AS TO THE ADMISSIBILITY OF

Application No. 24208/94
by Karlheinz DEMEL
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1995, 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. MARXER
G.B. REFFI
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 9 March 1994 by Karlheinz DEMEL against Austria and registered on 26 May 1994 under file No. 24208/94;

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 facts of the case as they have been submitted by the applicant, may be summarised as follows.

The applicant, born in 1937, is an Austrian national and resident in Vienna. Before the Commission the applicant is represented by MM. W. Strigl and G. Horak, lawyers practising in Vienna.

His previous Application No. 14610/90 and No. 17679//91 related to the secret surveillance of the applicant's telephone conversations in the course of criminal proceedings against him (see below) and were declared inadmissible on 31 August 1992 and 7 April 1994, respectively. His Application No. 17850/91 concerning disciplinary proceedings instituted against him in the context of his employment in the Austrian civil service was declared inadmissible on 11 February 1993.

In February 1989 criminal investigations were started against the applicant, at that time judge and President of the Vienna Labour and Social Court (Arbeits- und Sozialgericht), on suspicion of abetment after the fact (Begünstigung).

In these proceedings the applicant was assisted by defence

counsel. He was repeatedly questioned as a suspect as from 23 March 1989.

In view of the criminal charge against him, disciplinary proceedings were instituted against the applicant and he was suspended from his functions as civil servant on 5 May 1989.

On 16 May 1989 the applicant was arrested and detained between 10.20 a.m. and 6.15 p.m.

Following searches of the applicant's office in May 1989, the investigations were extended to the suspicion of abuse of authority.

On 25 July 1989 the Investigating Judge at the Vienna Regional Court (Landesgericht) ordered the tapping of the applicant's telephone conversations for a period of four weeks, this period was later extended until 31 January 1990. On 19 April 1990 the applicant's counsel was informed about the surveillance measures. Following subsequent decisions of the Supreme Court (Oberster Gerichtshof), all records of the applicant's telephone conversations were destroyed and the decisions of the Investigating Judge ordering the surveillance were declared unlawful (23 April 1991 and 28 September 1993, respectively).

Meanwhile, in November and December 1989 several witnesses had been heard on the charge of abuse of authority. The applicant was heard on 15 June 1990. It further appears that in June 1990 the applicant's counsel was granted full access to the files.

On 7 March 1991 the Vienna Public Prosecutor's Office (Staatsanwaltschaft) drew up the bill of indictment against the applicant charging him with abuse of authority, and with having given false testimony. The Prosecutor's Office, referring to the relevant provisions of the Penal Code (Strafgesetzbuch), considered that between April 1987 and May 1989 the applicant had instructed a secretary employed at the President's Office of the Vienna Labour and Social Court to perform on his behalf, during her working hours, typing work, using the technical equipment of the Court. Furthermore, the applicant had made wrong statements when heard as a witness by the parliamentary investigation committee. The details of the charges and the result of the investigations as well as the means of evidence were set out on 40 pages.

The proceedings regarding the charge of abetment were discontinued.

On 4 November 1991 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal against the bill of indictment and committed the applicant for trial.

On six days between 21 and 29 April 1992 the Vienna Regional Court, sitting with lay judges, conducted the trial against the applicant.

On 29 April 1992 the Vienna Regional Court convicted the applicant of abuse of authority and having given false testimony. It sentenced him to five months' imprisonment on probation and imposed a fine of 240 daily rates (Tagessätze) of AS 1,200 each, in default of payment 120 days' imprisonment.

The Regional Court found that the applicant had committed abuse of authority in that between April 1987 and May 1989 he had instructed a secretary employed at the President's Office of the Vienna Labour and Social Court to perform on his behalf, during her working hours, typing work, using the technical equipment of the Court. Furthermore, the applicant when heard as a witness by the parliamentary investigation committee relating to the course of the criminal proceedings in the case of "Lucona" (charges in connection with the sinking of the ship

"Lucona" in the Indian Ocean and important insurance claims against the Austrian Bundesländerversicherung) had wrongly denied having stated that he knew the whereabouts of the main accused Mr. P. in the said proceedings as well as further statements that he and other persons had done a lot of work in order to achieve P.'s release from detention on remand and to remove incriminating material regarding P.

The Regional Court proceeded from the statements of the applicant and of numerous witnesses. As regards the conviction for abuse of authority, the Court also had regard to numerous documents showing the secretarial work for the applicant's private needs. The Regional Court dismissed several requests of the applicant for the taking of further evidence on the grounds that it had based its considerations on the presumed truth of the fact to be proven or that the circumstances to be proven were irrelevant.

In fixing the sentence the Regional Court considered as mitigating circumstances the applicant's previous respectable conduct of life and his merits for the judiciary, and as aggravating circumstances that the applicant had committed several offences and, as regards the abuse of authority, for a long period of time as well as the considerable damage to the reputation of the judiciary. Noting that the statutory range of punishment was from six months to five years, the Regional Court regarded a punishment in the lower range as sufficient.

The written judgment was served upon the applicant's counsel on 8 September 1992.

The applicant made submissions giving extensive reasons for his plea of nullity (Nichtigkeitsbeschwerde) and his appeal against sentence (Berufung wegen Strafe) on 6 October 1992.

A plea of nullity before the Supreme Court can only be based on the specific grounds enumerated in S. 281 para. 1 of the Code of Criminal Procedure (Strafprozeßordnung), i.e. various procedural mistakes, including complaints about the composition of the court, the lack of legal assistance, or about the alleged failure to decide upon a request at the trial or allegedly incorrect refusal of such a request; further the alleged insufficiency of reasons in the judgment of the trial court or doubts as to the correctness of the relevant factual findings of the trial court, as compared to the contents of the court files. According to S. 295 of the Code of Criminal Procedure, the Supreme Court, when deciding of an appeal against sentence, has to base itself on the lower court's finding of guilt.

On 28 September 1993 the Supreme Court dismissed the applicant's plea of nullity and his appeal against sentence.

As regards the applicant's general complaints that he had no fair hearing within the meaning of Article 6 of the Convention, the Supreme Court considered that, in accordance with the relevant provisions of the Code of Criminal Procedure, it could, in the context of the nullity proceedings, only examine the allegedly unlawful course of the trial to the extent that the procedural mistake affected the court's finding of guilt. In this respect, the Supreme Court also noted that the applicant had not requested a postponement of the trial hearings, claiming insufficient time to ensure his defence. Moreover, all witnesses had been heard in the course of the public trial. The Supreme Court also confirmed the Regional Court's refusal to take further evidence as requested by the applicant, finding that the alleged circumstances could not have contributed to the establishment of the truth. Furthermore, the Supreme Court examined in detail the applicant's complaints as to the Regional Court's assessment of the evidence and considered that the Regional Court's findings could not be objected to.

The Supreme Court's judgment was served on 5 January 1994.

On 15 April 1994 the Supreme Court, sitting as disciplinary court for judges, decided that oral hearings should start as regards the disciplinary charges against the applicant, which related to the criminal charges which had been determined in the above criminal proceedings, and that the remainder of disciplinary charges be separated from these proceedings. The Supreme Court considered that the disciplinary prosecution should, as far as the matter had been clarified in the context of the criminal proceedings, be duly furthered. According to the applicant, the disciplinary proceedings are still pending.

COMPLAINTS

1. The applicant complains about his conviction and the alleged unfairness of the criminal proceedings against him. He relies on Article 6 paras. 1 and 2 as well as para. 3 (a), (b), (d) of the Convention.

a. The applicant considers that the surveillance of his telephone conversations between October 1989 and January 1990 infringed his defence rights, and also invokes Article 10 in this respect.

b. Furthermore, he submits that he was not informed in due time about the charges against him, but only in the bill of indictment.

c. He also considers that his information about some of the incriminating statements of witnesses was belated. He considers that he had thus no sufficient time to prepare his defence. In this respect, he also states that his counsel was granted full access to the files only in June 1990. Moreover, according to the applicant, the trial hearings had been exhausting.

d. The applicant further complains that contrary to the presumption of innocence the bill of indictment already contained an incriminating assessment of the circumstances and thereby negatively influenced the lay judges at the Regional Court. The applicant also refers to detrimental reports in the media.

e. The applicant complains about the Regional Court's taking and assessment of evidence. He submits in particular that witnesses against him had been heard in the course of the investigation proceedings whereas the witnesses on his behalf, named by him at the end of the investigation proceedings, were only heard in the course of the trial against him.

f. The applicant finally considers that the Supreme Court did not duly consider all his arguments and that, following his counsel's speech and the prosecutor's reply, he could not present his own concluding remarks.

2. The applicant also complains under Article 6 para. 1 of the Convention about the length of the criminal proceedings against him.

3. The applicant complains under Article 5 of the Convention about his arrest on 16 May 1989.

4. The applicant complains under Article 14 of the Convention that the Regional Court, in fixing the sentence, considered as aggravating circumstance that the applicant, in his position as judge, had caused damage to the reputation of the judiciary.

5. The applicant complains under Article 2 of Protocol No. 7 that he did not have a review as to the Regional Court's factual findings on his guilt.

THE LAW

1. The applicant complains about his conviction and the alleged unfairness of the criminal proceedings against him. He relies on Article 6 paras. 1 and 2 as well as para. 3 (a), (b), (d) (Art. 6-1, 6-2), 6-3-a, 6-3-b, 6-3-d) of the Convention.

Article 6 (Art. 6) of the Convention which, so far as relevant, provides as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence;
> ...
>
> 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.
> ..."

The Commission finds it appropriate to examine the applicant's various complaints about the proceedings from the points of view of paragraphs 1, 2 and 3 of Article 6 (Art. 6-1, 6-2, 6-3) taken together, especially as the guarantees in paragraphs 2 and 3 (Art. 6-2, 6-3) represent aspects of the concept of a fair trial contained in paragraph 1 (Art. 6-1) (Eur. Court H.R., Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29).

a. As regards the applicant's complaints about the surveillance of his telephone conversations, the Commission observes that these submissions were already at issue in his Applications No. 16410/90 and No. 17679/91. The applicant failed to show any new element in this respect, in particular as to the further conduct of the criminal proceedings against him, which would warrant a further examination by the Commission. The Commission therefore finds that this part of the application is substantially the same as the matter dealt with in the applicant's previous Applications No. 16410/90 and No. 17679/91, and inadmissible under Article 27 para. 1 (b) (Art. 27-1-b) of the Convention.

b. Furthermore, the applicant submits that he was not informed in due time about the charges against him, but only in the bill of indictment.

Article 6 para. 3 (a) (Art. 6-3-a) gives an accused person the right to be adequately informed of the cause and the nature of the accusation in order to enable him to prepare his defence accordingly (Eur. Court H.R., Brozicek judgment of 19 December 1989, Series A no. 167, pp. 18-19, paras. 38-42; No. 10857/84, Dec. 15.7.86, D.R. 48, p. 106).

In the present case, the Commission finds no indication that, at the different stages of the proceedings, the applicant, assisted by counsel, was not informed adequately about the charges and the state

of the investigations against him when he was repeatedly questioned as from 23 March 1989. Moreover, the bill of indictment of 7 March 1991 informed him in detail about the accusations against him and enabled him to prepare his defence adequately, first as regards his appeal against the indictment and subsequently in the course of the trial before the Vienna Regional Court.

c. The applicant's further complaints about insufficient possibilities to prepare his defence concern an allegedly belated information about some of the incriminating statements of witnesses, the belated access to the files and the exhausting course of the trial hearings.

The Commission observes that following counsel's full access to the files as from June 1990 and the detailed bill of indictment of March 1991, the applicant, assisted by counsel, was in a position to challenge the bill of indictment, albeit without success, and to further prepare his defence until the trial took place in April 1992. The applicant failed to show that the course of the trial as such prevented him and his counsel from making effective use of all defence rights. In this respect, the Commission notes that the applicant and his counsel did not apply for a postponement of the trial hearings before the Vienna Regional Court.

Consequently, the Commission finds no appearance of a violation of the applicant's right to have adequate time and facilities to prepare his defence and his right to a fair trial in these respects.

d. The applicant further complains that contrary to the presumption of innocence the bill of indictment already contained an incriminating assessment of the circumstances and thereby negatively influenced the lay judges at the Regional Court. The applicant also refers to detrimental reports in the media.

The principle of the presumption of innocence is first of all a procedural guarantee applying in any kind of criminal procedure; however, in a wider sense, it protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court (cf. No. 10857/84, Dec. 15.7.86, D.R. 48, p. 106).

In the present case, the Commission considers that the bill of indictment of March 1991 did not go beyond setting out the charges against the applicant on the basis of the preliminary investigations. Moreover, the applicant did not show that the reporting in the media was more that the inevitable publicity when a person of particular public interest such as a high-ranking judge is prosecuted. The Commission also attaches importance to the fact that the applicant did not challenge the lay judges at the Regional Court for bias.

The applicant's submissions do not, therefore, disclose any appearance of a violation of the presumption of innocence which could have had repercussions on his right to a fair trial.

e. The applicant complains about the Regional Court's taking and assessment of evidence. He submits in particular that witnesses against him had been heard in the course of the investigation proceedings whereas the witnesses on his behalf, named by him at the end of the investigation proceedings, were only heard in the course of the trial against him.

The Commission recalls that, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. More specifically, Article 6 para. 3 (d) (Art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the

Convention system; it does not require the attendance and examination of every witness on the accused's behalf (cf., Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33). However, it is the task of the Convention organs to ascertain whether the taking and assessment of evidence rendered the proceedings as a whole unfair. In this respect, the Commission also recalls that all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, paras. 26-27).

In the present case, the applicant failed to show that the fact that the witnesses against him had already been heard at the pre-trial stage could render the proceedings as a whole unfair. In this respect, the Commission notes that all witnesses were heard at the trial where the applicant had an adequate and proper opportunity to challenge and question the witnesses.

Moreover, the Commission notes that the Regional Court dismissed several of the applicant's requests for a further hearing of witnesses, explaining in its judgments the reasons, in particular as to the irrelevance of the evidence in question in the light of the Regional Court's taking of evidence as a whole. Having regard to all material before it, the Commission finds no sufficient grounds to form the view that there were any special circumstances which could prompt the conclusion that the failure to hear further witnesses was incompatible with Article 6 (Art. 6).

f. The applicant finally considers that the Supreme Court did not duly consider all his arguments and that, following his counsel's pleadings and the prosecutor's reply, he could not present his own concluding remarks.

Article 6 para. 1 (Art. 6-1) obliges the courts to give reasons for their judgments, but cannot be understood a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision (Eur. Court H.R., Ruiz Torija and Hiro Balani judgments of 9 December 1994, paras. 29/27, to be published in Series A nos. 303 A/B, respectively). However, the Convention organs are not called upon to examine whether arguments are adequately met (see above and Eur. Court H.R., Van De Hurk judgment of 19 April 1994, Series A no. 288, p. 20, para. 61).

The Commission, having considered the Supreme Court's reasoning in its judgment of 28 September 1993, finds no indication that the court failed to fulfil its obligation to state reasons.

g. In sum, taken individually none of the matters complained of by the applicant discloses any appearance of a violation of the rights of the defence under Article 6 (Art. 6) of the Convention. Furthermore, the Commission finds that taken cumulatively the alleged procedural deficiencies did not result in rendering unfair, for the purposes of Article 6 (Art. 6), the criminal proceedings considered as a whole.

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

2. The applicant also complains under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the criminal proceedings against him.

The Commission notes that criminal proceedings against the applicant were opened in February 1989 on the suspicion of abetment after the fact, a charge in respect of which the investigations were later discontinued. Investigations regarding the suspicion of abuse of authority only started in May 1989, and were later extended to the

charge of having given false evidence. The proceedings terminated with the Supreme Court's judgment of 28 September 1993 which was served upon the applicant on 5 January 1994. The proceedings thus lasted about four years and eight months.

The reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the case-law of the Convention organs and in the light of the circumstances of the case, which in this instance call for an overall assessment (cf. Eur. Court H.R., Ficara judgment of 19 February 1991, Series A no. 196-A, p. 9, para. 17).

The Commission notes that the proceedings at issue related to charges of abuse of authority committed throughout a period of two years and having given false evidence in parliamentary investigation proceedings. The preliminary investigations which at that time still covered the charge of abetment after the fact took about 21 months. The applicant's appeal against the bill of indictment of March 1991 was rejected by the Vienna Court of Appeal in November 1991 and the trial took place before the Vienna Regional Court on six days between 21 and 29 April 1992. The Regional Court's written judgment was served upon the applicant on 8 September 1992. The Supreme Court decided upon the extensive applicant's plea of nullity and appeal against sentence within less than one year from the submission of the applicant's reasoning and this decision was served three months and one week later.

In these circumstances, the Commission finds no delays on the part of the Austrian authorities which would appear substantial enough for the total length of the proceedings to be regarded as excessive.

Consequently, there is no appearance of a violation of the applicant's right to a hearing within a "reasonable time", as guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention.

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.

3. The applicant complains under Article 5 (Art. 5) of the Convention about his arrest on 16 May 1989.

In accordance with Article 26 (Art. 26) of the Convention, the Commission, even assuming exhaustion of domestic remedies, finds that the matter complained about dates back to May 1989, which is more than six months before the date on which the application was submitted. Consequently, the Commission is not required to decide whether or not the applicant's complaint about his arrest discloses any appearance of a violation of the Convention.

It follows that this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

4. The applicant complains under Article 14 (Art. 14) of the Convention that the Regional Court, in fixing the sentence, considered as aggravating circumstance that the applicant, in his position as judge, had caused damage to the reputation of the judiciary.

Article 14 (Art. 14) provides that 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 has examined the applicant's complaint about the fixing of the sentence by the Vienna Regional Court under Article 14, taken in conjunction with Article 6 (Art. 14+6) of the Convention. The Commission finds that the Vienna Regional Court, in its judgment of

29 April 1992, having weighed mitigating and aggravating circumstances, fixed a sentence at the lower end of the statutory range of punishment.

There is no appearance that the Regional Court, having considered as one of the mitigating circumstances the applicant's merits for the judiciary, discriminated against him, contrary to Article 14 (Art. 14) of the Convention, when taking into account the negative consequences of his criminal behaviour for the judiciary.

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

5. The applicant finally complains under Article 2 of Protocol No. 7 (P7-2) that he did not have a review as to the Regional Court's factual findings on his guilt.

Article 2 of Protocol No. 7 (P7-2), as far as relevant, provides as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

The Commission recalls that the reference, in the second sentence of Article 2 para. 1 of Protocol No. 7 (P7-2-1), to the grounds for the review to be governed by national law shows that the States have a discretion as to the modalities for the exercise of the right of review. Indeed different rules govern review by a higher tribunal in the Member States of the Council of Europe. In some countries such review is in certain cases limited to questions of law, such as the "recours en cassation" (in French law) or "Revision" (in German law). In others there is a right to appeal against findings of fact as well as on questions of law; and in some States a person wishing to appeal to a higher tribunal must in certain cases apply for leave to appeal (cf. No. 19028/91, Dec. 9.9.92, D.R. 73, p. 239).

In the present case, the applicant could under Austrian law lodge a plea of nullity and an appeal against sentence with the Austrian Supreme Court, and he availed himself of these possibilities. The Commission finds that the limitation of the right to review under S. 281 of the Code of Criminal Procedure as regards the plea of nullity and under S. 295 of the Code of Criminal Procedure as to the appeal against sentence is in line with the typical rules governing the procedures before Supreme Courts which sit only to control the legality of the judgment of the trial court.

In the circumstances of the present case, the right to review as provided for under Austrian law satisfied the requirements of Article 2 of Protocol No. 7 (P7-2).

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.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)