AS TO THE ADMISSIBILITY OF

Application No. 21442/93
by Otto BRUCKNER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

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 1 February 1993 by Otto Bruckner against Austria and registered on 26 February 1993 under file No. 21442/93;

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 citizen born in 1940. He lives in Linz and is represented before the Commission by Mr. H. Kaltenbrünner, a lawyer practising in Linz. The facts of the case as submitted by the applicant's representative may be summarised as follows.

The particular circumstances of the case

On 9 February 1990 the Linz City Authority (Magistrat) issued administrative criminal proceedings against the applicant in connection with a contravention of the Work (Periods of Rest) Act 1983 on 2 December 1989. On 15 March 1990 the City Authority proposed not to proceed with the proceedings on the ground that the applicant was not at fault. The Works Inspectorate (Arbeitsinspektorat) considered that the proceedings should continue.

On 19 July 1990 the Mayor of Linz issued a penal order (Straferkenntnis) in which the applicant was fined AS 3,000 with 3 days' detention in default for contravening Sections 27 (1) and 3 (2) of the Work (Periods of Rest) Act 1983 (Arbeitsruhegesetz). The Mayor referred to Article 5 para. 1 of the Code of Administrative Offences (Verwaltungsstrafgesetz). The applicant appealed to the Upper Austrian Provincial Governor (Landeshauptmann), who on 30 July 1991 confirmed the penal order and dismissed the appeal.

On 9 July 1992 the Administrative Court (Verwaltungsgerichtshof) dismissed the applicant's administrative complaint. The Administrative Court, referring to decisions of 29 January 1987, 9 June 1988 and 8 June 1988, pointed out that the addressee of the regulations on periods of rest was not the employee, but the employer. It added that the offence was committed by the employer when an employee worked during prohibited periods. The Court dismissed the applicant's argument that the employee had been working voluntarily on a Saturday afternoon, and that he could not be expected to know when she would work. In connection with Article 5 para. 1 of the Code of Administrative Offences, it found that the applicant had not set up an effective control system, and had not even shown how the system he had set up could work: in particular the system did not involve supervision by him of the persons who were supposed to supervise the employees, and "random checks" (Stichproben) were not capable of amounting to adequate control. The Administrative Court noted that the leaflets distributed by the firm "Metro" to advertisers could not assist the applicant as Metro was not the employer in the case. The Administrative Court concluded that the applicant had not shown that he had instituted an adequate control system for the purposes of Article 5 para. 1 of the Code of Administrative Offences.

Relevant domestic law

Section 3 (2) of the Work (Periods of Rest) Act 1983 provides, so far as relevant:

(Translation)

> "All employees must end their work for the week-end on Saturday at 13.00 hrs at the latest ..."

(German)

> "Die Wochenendruhe hat für alle Arbeitnehmer spätestens um 13 Uhr ... zu beginnen."

Section 27 (1) of that Act provides, so far as relevant:

(Translation)

> "Employers ... who contravene ... Sections 3, 4, 5, ... shall be fined between AS 500 and AS 30,000."

(German)

> "Arbeitgeber ..., die den § 3, 4, 5 ... zuwiderhandeln, sind, ... mit einer Geldstrafe von 500 S bis 30 000 S zu bestrafen"

Article 5 para. 1 of the Code of Administrative Offences provides:

(Translation)

> "Unless a provision of administrative law states otherwise, negligent behaviour is sufficient to establish guilt. Negligence is to be assumed in the case of failure to observe a prohibition or a prescription where damage or danger is not an element of the administrative offence, and the defendant does not convincingly show that no fault lies with him for the contravention of the provision of administrative law".

(German)

> "Wenn eine Verwaltungsvorschrift über das Verschulden nicht anderes bestimmt, genügt zur Strafbarkeit fahrlässiges Verhalten. Fahrlässigkeit ist bei Zuwiderhandeln gegen ein Verbot oder bei Nichtbefolgung eines Gebotes dann ohne weiteres anzunehmen, wenn

zum Tatbestand einer Verwaltungsübertretung der Eintritt eines Schadens oder einer Gefahr nicht gehört und der Täter nicht glaubhaft macht, daß ihn an der Verletzung der Verwaltungsvorschrift kein Verschulden trifft."

COMPLAINTS

The applicant alleges a violation of Article 6 paras. 1 and 3 (d) of the Convention on the ground that he was not able to put questions to witnesses, and that the Administrative Court did not remedy the position. He also alleges a violation of Article 6 para. 2 of the Convention in that he was required by Article 5 para. 1 of the Code of Administrative Offences to exculpate himself, rather than the burden being on the prosecution.

He also alleges violations of Articles 7 and 14 of the Convention on the ground that he could not foresee that the provisions at issue would be applied to him, and that he was discriminated against as an employer because he was made criminally responsible for the acts of his employees.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 1 February 1993 and registered on 26 February 1993.

On 11 May 1994 the Commission (First Chamber) decided to bring the application to the notice of the respondent Government without requesting observations.

THE LAW

1. The applicant alleges violation of Article 7 (Art. 7) of the Convention, contending that it was not foreseeable that he would be convicted of his employee's failure to comply with the regulations. Article 7 (Art. 7) of the Convention provides, in its relevant parts, as follows.

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed..."

The Commission notes that the provisions of domestic law at issue in the present case, Sections 3 and 27 of the Work (Periods of Rest) Act 1983 have been in force since long before the contraventions in the present case. The complaint is limited to an allegation that it was not foreseeable that he would fall within the ambit of the offence.

The Commission first notes in this respect that, whilst it is true that Section 3 (2) of the Work (Periods of Rest) Act 1983 refers to "employees" having to end their week's work at 13.00 hrs on Saturday, Section 27 (1) expressly makes employers liable for contraventions of Section 3. Moreover, the Administrative Court referred in its decision in the case to its own case-law dating from 1987, 1988 and 1989, all of which dates fell before the offence at issue in the present case.

Accordingly, the Commission does not share the applicant's view that his conviction under Section 27 of the Work (Periods of Rest) Act was not foreseeable.

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 a violation of Article 6 para. 2

(Art. 6-2) of the Convention, claiming that the effect of Article 5 para. 1 (Art. 5-1) of the Code of Administrative Offences is to require him to exculpate himself, rather than the burden being of the prosecution.

Article 6 para. 2 (Art. 6-2) of the Convention provides as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Article 5 para. 1 (Art. 5-1) of the Code of Administrative Offences first lays down a statement of substantive law that in the administrative criminal offences to which it applies, negligent behaviour is sufficient to establish guilt. It then continues with a presumption that negligence is to be assumed where the offence is one of failure to comply with a prohibition or a proscription, provided the case is not one of a specified category, and a defendant cannot establish that no fault lies with him.

The Commission recalls that the European Court of Human Rights has given guidance as to the interpretation of this type of presumption in the case of Salabiaku (Eur. Court H.R., Salabiaku judgment of 7 October 1988, Series A no. 141-A, pp. 14-18, paras. 26-30). The Court recalled that the Convention does not prohibit presumptions of fact or law in principle, but does require Contracting States to remain within certain limits as regards criminal law (p. 15, para. 28) which take into account the importance of what is at stake and maintain the rights of the defence (p. 16, para. 28).

The Commission first notes that Section 27 (1) of the Work (Periods of Rest) Act states clearly that employers are to be punished for contraventions of, inter alia, Section 3 (2) of the Act. There is thus no question in the present case of any presumption being made in respect of the applicant's liability for acts he did not personally commit.

Notwithstanding the operation of Article 5 para. 1 (Art. 5-1) of the Code of Administrative Offences, it remains for the prosecuting authorities to establish the elements of an administrative offence. Thus if the offence is of failure to ensure compliance with the regulations on rest periods, the prosecution must establish that the employee falls within the scope of the relevant legislation, that the employee was working when he or she should not have been, that the employer was in fact the employer of the employee and that the employer is the person to whom the criminal liability attaches. The presumption in Article 5 para. 1 (Art. 5-1) then relates to the mental element required for a conviction: it specifies that negligence is sufficient to found a conviction, and that negligence is assumed where, as here, a requirement to do something has not been complied with and the defendant cannot show that he was not at fault.

The Commission finds that the second sentence of Article 5 para. 1 (Art. 5-1) of the Code of Administrative Offences is no more than a statutory repetition of the common sense proposition that where a person does a prohibited action, or fails to do something which he is under a duty to do, the conclusion can reasonably be drawn that he has contravened the provision at issue, unless he can show that he was not at fault.

The applicant in the present case tried to allege that he was not at fault because the employee was working voluntarily on a Saturday afternoon, and he had set up an adequate system of control to prevent this. The Administrative Court rejected this argument as the applicant's control system merely involved entrusting supervision to a third party, and did not involve actual supervision by the applicant. The leaflets he referred to were distributed by a shop, and so did not

form part of the contract between the applicant and the employee in any event.

In the light of the above, the Commission finds no indication that the provisions of Article 5 para. 1 (Art. 5-1) of the Code of Administrative Offences operated contrary to the provisions of Article 6 para. 2 (Art. 2) of the Convention in the present case.

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 a violation of Article 14 (Art. 14) of the Convention in that he was made criminally liable for the acts of his employee whilst she was not liable to be prosecuted. 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."

Article 14 (Art. 14) of the Convention prohibits discrimination in the "enjoyment of the rights and freedoms" in the Convention. The applicant does not refer to any other Convention rights in the enjoyment of which he has been discriminated against.

In any event, the Commission finds that the application of administrative criminal legislation to employers only in the context of regulations on permitted working hours does not constitute discrimination on grounds of the "status" of the employer.

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.

4. Finally, the applicant alleges violation of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

The Commission has already given notice of the application to the respondent Government but has not requested the parties to submit their observations. The Commission has now adopted its Reports in cases similar to the present one (cf., for example, No. 15523/90, Schmautzer v. Austria, Comm. Rep. 19.5.94, pending before the European Court of Human Rights), and finds it appropriate now to resume the proceedings in the present case in the light of those Reports.

For these reasons, the Commission
unanimously
DECIDES TO ADJOURN its examination of the complaints under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention;

by a majority
DECLARES INADMISSIBLE the complaint concerning the presumption of innocence; and

unanimously
DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)