AS TO THE ADMISSIBILITY OF

Application No. 26100/95
by Manfred BURGER
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 13 October 1994 by Manfred BURGER against Austria and registered on 2 January 1995 under file No. 26100/95;

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, born in 1957, is an Austrian national residing in Schwechat. In the proceedings before the Commission he is represented by Mr. M. Müllauer, a lawyer practising in Vienna.

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

In 1979 the applicant met his companion in life. Following an abortion in 1980, they decided that she would take the pill in order to avoid a further pregnancy. However, in early 1982 the applicant's companion became pregnant again.

On 20 April 1982 the applicant's companion signed a declaration which had been prepared by the applicant's counsel. According to this declaration she had deceived the applicant as regards the possibility of conception. Therefore, she would do everything possible in order to avoid that the applicant had to fulfil any obligations as a father, in particular any obligation to pay maintenance, and that she would indemnify him, if nevertheless he were obliged to pay child maintenance.

On 6 October 1982 the applicant's daughter was born out of wedlock. The applicant and his companion continued to cohabit. However, the applicant did not recognise his daughter.

On 27 June 1985 the applicant and his companion got married.

In 1991 divorce proceedings were started. The applicant's wife also started paternity proceedings in the course of which the applicant recognised his daughter. The applicant was then ordered to pay child maintenance.

Subsequently, he requested the Floridsdorf District Court (Bezirksgericht) to render a declaratory decision that the declaration of 20 April 1982 was legally valid and to order his wife to pay back AS 2,700 corresponding to maintenance he had already been obliged to pay.

On 18 November 1992 the Floridsdorf District Court dismissed the applicant's claim. In establishing the facts the court found that the applicant, upon learning that his companion was pregnant, had proposed an abortion, which she had refused. The applicant had then threatened to leave her. Thereupon, on 20 April 1982, the applicant's companion had signed the declaration which had been prepared by the applicant's counsel. As regards the law, the court referred to S. 879 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch), according to which agreements which are contra bonos mores (sittenwidrig) are null and void. The court found that the declaration at issue had been made by a pregnant woman who had been put under considerable pressure and was, thus, null and void.

On 28 June 1993 the Vienna Regional Civil Court (Landesgericht für Zivilrechtssachen) dismissed the applicant's appeal. The court, referring to case-law, found that a declaration of one parent to indemnify the other for maintenance claims concerning their child was prima facie not invalid. It noted that such agreements were sometimes concluded in divorce proceedings. Usually, these agreements were part of the partition of matrimonial property and the parent undertaking to maintain the child received something in return for indemnifying the other. However, in the present case, the mother of the child had not received anything in return. The declaration at issue went far beyond an indemnification for maintenance obligations, in that the applicant's companion discharged him from any of his obligations as a father. Moreover, according to the contents of the declaration, the companion had signed it in order to compensate the applicant for having misled him as regards the use of contraceptives. Referring to case-law, the court found that the sexual relationship of two adults belonged to a sphere which was not open to regulation by a legal agreement. The deception of one partner by the other about the use of contraceptives could never give rise to compensation claims. It followed that a declaration acknowledging compensation claims in this context was null and void as being contra bonos mores within the meaning of S. 879 of the Civil Code.

On 14 April 1994 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's appeal on points of law. The court, referring to S. 879 of the Civil Code, found in particular that concealing the possibility of conception affected primarily the most intimate personal sphere of the woman who had to remain free to decide whether to apply contraceptives or not. The freedom to decide any time in favour of conceiving a child was an essential part of any woman's personal dignity and freedom. Further, as the sexual relationship between a man and a woman, whether they were married or not, involved their most intimate personal sphere it was not open to regulation by a legal agreement. The declaration at issue amounted to a complete denial of the applicant's responsibility for the consequences of an intimate relationship. It penalised the woman for her wish to have a child and degraded her to a mere sexual partner who had to bear all the

consequences of a pregnancy which was unwanted only by the applicant. In the circumstances of the case, the declaration, in an extremely unbalanced way, put all the burden on the woman, while the applicant had only agreed to continue to live with her. Therefore, it was contra bonos mores.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention that the court decisions, which found that the declaration of 20 April 1982 by which his companion in life had discharged him from any obligations as a father was null and void, violated his right to private and family life. He contests the assumption that the declaration to indemnify him for his daughter's maintenance claims was designed to compensate him for having been deceived on the use of contraceptives. He also contests the courts' opinion that the sexual relationship between adults is not open to regulation by legal agreement. He claims that an agreement like the one at issue was not prohibited by Austrian law.

2. The applicant further complains under Article 14 of the Convention that the declaration by which his companion stated that she would indemnify him in particular as regards his obligation to pay maintenance for his daughter was declared null and void, whereas agreements in which one spouse, in the course of divorce proceedings, would undertake to indemnify the other for maintenance obligations towards their child are valid according to the Austrian courts' case-law. He submits that, thus, the contested decisions discriminated against unmarried couples.

3. Finally, the applicant complains under Article 1 of Protocol No. 1 that the decisions at issue also violated his right to property. He argues that the right to be indemnified by another person with regard to certain obligations forms part of his possessions.

THE LAW

1. The applicant complains under Article 8 (Art. 8) of the Convention that the court decisions, which found that the declaration of 20 April 1982 by which his companion in life had discharged him from any obligations as a father was null and void, violated his right to private and family life. In particular, he criticises the Austrian courts' interpretation of the relevant law.

Article 8 (Art. 8), as far as relevant, reads as follows:

"1. Everyone has the right to respect for his private and family life ....

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others."

The Commission recalls that proceedings to contest paternity of a child born out of wedlock concern the plaintiff's "private life" (Eur. Court HR., Rasmussen v. Denmark judgment of 28 November 1984, Series A no. 87, p. 13, para. 33). The Commission notes that the proceedings in the present case did not concern the question of the applicant's paternity, which moreover has been formally recognised by him. They concerned the validity of a declaration made for the purpose of discharging the applicant from any obligations, in particular any maintenance obligations, as regards his daughter born out of wedlock. Assuming that the decisions at issue constituted an interference with the applicant's right to respect for his "private life", the Commission finds that it was justified under the second paragraph of Article 8 (Art. 8).

The interference complained of was in accordance with Austrian law, namely S. 879 of the Civil Code. As far as the applicant criticises the application of the relevant legal provisions by the Austrian courts, the Commission recalls that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (Eur. Court HR. Olsson (No. 2) v. Sweden judgment of 27 November 1992, Series A no. 250, p. 32, para. 79).

Further, the interference served a legitimate aim, namely the protection of the rights and freedoms of others. As regards the necessity of the interference, the Commission notes that the Austrian courts had regard to the particular circumstances of the case. They took into account the need to protect the personal sphere of the woman concerned, which the applicant himself had infringed by urging her to have an abortion and by putting pressure on her to sign the declaration, and the imbalance which the declaration created between the applicant and the mother of his child. The Commission finds that the reasons adduced by the courts were "relevant" and "sufficient" and that the interference complained of was proportionate to the legitimate aim pursued (Eur. Court HR. Olsson (No. 1) v. Sweden judgment of 24 March 1988, Series A no. 130, pp. 31-32, paras. 67-68).

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 complains under Article 14 (Art. 14) of the Convention that the contested decisions discriminated against unmarried couples. He submits that the declaration by which his companion stated that she would indemnify him in particular as regards his obligation to pay maintenance for his child was declared null and void, whereas agreements in which one spouse, in the course of divorce proceedings, would undertake to indemnify the other for maintenance obligations towards their child, are valid according to the Austrian courts' case-law.

Article 14 (Art. 14) of the Convention reads 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 recalls that Article 14 (Art. 14) protects individuals against discriminatory treatment only if they are placed in analogous situations (Rasmussen judgment, loc. cit., pp. 12-13, paras. 29 and 35).

In the present case the Austrian courts noted the difference between the declaration at issue and agreements which are sometimes made between spouses in the course of divorce proceedings when partitioning matrimonial property. They found that the declaration at issue went far beyond an indemnification for maintenance claims and that moreover, the applicant's companion received nothing in return for it. Accordingly, the applicant and his companion when making the declaration were not in a situation which could be considered as analogous to that of a married couple, who divorce and attempt to settle the pecuniary consequences of the divorce through agreement. Thus, the contested decisions were not discriminatory.

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 under Article 1 of Protocol No. 1 (P1-1) that the decisions at issue also violated his right to

property. He argues that the right to be indemnified by another person with regard to certain obligations forms part of his possessions.

Article 1 of Protocol No. 1 (P1-1) reads 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."

Even assuming that the above claim formed part of the applicant's possessions, and assuming that the decision of a court in a dispute between private individuals in the context of family law may engage the responsibility of the State under Article 1 of Protocol No. 1 (P1-1) (see mutatis mutandis Eur. Court HR., Hoffmann v. Austria judgment of 23 June 1993, Series A no. 255, p. 58, para. 29), the Commission finds that the complaint is, in any case, inadmissible for the following reasons.

Any interference with the applicant's right to the peaceful enjoyment of his possessions falls within the scope of the second paragraph of Article 1 of Protocol No. 1 (P1-1). This paragraph requires that the interference is lawful, serves a legitimate aim and is proportionate, achieving a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (Eur. Court of HR., Fredin v. Sweden judgment of 18 February 1991, Series A no. 192, pp. 16-17, paras. 48-51). With a view to its above findings under Article 8 (Art. 8) of the Convention, the Commission considers that these requirements are met.

It follows that this part of the application is also 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