AS TO THE ADMISSIBILITY OF

Application No. 16925/90
by F. K.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 11 May 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

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 May 1990 by F. K. against Austria and registered on 25 July 1990 under file No. 16925/90;

Having regard to :

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 20 July 1992 and the observations in reply submitted by the applicant on 12 October 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1948. He lives in Vomp, in the Tyrol, and is represented by Mr. A. Heiss, lawyer, of Innsbruck. The facts of the case may be summarised as follows:

On 30 January 1983 an investigating judge decided to institute proceedings against the applicant and two others on suspicion of having committed aggravated fraud by holding themselves out as publishers of a holiday catalogue which would be widely distributed, when in fact they merely intended to receive payments for entries in a catalogue.

A search and seizure warrant was issued in respect of, inter alia, the applicant's flat. Arrest warrants were issued on 3 February 1983, and the applicant was questioned on 15 March 1983. The final indictment of the applicant and one co-accused was transmitted to the Innsbruck Regional Court (Landesgericht) on 27 June 1984 and the final indictment of another co-accused was transmitted on 20 July 1984. On 20 October 1986 the trial date was fixed for 5 December 1986, but on that date the trial had to be adjourned because neither of the co-accused was represented. Three further adjournments ensued because both prosecution and defence called large numbers of witnesses. Three witnesses were heard on 23 June 1988, and 14 further witnesses were heard on 20 October 1988. At the final hearing on 27 April 1989, 6 further

witnesses were heard. The applicant was convicted.

In its judgment of 27 April 1989, served on the applicant on 14 July 1989, the court noted that it was not denied that the defendants had published the advertisements for entries in their catalogue, and rejected the applicant's contention that the advertisements had all been simply wrongly phrased. It found the intention to deceive customers was clear, and the discrepancy between the actual text used and what the defendants claimed in court confirmed this. The court noted:

> "Den verschiedenen Anzeigen der Polizei und Gendarmerie sowie den dort enthaltenen Niederschriften und Urkunden ist zweifelsfrei zu entnehmen, wann welche Personen zur Bezahlung welcher Beträge verleitet wurden. Diese Beweismittel wurden dem Schuldspruch Punkt A) bzw. den darauf bezugnehmenden Feststellungen zugrundegelegt.
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> Ein Teil dieser Personen wurde im Rahmen der Hauptverhandlung bzw. im Zwischenverfahren als Zeugen vernommen. Naturgemäß konnten sich die Vernommenen dabei an die Jahre zurückliegenden Vorgänge nicht mehr so deutlich erinnern. Alle diese Zeugen hinterließen jedoch den Eindruck, bei der seinerzeitigen Anzeige-erstattung jedenfalls die Wahrheit gesagt zu haben, sodaß die damaligen Angaben den Feststellungen und dem Schuldspruch zugrundegelegt wurden ..."

[Translation]

> "It is clear from the informations laid by the police and the witness statements and certificates attached thereto which persons were induced to pay which sums and when. The conviction at point A and the related findings of fact are based on this evidence.
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> Some of these persons were heard as witnesses in the context of the trial or the pre-trial proceedings. It is in the nature of things that the witnesses could no longer remember so clearly events which happened so long ago. However, all these witnesses gave the impression that they had been stating the truth when their informations were laid, such that the findings of fact and the conviction were based on the statements made then ..."

The court also referred to the evidence given by individuals who had acted as sales representatives of the defendants, finding that the instructions they had been given were consistent with the charges against the defendants. It noted that the applicant had worked for a considerable time with the printing firm which, according to the defendants, had produced a catalogue of inadequate quality. It considered that the applicant would have known what to expect from the firm, and that in any event the print run of 500 was far too small to be effective publicity. The court rejected an argument that the catalogue was merely "provisional" on the ground that no serious attempts were made to have a proper catalogue printed. It found that the facts as established led only to the conclusion that the defendants all had the requisite criminal intent, as they had all worked together in the scheme (the applicant as treasurer) over a lengthy period of time.

The applicant made a plea of nullity (relating to his conviction) and an appeal against sentence.

On 6 December 1989 the Supreme Court (Oberster Gerichtshof) rejected the applicant's plea of nullity. As regards his plea under Article 6 para. 1 of the Convention that his trial had been unfair due to the effluxion of so much time since the witness statements were originally taken that the trial court had had to have recourse to the original statements rather than being able to rely on the witnesses, the Supreme Court noted that the applicant had not raised this matter as a ground of nullity. In order to do so, he would have had to make a specific request at the trial and if his request was unsuccessful he could then have raised the point as a plea of nullity (Article 281 para.

1 (4) of the Code of Criminal Procedure (Strafprozeßordnung)).

The applicant's appeal against sentence was rejected by the Innsbruck Court of Appeal (Oberlandesgericht) on 15 February 1990. The applicant's representative received the judgment on 2 March 1990.

COMPLAINTS

The applicant alleges a violation of Article 6 paras. 1 and 3 (d) of the Convention. He complains both of the length of proceedings as such, and of the fact that, because of the effluxion of time between the original witnesses' statements and the trial, his representative was no longer able effectively to question witnesses at the trial, as they had forgotten what had happened in the meantime.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 May 1990 and registered on 25 July 1990.

On 1 April 1992 the Commission decided to communicate the case to the respondent Government for observations on its admissibility and merits. The Government submitted their observations on 20 July 1992 and the applicant submitted his observations in reply on 12 October 1992.

THE LAW

1. The applicant alleges a violation of Article 6 (Art. 6) of the Convention by virtue of the length of the proceedings against him. Article 6 para. 1 (Art. 6-1) of the Convention provides, as far as relevant, as follows:

> "1. In the determination 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. ..."

The Commission notes that a decision to open proceedings against the applicant was, taken on 30 January 1983, and that the applicant was questioned on 15 March 1983. The final decision in the case, that of the Innsbruck Court of Appeal, is dated 15 February 1990 and was received by the applicant's representative on 2 March 1990.

According to the applicant, the length of the proceedings - a period of almost seven years - is in breach of the "reasonable time" requirement of Article 6 para. 1 (Art. 6-1) of the Convention. The Government take the opposite view.

The Commission considers, in the light of the criteria established by the case-law of the Convention institutions on the question of "reasonable time" (the complexity of the case, the applicant's conduct and that of the competent authorities), and having regard to all the information in its possession, that an examination of this complaint is required as to the merits.

2. The applicant also alleges a violation of Article 6 para. 1 (Art. 6-1) and Article 6 para. 3 (d) (Art. 6-3-d) of the Convention in that by the time the matter came to trial, the proceedings had already lasted so long that witnesses could no longer remember the events concerned. From this, the applicant deduces that he was unable properly to question witnesses such that the rights of the defence were not respected.

The Government point out that all the applicant's requests for witnesses to be heard were granted by the first instance court, and consider that he was able to put all the questions he wanted to all the witnesses he wanted. They consider that it was inevitable that some

witnesses' memories had faded with the passage of time, but point out that there was a large amount of other evidence. The applicant considers that the Government have misunderstood his complaint, as it relates to his inability effectively to question the witnesses, not an inability to call them. He considers that he should have had the opportunity to question the witnesses while events were still fresh in their minds.

The Commission 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 (Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 27). In the present case, the witnesses who gave evidence were present in the court, but the court was obliged to supplement that evidence by the witness statements made by the same witness earlier in the proceedings, because by the time the matter came to trial, events had faded in witnesses' memories.

The Commission recalls that the European Court of Human Rights has held that it may, in certain circumstances, be permissible not to hear certain witnesses at all, but rather to rely on their previous statements (cf, eg, Eur. Court H.R., Artner judgment of 28 August 1992, Series A no. 242). In the present case the witnesses were in fact present, and the role of the earlier witness statements was limited to filling the gaps in witnesses' memories. The applicant was not prevented from questioning the witnesses about the events, not would he have been prevented from putting inconsistencies to them. In the light of these circumstances, together with the other evidence available to the court, such as the statements from the persons who had worked for the defendants, the advertisements and orders which the defendants had placed, and the admissions made by the applicant as to his participation, the Commission finds no indication that the applicant was deprived of a fair trial.

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.

For these reasons, the Commission unanimously

DECLARES ADMISSIBLE the complaint concerning the length of the proceedings against the applicant, without prejudging the merits; and

DECLARES INADMISSIBLE THE REMAINDER OF THE APPLICATION.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)