AS TO THE ADMISSIBILITY OF

Application No. 16413/90
by Rudolf DANZINGER
against Austria

The European Commission of Human Rights sitting in private on 31 March 1993, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
J.-C. GEUS
M. NOWICKI

Mr. K. ROGGE, Secretary to the Second Chamber
assisted by Mr. W. PEUKERT.

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 19 March 1990 by Rudolf DANZINGER against Austria and registered on 6 April 1990 under file No. 16413/90;

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 an Austrian citizen, born in 1944 and living in Vienna. He is represented by Mr. G. Zanger, a lawyer practising in Vienna.

It follows from the applicant's statements and the documents submitted that on 13 March 1989 the applicant was convicted by the Vienna Regional Court (Landesgericht) of having on 17 June 1986 given false evidence when heard as a witness in criminal investigation proceedings against Mr. K. S., a former Federal Minister of Buildings (Bautenminister). The investigation proceedings in which the applicant had given evidence apparently concerned illegal property transactions according to which the minister's wife had bought a villa at a price far below its real value. The applicant had been involved in the transaction on the vendor's side. The sale had been fixed in a provisional agreement but was apparently not realised.

The applicant, when heard as a witness, denied being implicated in the matter. He alleged that, on the contrary, he prevented the sale.

Having heard ten witnesses, the Regional Court came to the conclusion that the applicant's prior statements given as a witness were untrue and that it had been the applicant who initiated the sales

agreement in question.

On 19 September 1989, the Vienna Court of Appeal (Oberlandesgericht) rejected the applicant's appeal and plea of nullity. Prior to the hearing of the appeal the Public Prosecutor at the Court of Appeal (Oberstaatsanwaltschaft) had submitted observations. In an order of 23 August 1989 fixing the hearing for the 19 September 1989 it was stated that along with the summons the applicant should be informed that he could inspect the Public Prosecutor's observations which were included in the court file. Insofar as the applicant had complained that he had been heard in the prior criminal proceedings against S. despite the fact that he risked incriminating himself, the appellate court pointed out that the investigating judge had at the hearing in question informed the applicant about his right to refuse to give evidence in accordance with Section 153 of the Code on Criminal Procedure (StPO). Furthermore, at the relevant time there had been no objective reasons to consider the applicant as a suspect rather than a witness.

COMPLAINTS

The applicant submits that his conviction violates the principle of a fair trial and that he was obliged to give evidence in a matter in which he was himself involved.

Furthermore, he submits that the appeal proceedings were unfair because not only the Public Prosecutor at the Regional Court, but subsequently also the Public Prosecutor of the Court of Appeal were requested to submit observations. In the applicant's submission it is unusual that the Public Prosecutor of the Court of Appeal is requested to submit observations when, as was done in his case, the Public Prosecutor at the Regional Court does not consider it necessary to submit such observations. He furthermore submits that the Public Prosecutor at the Court of Appeal received the draft judgment of the judge rapporteur and he considers that in these circumstances the principle of equality of arms as guaranteed by Article 6 para. 1 of the Convention was violated. He points out that the Constitutional Court (Verfassungsgerichtshof) also objected to the practice in question.

THE LAW

1. The applicant complains that he did not have a fair trial in that he was convicted on account of evidence he was obliged to give although he risked thereby incriminating himself.

Article 6 para. 1 (Art. 6-1) of the Convention secures to everyone charged with a criminal offence the right to a fair hearing.

The obligation to testify may under certain circumstances amount to a violation of the right to a fair hearing, in particular where someone is forced to give evidence in a matter in which criminal proceedings are likewise pending against him or are likely to be instituted against him (cf. K. v. Austria, Comm. Report 13.10.92). However, the applicant is not prosecuted on account of the matter on which he was questioned as a witness but on account of having made false statements. In addition, the Commission notes that when heard as a witness the applicant could under Section 153 of the Austrian Code on Criminal Procedure refuse to give evidence. He did not, however, avail himself of this possibility.

Insofar as the applicant complains of the first instance criminal proceedings against him, his statements and the documents submitted therefore do not disclose that his right to a fair hearing was in any way impaired. To this extent the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains about the appeal proceedings

which in his opinion violated the principle of equality of arms, as guaranteed by Article 6 para. 1 (Art. 6-1), in that the Prosecutor at the Court of Appeal was given the possibility to submit comments on his appeal and saw the Judge Rapporteur's draft decision relating to his appeal before the appeal was determined.

However, the applicant has himself referred to the case law of the Austrian Constitutional Court according to which draft judgments may not be made available to the public prosecution. The Commission knows from other cases brought against Austria that in principle the draft decision of the judge rapporteur is only established after the observations by the Public Prosecution have been received and is not communicated to the Public Prosecution (No. 13129/87, Frick v. Austria, Dec. 15.10.91 to be published in D.R. 71). The applicant has not submitted any evidence tending to show that contrary to this general practice the judicial authorities proceeded otherwise in the present case.

Insofar as the applicant complains that the appellate court's draft judgment was prepared before the hearing of the appeal took place the Commission has already found this practice to be unobjectionable (Kremzow v. Austria, Comm. Report, 20.5.92, pending before the European Court of Human Rights, with further reference in para. 110).

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

For these reasons the Commission, unanimously

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)