AS TO THE ADMISSIBILITY OF

Application No. 13866/88
by Walter BAYER
against Austria

The European Commission of Human Rights sitting in private on 2 April 1990, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES

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 6 April 1988 by Walter Bayer against Austria and registered on 13 May 1988 under file No. 13866/88;

Having regard to:

- the observations submitted by the respondent Government on 9 January 1989 and the observations in reply submitted by the applicant on 3 March 1989;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, an Austrian citizen born in 1940, is without profession and currently detained in Garsten prison in Austria. Before the Commission he is represented by Dr. H. Trenkwalder, a lawyer practising in Linz.

A. Particular circumstances of the case

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

According to the bill of indictment of the Linz Public Prosecutor's Office (Staatsanwaltschaft) of 7 August 1986, the applicant and his former wife, now Mrs. K., ran a car garage together after 1977. When the garage was closed in 1980, the debts amounted to 200,000 AS. From 1981 to 1983 the applicant sub-let rooms of his flat in Traun for prostitution.

The applicant was subsequently accused of robbery and murder in respect of three persons. The first person was Mr. S., a former employer of the applicant. According to the bill of indictment the applicant and Mr. H., an acquaintance of the applicant, decided in view of financial difficulties to tempt S. with a coin collection, and then to rob and murder him. However, it could subsequently only be determined that the offence was committed on 8 October 1980. The details of how and where it was carried out were never unequivocally established.

On 8 October 1980 S. withdrew 1,100,000 AS from two banks. He told a bankteller that he was on to a "super deal" ("Supergeschäft"). S. also requested the opening of a bank deposit in another bank for the same day, but he never turned up.

Mrs. H., as she then was, later told the authorities that on one day in October 1980 Mr. H. had presented her at breakfast with 10,000 AS. She had noticed that his shoes were full of mud, and that his overalls hanging in the workshop were unusually covered with mud, as if somebody had slipped down a muddy hill in them. Mrs. H. phoned the applicant's then wife who stated that the applicant had also come home completely full of mud. Subsequently, Mr. H. bought his wife a number of valuable presents and gave her larger sums of household money. Mrs. H. also noticed that Mr. H.'s credit limit at their bank had risen from 1,000 to 50,000 AS.

At about this time, the applicant's wife received from the applicant a plastic bag containing 200,000 AS with the instruction to invest the money. On 12 November 1980 this sum was paid in at a bank. The applicant also paid debts of 80,000 AS and made valuable presents to his wife. The applicant claimed that this wealth came from gambling winnings and possibily from car sales.

The authorities also found in the applicant's car a banknote wrapper which, according to the bankteller concerned, had almost certainly been used when handing the money over to S. on 8 October 1980.

II.

The other two persons in respect of whom the applicant was later accused of having committed robbery and murder were Messrs. P., two Yugoslav citizens. According to the bill of indictment, the applicant and Mr. H. met Messrs. P., who wanted to smuggle coffee to Yugoslavia, in December 1981. In January 1982 Mr. H. again met Messrs. P. and agreed to a transaction of five tons of coffee at 146 AS per kilo. Half the sum would be paid to Mr. H. upon delivery of the goods, and the remainder after distribution. Mr. H. later requested the whole sum in advance.

On 26 January 1982 Messrs. P. returned from Yugoslavia to Austria and met Mr. H. and the applicant in St. V. The applicant's neighbour later stated that on that day the applicant had asked him to prepare a meal for his son after school as he would be absent and that later the applicant and Mr. H. drove off together in a car. It appears that Messrs. P. were then brought to the applicant's flat, where, after a fight involving at least one shot, they were killed; they were robbed of 310,000 AS. The applicant apparently put the bodies in 200 litre barrels, which he later filled with fast drying cement (Schnellbindermörtel). This he had bought on 26 January 1982 from the B. Company. The bodies were briefly stored in a garage and later probably deposited on a refuse tip.

The bodies of Messrs. P. were never found. The Public Prosecutor's Office explained that enormous bulldozers were constantly filling the refuse tip. A search by hand was impossible, and a search

with machines involved inordinate costs with very small prospects of success. Once the tip was opened, it would immediately start to burn.

Apparently in the night from 26 to 27 January 1982 Mrs. H. was woken up at 5 am by their dog. On the staircase the dog indicated to her that somebody was in their second flat, in the same house, which was not being used. Mrs. H. looked inside and noticed the applicant asleep. Later in the day, when cleaning the flat, Mrs. H. found a plastic bag with a stack of 1,000 AS notes approximately 1,5 cm thick. She left this bag in the flat.

On the day before Messrs. P. arrived in St. V., the applicant asked his neighbour for a loan of 1,400 AS in order to pay an electricity bill to avoid the electricity being cut off. However, on 27 January 1982 the applicant paid three monthly rents to the house proprietor. He subsequently paid approximately 5,000 AS into his son's bank account. To a former wife, he paid alimony of 24,000 AS. This person also reported that the applicant had come to her to have a wound in his face treated. The neighbour and Mrs. H. later also recalled the applicant's striking appearance, namely a lady's scarf with red dots tied around his head, with the knot on top.

III.

Criminal proceedings were then instituted against Mr. H. and later against the applicant who was intermittently detained on remand. The applicant denied having murdered or robbed S. or Messrs. P. He explained that on 26 January 1982 he had put his flat at the disposal of Mr. H. who had wanted to negotiate a business deal with arms. The applicant had been in the cellar when he heard a shot in the flat. He had then gone upstairs and seen a man on the floor, whereupon Mr. H. had pushed him out of the flat. Conversely, Mr. H. told the authorities that the applicant had killed Messrs. P., apparently after being threatened with a revolver.

During detention the applicant confided in Mr. D.C. who shared his cell and later reported the conversations to the authorities. The applicant then stated that he was very angry with Mr. H. who had given up. The applicant also said that he had hidden the bodies for good. When D.C. pointed out that this was not possible, the applicant stated that it would require an earthquake to find them. He also explained various other details, though never completing his information, for instance in respect of barrels which were filled with cement.

While examining the flat with chemical means for blood stains, the authorities found various stains between the entrance and the bedroom and also the cellar and the garage. The authorities concluded that a lot of blood had been spilled there which later was cleaned up, although traces remained. The authorities also discovered that a certain Mr. L. had rented a shack next to the applicant's garage. Mr. L. remembered that in spring 1982 or 1983 he had noticed a stench coming from the garage which his brother said came from dead rats. Later L. noticed a metal barrel on a refuse tip nearby.

During the investigations conducted against the applicant Mr. H. was questioned on various occasions inter alia by the Linz Federal Police Direction (Bundespolizeidirektion) between 1984 and 1986, first as an accused and later in respect of the investigations concerning the applicant, and his statements were recorded (Niederschrift). On one such occasion on 12 February 1986 he claimed to make for the first time a free confession as to the offences concerning Messrs. P. in which he implicated the applicant.

The applicant's wife was questioned by the Federal Police Direction on ten occasions between 24 July 1985 and 20 February 1986. The applicant's son was questioned three times in 1985. Their

statements were recorded.

In separate proceedings Mr. H. was convicted of murder in respect of S. at Linz and serious robbery in respect of Messrs. P. at Linz and sentenced to life imprisonment.

On 7 August 1986 the Public Prosecutor's Office indicted the applicant before the Jury Court at Linz Regional Court (Geschworenengericht beim Landesgericht) of having committed the offences of murder and serious robbery in respect of S. and Messrs. P. The bill of indictment referred on 64 pages to the above circumstances and to the results of a psychiatric examination according to which the applicant was not mentally ill or debile.

The bill of indictment requested the hearing of 38 witnesses, inter alia, the applicant's wife and son and Mr. and Mrs. H., as well as the reading out, according to Section 252 of the Austrian Code of Criminal Procedure (Strafprozessordnung, see below Relevant domestic law and practice), of the documents compiled during the investigations against the applicant and the file concerning Mr. H.

IV.

The trial lasted from 24 November until 11 December 1986. During the trial the 51 witnesses and three experts were heard and the Court undertook a visit of various localities. The minutes of the trial extended to approximately 1000 pages.

At the trial the applicant's wife and his son availed themselves of their right to refuse to give evidence according to Section 152 of the Code of Criminal Procedure (see below Relevant domestic law and practice). Thereupon the statements of the applicant's wife and son made before the police were read out in Court. The applicant's objections thereto were rejected by the Court with reference to Section 252 para. (2) of the Code of Criminal Procedure.

Mr. H. who was then serving his prison sentence was twice present at the trial as a witness. However, he did not reply in substance to questions put to him by the applicant. The applicant's defence counsel eventually requested the Court to stop questioning H. The Court reserved its position on this request though shortly afterwards it stopped questioning H. The Court then read out in particular the statement previously made by Mr. H. on 12 February 1986. It rejected the applicant's objections thereto with reference to Section 252 para. 1 subpara. 3 of the Code of Criminal Procedure.

Other witnesses heard at the trial were Mr. L., who had rented the shack next to the garage which the applicant had rented, and Mr. G., the owner of the garage. Mr. H.'s former wife testified inter alia as to the financial situation of the applicant and the latter's wife and as to a night which the applicant's son had spent in her flat in January 1980. Mrs. H. further testified as to a bag containing 1000 AS notes which the applicant had left there as well as to the head bandage worn by the applicant in January 1982.

The witness N. confirmed that the applicant and H. had set out on a trip to St. V. on 26 January 1982. Three witnesses were questioned about the exact circumstances of the withdrawal of money by S. Several witnesses commented on the applicant's gambling habits, stating that he had only had small winnings. The house proprietor in whose house the applicant had lived, his former wife, and Mr. D.C., his former cell-mate in prison, were also heard.

On 11 December 1986, the Jury Court decided by five votes to three that the applicant was guilty of having killed S., together with Mr. H. Here, the minutes of the Jury's deliberations mention as

reasons for its conclusions: "violent temper, money, acquainted with S." The Jury decided by seven votes to one that the applicant had not killed Messrs. P. The minutes of the Jury's deliberations state here: "threatened by the Yugoslavs". By the same vote the Jury decided that the applicant had robbed S., together with Mr. H., of the amount of 1,100,000 AS, and unanimously, that he had robbed Messrs. P., together with Mr. H., of 310,000 AS. The minutes state here "inexplicable prosperity" and "high debts", respectively. By six votes to two it was found that the robbery of Messrs. P. had resulted in their death. The minutes explain here: "bullet hole, blood traces". When putting the questions to the Jury, the Court referred to offences which had been committed either at Linz or at Traun in a manner not known more closely (auf nicht näher bekannte Art und Weise).

The Court concluded in its judgment of 11 December 1986 that in respect of S. the applicant had committed the offences of murder and of serious robbery either at Linz or at Traun, and in respect of Messrs. P. the offence of serious robbery resulting in death either at Linz or at Traun, and sentenced him to life imprisonment. The judgment did not adduce any reasons.

V.

Against this decision the applicant filed a plea of nullity (Nichtigkeitsbeschwerde) and an appeal (Berufung) to the Supreme Court (Oberster Gerichtshof). He complained, inter alia, that a certain police officer had not been heard as a witness and that the testimony of C.D. was null and void inasmuch as the latter had been employed by the police. The applicant also complained that the questions put to the Jury did not specify where or how the offences had been committed. Hence it was impossible to determine the considerations leading to the Jury's conclusions.

The applicant further complained that the statements of his wife and son made during the investigations were read out at the trial after they had availed themselves of their right to refuse to give evidence. Thus, he had not been able to question these witnesses. In particular the statements of his wife concerning his finances and other occurrences were highly incriminating. The applicant also complained that, while documents were read out concerning Mr. H., it had in fact not been possible at the trial to put questions to him. Yet during the proceedings instituted against Mr. H., the latter gave seven to eight versions of the applicant's role in the offences.

On 15 October 1987 the Supreme Court dismissed the applicant's plea of nullity and appeal. The decision was served on the applicant's lawyer on 12 November 1987.

In respect of the reading out of the witnesses' statements recorded by security organs, the Supreme Court found that the Regional Court had been obliged to do so according to Section 252 para. (2) of the Code of Criminal Procedure, provided the document was of importance to the matter, and that this was not incompatible with Article 6 para. 1 of the Convention. The Court observed that the applicant had filed no application to contradict or weaken the witnesses' statements which in any event played a subordinate role in view of the results of the comprehensive evidence taken. The same held true in the Court's view for Mr. H.'s testimony. As the latter had refused to comment on the matters, the Regional Court had admissibly permitted the reading out of the minutes according to Section 252 para. (1) subpara. 3 of the Code of Criminal Procedure. Thus, the applicant's right to put questions to the incriminating witnesses had not been impaired.

Finally, the Supreme Court considered that the questions put to the Jury were as specific as this was possible and that they individualised the offences sufficiently so as to avoid confusion with another offence.

B. Relevant domestic law and practice

Section 152 of the Code of Criminal Procedure concerns exemptions from the obligation to testify at the hearing. Para. 1 subpara. 1 states:

<German>

"(1) Von der Verbindlichkeit zur Ablegung eines Zeugnisses sind befreit:

1. Die Angehörigen des Beschuldigten (§ 72 StGB), wobei die durch eine Ehe begründete Eigenschaft einer Person als Angehöriger aufrecht bleibt, auch wenn die Ehe nicht mehr besteht."

<Translation>

"(1) There shall be exempted from the obligation to testify:

1. the members of the accused's family (Section 72 of the Penal Code), and in this context a person who has become a family member by marriage retains this status even if the marriage no longer exists."

Section 252 of the Code of Criminal Procedure provides, insofar as it is relevant to the present case:

<German>

"(1) Protokolle über die Vernehmung von Mitbeschuldigten und Zeugen, dann die Gutachten der Sachverständigen dürfen nur in folgenden Fällen vorgelesen werden:
...

3. wenn Zeugen, ohne dazu berechtigt zu sein, oder wenn Mitschuldige die Aussage verweigern;
...

(2) Augenscheins- und Befundaufnahmen, gegen den Angeklagten früher ergangene Straferkenntnisse sowie Urkunden und Schriftstücke anderer Art, die für die Sache von Bedeutung sind, müssen vorgelesen werden, wenn nicht beide Teile darauf verzichten.

(3) Nach jeder Vorlesung ist der Angeklagte zu befragen, ob er darüber etwas zu bemerken habe."

<Translation>

"(1) Minutes of the questioning of co-accused and witnesses, as well as the opinions of experts, may only be read out in the following cases:
...

3. if witnesses, without being entitled thereto, or co-accused, refuse to give evidence.
...

(2) Reports on inspections and tests, previous criminal convictions of the defendant, as well as other types of documents and papers relevant to the matter must be read out unless both parties agree that they should not be read out.

(3) After each reading out, the accused must be asked whether he wishes to comment thereupon."

COMPLAINTS

The applicant complains under Article 6 paras. 1 and 3 (d) of the Convention that he did not have a fair and public hearing in that he could not put questions to the witnesses incriminating him, namely his former wife and his son. At the trial, when these witnesses availed themselves of their right to refuse to give evidence according to Section 252 of the Code of Criminal Procedure, their statements made before the police were read out, despite the applicant's objections. This evidence must have played an important role for the decision, though its precise relevance cannot be determined with certainty insofar as the judgment of the Jury Court at the Linz Regional Court did not contain reasons. The applicant raises the same complaints in respect of the documents read out concerning Mr. H.'s trial, inasmuch as Mr. H. did not reply to the questions put by the applicant.

The applicant observes that he was not present when these witnesses were heard in the preliminary investigations. In his submissions, the majority of legal writers in Austria share the view that such minutes should only be read out at the trial if they have been prepared in the framework of the same guarantees as the evidence reached at the trial.

The applicant also points out discrepancies between the conviction of Mr. H. which concerned offences committed in Linz, and his own conviction which concerned offences committed in Linz or Traun.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 April 1988 and registered on 13 May 1988.

On 12 October 1988 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on its admissibility and merits pursuant to Rule 42 para. 2 (b) of its Rules of Procedure.

The respondent Government's observations were submitted on 9 January 1989 and the reply thereto by the applicant on 3 March 1989.

THE LAW

The applicant complains that he did not have a fair and public hearing in that he could not put questions to his former wife and his son whose incriminating statements made before the police were

read out at the trial. The applicant raises the same complaints in respect of documents read out concerning Mr. H.'s trial inasmuch as Mr. H. did not reply to the questions put by the applicant. The applicant relies on Article 6 paras. 1 (Art. 6-1) and 3 (d) (Art. 6-3-d) of the Convention which state, insofar as they are relevant:

"1. In the determination of his civil rights and obligations or 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.
...
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; ..."

With regard to the witnesses heard at the trial the applicant submits that it cannot be said which considerations guided the Jury Court when convicting the applicant. The discrepancies between the statements of the applicant and his wife may well have been decisive therefor. The applicant also submits that it was of no relevance that his defence counsel requested the Court to stop questioning Mr. H. and that no conclusion could be drawn from H.'s conflicting evidence.

The Government submit that the application is manifestly ill-founded. Reference is made to the case-law of the Austrian Supreme Court, after the judgment of the Court in the Unterpertinger case (see Eur. Court H.R., judgment of 24 November 1986, Series A no. 110), according to which the admissibility of reading out such statements of witnesses at a trial is a question of balancing interests. In the present case the Supreme Court undertook such a balancing of interests in respect of the persons concerned and considered that the statements read out played a subordinate role in view of the results of the comprehensive evidence obtained.

The Government point out that the statements of the applicant's son concerned facts which were not denied by the applicant or in fact corresponded with his statements. The same applies to statements of the applicant's wife. Her statements provided insight into the applicant's financial and professional situation between 1975 and 1982. The only discrepancy between the statements of the applicant and of his wife concerned his claim that his sudden wealth resulted from gambling and possibly from car sales, whereas his wife stated that she knew only about a winning of 100,000 AS and doubted the possibility of additional winnings or car sales. However, the Government point out that the applicant's financial situation in autumn 1980 and January 1982 was also illustrated by three other witnesses examined at the trial.

The Government also recall that Mr. H. twice refused to give evidence at the trial. As the applicant's defence counsel proposed to terminate his interrogation it is questionable whether the applicant can now raise a complaint in respect of this witness. The Government consider that these statements were in any event so contradictory, in that they partly exonerated and partly incriminated the applicant, that it cannot be assumed that the Jury Court substantially relied on them. The Government further submit that for the applicant's conviction the Court relied on the evidence of many other witnesses (mentioned in the Facts above) who gave evidence at the trial and whom the applicant was able to question.

The Commission recalls that the reading out of statements at the trial, to which the judgment later has recourse, is not in itself inconsistent with Article 6 paras. 1 (Art. 6-1) or 3 (d) (Art. 6-3-d) of the Convention. Nevertheless the use made of these statements must comply with the rights of the defence. On the one hand, a person charged with a criminal offence must have the opportunity to examine or have examined witnesses against him, particularly if he has not had the opportunity at an earlier stage in the proceedings to question the persons whose statements are read out at the trial and later are relied upon in the judgment of the Court concerned (see Unterpertinger judgment loc. cit. p. 14-15 para. 31). On the other hand, Article 6 paras. 1 and 3 (d) do not give an accused an unlimited right to obtain the appearance of, and to examine, witnesses before court (see No. 9000/80, Dec. 11.3.82, D.R. 28 p. 127).

In the present case the Commission notes on the one hand that at the trial before the Jury Court of the Linz Regional Court the applicant's wife and son did not give evidence as witnesses with reference to S. 152 of the Code of Criminal Procedure. Subsequently, their statements made before the Linz Federal Police Direction were read out at the trial without the applicant or his lawyer being able

to put questions to these witnesses. The Commission, in the absence of any indication to the contrary in the judgment, assumes that these statements were taken into account by the Jury Court when reaching its decision.

On the other hand, the applicant has not alleged before the Commission that he could not inform himself of the contents of the statements concerned.

Moreover, the Commission notes the submissions of the respondent Government, which have not been called in question by the applicant, according to which the content of the statements of the applicant's wife and son were either not denied by the applicant or corresponded with his own statements, the only discrepancy concerning certain additional grounds for the applicant's then sudden wealth.

As regards the witness Mr. H., the Commission notes that at the trial he refused to reply in substance to the applicant's questions. The Regional Court eventually ceased questioning this witness and ordered the reading out in particular of one statement in which Mr. H. had implicated the applicant. Insofar as the applicant complains of this reading out although he could not put questions to Mr. H., the Commission considers that Mr. H. was actually twice present at the trial and that it cannot be held against the authorities concerned if Mr. H. then refused to give evidence.

Furthermore, the Commission considers that the evidence produced before the Regional Court did not consist exclusively of the statements of the applicant's wife and son and Mr. H. which were read out in court. Rather, at the trial the Regional Court heard altogether 51 witnesses as well as three experts, and inspected various localities. The minutes of the trial extended to approximately 1000 pages. Among the witnesses heard, and whom the applicant could question, were three witnesses, in particular the then wife of Mr. H., who could give evidence with regard to certain aspects of the applicant's financial situation at the relevant time.

As a result, the Commission does not regard the reading out at the applicant's trial before the Regional Court of statements made before the police by his wife and his son, and by Mr. H., without the applicant having been able to put questions to them as being inconsistent with Article 6 paras. 1 (Art. 6-1) or 3 (d) (Art. 6-3-d). It follows that the above complaints do not disclose any appearance of a violation of the rights set out in Article 6 (Art. 6) of the Convention. The Commission concludes that 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

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)