequent bankruptcy proceedings (Anschlußkonkursverfahren) concerning the employer company.

B. Relevant domestic law and practice

1. Composition with Creditors Act (Ausgleichsordung)

SS. 20 b and c of this Act, in the version, which was in force at the time of the relevant facts, provided as follows.

S. 20 b para. 2 stated that the debtor, provided permission is given by the Court, may give notice of termination of contracts which have not been entirely fulfilled at the time of the institution of the composition proceedings. If appropriate, the Court has to hear the other contracting party and the administrator in the composition proceedings before taking a decision. Permission to give notice of termination of a contract may only be given if its fulfilment would endanger the composition with creditors or the further existence of the enterprise, and if the other contracting party will not suffer disproportionate damage. The decision of the Court has to be served upon the debtor, the administrator in the composition with creditors proceedings and the other contracting party. There is no appeal against the Court's decision.

S. 20 c para. 2 stated that S. 20 b is also applicable to contracts of employment, where the debtor is the employer. In such cases, the Court may allow the debtor to give notice of the termination of contracts of employment. The debtor has to respect the period of notice (Kündigungsfrist) provided for in the law or in a collective

agreement, but is not bound to respect a longer period of notice which might have been agreed upon in a specific contract, or the duration of employment agreed upon in a fixed term contract. Apart from that, the employer has to respect restrictions on the termination of contracts of employment provided for by law (gesetzliche Kündigungs-beschränkungen).

According to Court practice, the employer, when dismissing employees under SS. 20 b and c, is not bound by the date for termination of contracts (Kündigungstermin) prescribed in S. 20 of the Employees' Act (see below).

S. 20 d provides that if the debtor terminates a contract under SS. 20 b or 20 c, the other contracting party may claim compensation for damage suffered, and participates in the composition with creditors proceedings.

S. 23 para. 1 (3) provides that claims of employees are privileged in the composition with creditors proceedings, if the employment has been taken up before the introduction of such proceedings and has not been terminated by the debtor under SS. 20 b and c.

2. Employees' Act (Angestelltengesetz)

S. 20 deals with the termination of contacts of employment which have not been concluded for a fixed term. The employer may terminate the contract at the end of each quarter of the year (Kündigungstermin) after giving prior notice. The period for giving notice (Kündigungsfrist) is six weeks, after two years of employment it is two months, after five years of employment it is three months, after fifteen years of employment it is four months and after 25 years of employment it is five months (paragraph 2). The employee can terminate the contract at the end of each month with one month's notice (paragraph 4).

3. Industrial Relations Act (Arbeitsverfassungsgesetz)

S. 105 deals with the dismissal of employees.

Before dismissing an employee the employer shall notify the works council, which may comment within five days (paragraph 1).

Provided the works council has not expressly authorised the dismissal within this period, application may be made to the Court inter alia if the dismissal is not justified from a social point of view and the dismissed employee has already been in the employment of the undertaking for six months. Dismissal is unjustified from a social point of view, when it damages the employee's important interests, unless the employer can prove that inter alia it is due to business requirements which militate against continued employment (paragraph 3).

The employer is required to give the works council notice of the dismissal. If it has expressly objected to the proposed dismissal, the works council may, within one week of being notified, contest it before the Court at the dismissed employee's request. If the works council does not act on the employee's request, he may himself do so within one week following he expiry of the time-limit laid down for the works council (paragraph 4).

According to the Labour and Social Courts Act the Labour Courts are competent to deal with these proceedings.

4. Insolvency (Continued Payments) Act (Insolvenz-Entgelt Sicherungsgesetz)

S. 3 para. 3 provides that an employee, whose contract has been

terminated by the employer either before the opening of bankruptcy or composition with creditors proceedings or after the opening of such proceedings according to S. 25 of the Bankruptcy Act or according to SS. 20 b and c of the Composition with Creditors Act, is entitled to payment under this Act. The payment is due for claims under S. 1 para. 2 (i.e. claims for payment originating from the contract of employment or its termination, claims for damages). Payment is due until the end of employment. It may not be granted beyond the period of notice (Kündigungsfrist), which is provided for by law or in collective agreement and was applied respecting the date of termination (Kündigungstermin) and any restrictions for the termination of contracts provided for by law (gesetzliche Kündigungsbeschränkungen).

COMPLAINTS

1. The applicants complain under Article 6 para. 1 of the Convention that they were not heard by the Vienna Commercial Court before it gave their employer company permission to terminate their contracts of employment under SS. 20 b and c of the Composition with Creditors Act. They consider that this decision directly affected their civil rights in that their claims relating to their employment were reduced. They complain that their employer, based on the impugned decision, was allowed to terminate their contracts without being bound by the date for termination (Kündigungstermin) provided for in S. 20 of the Employees' Act. They further allege that they were not fully compensated under the Insolvency (Continued Payments) Act for the damage suffered.

2. The applicants further complain under Article 4 of the Convention that the termination of their contracts of employment under SS. 20 b and c of the Composition with Creditors Act compelled them to work without full pay, as they could not terminate their contracts themselves without losing other claims, eg a lump sum payment which is only due when the employer terminates the contract.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 August 1993 and registered on 14 December 1993.

On 2 September 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 5 December 1994. The applicants replied on 10 February 1995.

THE LAW

1. The applicants complain under Article 6 para. 1 (Art. 6-1) of the Convention that they were not heard by the Vienna Commercial Court before it gave their employer company permission to terminate their contracts of employment under SS. 20 b and 20 c of the Composition with Creditors Act.

Article 6 para. 1 (Art. 6-1), so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

a. The Government submit that the applicants failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention. Firstly, they submit that the applicants did not appeal to the Vienna Court of Appeal against the decision of 23 March 1993 rejecting their appeal, although this is possible in accordance with

the provisions of the Code of Civil Procedure (Zivilprozeßordnung). Thereby, they also prevented the Vienna Court of Appeal from requesting the Constitutional Court to review the constitutionality of the contested provisions of the Composition with Creditors Act. Secondly, the Government submit that the applicants failed to challenge the notice of termination of their employment under S. 105 of the Industrial Relations Act. They argue that under this provision the labour courts can declare the termination of employment invalid if the interests of the employee prevail over those of the employer.

The applicants contest the Government's view. They submit that S. 20 b of the Composition with Creditors Act is perfectly clear in that it states that there is no appeal against a decision taken under this provision. Thus, they would not even have been obliged to lodge the appeal, which was rejected by the Commercial Court on 23 March 1993. Any further appeal to the Vienna Court of Appeal would have been to no avail. It is true that this Court has a right to challenge a law before the Constitutional Court, but the party concerned is not entitled to have such proceedings instituted. As regards possible proceedings under S. 105 of the Industrial Relations Act, the applicants submit that they would not offer any prospects of success. They argue that other courts would be bound by the decision of the Vienna Commercial Court. Thus, they would not be able to come to a different assessment when examining whether the interests of the applicants prevailed over the employer's interest in terminating their contracts under S. 20 b of the Composition with Creditors Act. Moreover, the applicants point out that the proceedings under S. 105 of the Industrial Relations Act are aimed at restoring the employment, whereas they wished to complain about the effects of the termination of their contracts of employment under S. 20 b of the Composition with Creditors Act, as compared to termination in accordance with the general provisions of labour law.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not offer any chance of redressing the alleged breach (cf. No. 20357/92, Dec. 7.3.1994, D.R. 76-A p. 87).

In the present case, the Commercial Court, on 22 February 1993, gave the applicants' employer permission to terminate their contracts of employment under SS. 20 b and c of the Composition with Creditors Act. On 23 March 1993 it rejected the applicants' appeal on the ground that, according to S. 20 b of the said Act, no remedy was available against its decision. There is no indication that a further appeal to the Vienna Court of Appeal would have had any prospect of success. In particular, the applicants could only have suggested to this Court to challenge the contested provisions before the Constitutional Court, without the Court being obliged to do so.

As regards the possibility to challenge the termination of their employment, the Commission finds that the proceedings under S. 105 of the Industrial Relations Act are aimed at the continuation of employment. They do not, however, offer the applicants a possibility to claim that the general rules of labour law, instead of SS. 20 b and c of the Composition with Creditors Act, should be applied to the termination of their contracts of employment.

In conclusion, the Commission finds that the applicants have exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention.

b. As regards the merits of the complaint, the Government submit that the Commercial Court's decision of 22 February 1993, did not determine the applicants' civil rights and obligations within the

meaning of Article 6 (Art. 6) of the Convention. They submit in particular that this decision only gave the applicants' employer permission to terminate their contracts of employment prematurely in accordance with SS. 20 b and c of the Composition with Creditors Act.

Further, the Government argue that the Commercial Court's refraining from hearing the applicants was justified. They refer to S. 20 b of the Composition with Creditors Act which, in the version applicable at the relevant time, stated that the competent court has to hear the employees concerned, if appropriate. They point out that in the composition with creditors proceedings close deadlines have to be observed. Given that sixty-eight employees were concerned by the employer's request, hearing all of them would have caused considerable delay and would have jeopardized the composition with creditors. Moreover, the Commercial Court found that the applicants would not suffer disproportionate damage from the termination of their contracts of employment. Further, the Government again refer to S. 105 of the Industrial Relations Act and argue that the applicants had the possibility to challenge the termination of their employment as being unjustified from a social point of view before the labour court and to be heard in these proceedings.

Finally, the Government, referring to S. 3 para. 3 of the Insolvency (Continued Payments) Act, submit that the applicants were entitled to full compensation. They argue that this provision inter alia applies to compensation claims under S. 20 d of the Composition with Creditors Act, which are designed to cover any losses suffered as a result of the premature termination of employment as compared to a regular notice given by the employer.

The applicants submit that the Commercial Court's decision directly affected their civil rights within the meaning of Article 6 (Art. 6). They submit in particular that it allowed their employer to terminate their contracts without being bound by the date for termination provided for in S. 20 of the Employees' Act, and thus to terminate them within a shorter period. Moreover, all their claims were reduced to the quota in the composition with creditors proceedings and the subsequent bankruptcy proceedings.

Further, the applicants submit that the need to carry out the composition with creditors proceedings speedily cannot justify the fact that they were not heard at all. As regards the possibility to challenge the termination of their employment under S. 105 of the Industrial Relations Act the applicants refer to their above submissions, namely that the labour courts could not come to a different assessment of the interests involved; and that the proceedings were not suited to assert their claim that they suffered damages from the termination of their employment under SS. 20 b and c of the Composition with Creditors Act.

Finally, the applicants argue that they are not entitled to full compensation under the Insolvency (Continued Payments) Act. In particular they submit that, according to the Supreme Court's case-law at the relevant time, claims under S. 20 d of the Composition with Creditors Act, resulting from the premature termination of employment, were not covered by S. 3 para. 3 of the Insolvency (Continued Payments) Act. Moreover, if subsequent bankruptcy proceedings were opened, like in the present case, no such compensation claim exists.

The issues to be decided are whether, in regard to the Vienna Commercial Court's decision to permit the applicants' employer to terminate their contracts of employment under SS. 20 b and c of the Composition with Creditors Act, the applicants were entitled to a procedure in accordance with Article 6 para. 1 (Art. 6-1) of the Convention and, if so, whether such a procedure was available to them.

After an examination of these issues in the light of the parties'

submissions, the Commission considers that they raise questions of fact and law which can only be determined by an examination of the merits. It follows that this complaint cannot, therefore, be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

2. The applicants further complain under Article 4 (Art. 4) of the Convention that the termination of their contracts of employment under SS. 20 b and c of the Composition with Creditors Act compelled them to work without full pay, as they could not terminate their contracts themselves without losing other claims, eg a lump sum payment which is only due when the employer terminates the contract.

Article 4 para. 2 (Art. 4-2) reads as follows:

"No one shall be required to perform forced or compulsory labour."

The Commission recalls that the concept of forced or compulsory labour within the meaning of Article 4 para. 2 (Art. 4-2) comprises two elements. These elements are first that the labour or service must be performed by the person concerned against his will and secondly that the obligation to perform this labour or service must be either unjust or oppressive, or must itself constitute an avoidable hardship (No. 9322/81, Dec. 3.5.83, D.R. 32 p. 182).

The Commission finds that the applicants entered freely into their contracts of employment. Moreover it appears that, according to S. 20 para. 4 of the Employees' Act, they were free to terminate them with one month's notice. Moreover, the applicants failed to show that the financial losses they would suffer from terminating their contracts of employment, would be such as to amount to a restriction of their contractual freedom. Therefore, it cannot be said that they had to perform their work against their will. In any event, there is no indication that the performance of their work can be considered as unjust or oppressive or as constituting avoidable hardship.

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

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicants' complaint that they were not heard as regards the permission to terminate their contracts of employment under SS. 20 b and c of the Composition with Creditors Act;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)