AS TO THE ADMISSIBILITY OF

Application No. 15853/89
by J.G.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 19 February 1992, the following members being present:

MM.J.A. FROWEIN, President of the First Chamber
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
SirBasil HALL
Mr.C.L. ROZAKIS
Mrs.J. LIDDY
Mr.M. PELLONPÄÄ

Mr.M. de SALVIA, Secretary to the First 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 August 1989 by J.G. against Austria and registered on 1 December 1989 under file No. 15853/89;

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 1956 and at present detained in prison in Krems. He is represented by Mr. K. Bernhauser, a lawyer in Vienna.

It follows from the statements and documents submitted by the applicant that on 17 August 1988 he was convicted by the Vienna Regional Court (Landesgericht) of grievous bodily harm (absichtliche schwere Körperverletzung) and sentenced to twelve years' imprisonment.

According to the findings of the Court the applicant had on 31 October 1987 poured an inflammable liquid over his wife and then set fire to her causing serious burns on 35% of her body. The applicant had defended himself by alleging that his wife had inadvertently spilt the liquid herself and then caused the fire by lighting a cigarette. Although the victim had made use of her right not to give evidence at the trial the Court considered the applicant's defence to be disproven. It referred to the report established by the police according to which the applicant's wife had told a female police officer how the applicant had treated her. According to this report she had also told the officer that she was afraid of giving evidence against the applicant as he had threatened to kill her. The officer had thereupon informed her that as a relative she had a right to refuse to give evidence.

The report in question was, as is stated in the judgment, read out at the trial. The Court considered that it could make use of the report despite the fact that the victim later availed herself of the right not to give evidence.

The Court further relied on evidence given by an eye-witness, namely the victim's son, born on 29 November 1982. It is stated in the judgment that the child was informed in an informal and adequate manner that he did not have to give evidence against the applicant, his step-father, and that he answered he wished to give evidence. It follows from a handwritten note in the minutes that the presiding judge said to the boy: "You do not have to say anything as your daddy is concerned" ("Du mußt aber nichts erzählen, es geht ja um deinen Papa"). The Court rejected the defendant's motion to ask the mother whether she agreed on behalf of her son that he give evidence. The Court stated that only the witness personally had to decide whether or not to give evidence. It pointed out that otherwise evidence would be difficult to obtain in cases of ill-treatment of children by their parents.

The boy's evidence was considered to be trustworthy despite certain contradictions which existed between his statements at the trial and those made before the police and the investigating judge.

The Court found no indication that the boy had a tendency to lie or had a personality default and was susceptible. Therefore it rejected the defendant's request to have the boy examined by a psychiatrist.

The Court also considered expert evidence submitted by a medical doctor and a pyrotechnic expert. Both experts had inter alia stated that the victim's dress had been soaked with the inflammable liquid. The pyrotechnic expert had further stated that it was most likely (hohe Wahrscheinlichkeit) that the fire had been caused by an open flame and could not have been caused by a glowing cigarette. This statement was corroborated by the medical expert who pointed out that the efore it
hands were uninjured while they would have been affected by the flames had she herself spilled the liquid and then inadvertently caught fire from a cigarette held in a hand.

The Court concluded that the statements made by the applicant's stepson and the expert evidence at the trial, the result of the police inquiries and the statements made by the applicant's wife before the police clearly proved the applicant's guilt and refuted his version of the event.

Insofar as the defence had produced a written declaration signed by the applicant's wife before a public notary exonerating the applicant, the Court stated that if the applicant's wife really regretted to have him wrongly incriminated by her previous statements before the police she could have given evidence to that effect at the trial. The fact that she preferred not to give evidence showed, in the Court's opinion, that she had made her written declaration because she was afraid of the applicant who had a criminal record of violent aggressions.

The applicant's plea of nullity (Nichtigkeitsbeschwerde) was rejected by the Supreme Court (Oberster Gerichtshof) on 21 February 1989. The Court stated that it was for the trial court to determine whether or not a child was apt to give evidence and it was for the child and not his legal representative to decide whether or not to avail himself of the right not to give evidence. The Supreme Court agreed with the trial court that there had been no reason to have the child examined by an expert.

Insofar as the applicant had alleged that documentary evidence relied on in the trial court's judgment had not been read out at the trial, the Supreme Court found that this allegation contradicted by the minutes of the trial which contained handwritten corrections made by the trial court's presiding judge stating that the report in question was read out. The applicant's complaint on this point was therefore rejected as being unsubstantiated (aktenwidrig - nicht gesetzmässig

ausgeführt).

The applicant's appeal (Berufung) was likewise to no avail whereas the Vienna Court of Appeal (Oberlandesgericht) on 10 April 1989 increased his sentence to fourteen years' imprisonment following the appeal of the public prosecution.

COMPLAINTS

The applicant maintains that, contrary to the handwritten notes in the minutes, the police report was not read out at his trial. He considers that Article 6 para. 1 of the Convention was thereby violated. Furthermore he argues that this provision was also violated in that the principal witness against him was not in a position to grasp the meaning and importance of his right to refuse to give evidence. Therefore his legal representative should have decided on the witness' behalf whether or not this right should be invoked by the witness.

THE LAW

1. The applicant has mainly complained that his conviction of having caused grievous bodily harm to his wife is principally based on the evidence given by his step-son, a boy who was at the time five years old. He invokes the right to a fair hearing under Article 6 para. 1 (Art. 6-1) of the Convention and argues that the legal representative of the boy, namely his mother, should have had to decide whether or not the boy ought to have made use of his right as a relative of the accused not to give evidence against him.

The Commission first observes that the admissibility of evidence is primarily a matter for regulation by national law. The Commission's task is therefore not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (Eur. Court H.R., Kostovski judgment of 20 November 1989, Series A no. 166, para. 39).

The Commission notes that in the present case the trial court and the Supreme Court carefully examined the legal problem of whether a child, being called as witness in criminal proceedings against a parent, could be left to decide himself whether or not to make use of his right not to give evidence. The Austrian courts considered that the right in question was of a very personal nature (höchstpersönliches Recht) and that therefore the child himself and not his legal representative was entitled to decide whether or not to make use of it. The Commission cannot find this reasoning to be incompatible with the notion of a fair hearing. It further notes that the trial court's presiding judge informed the boy that he did not have to make any statements as his step-father was concerned. The boy replied that he wished to make a statement and he then gave evidence in the presence of the applicant and his defence counsel. The trial court carefully examined the question whether the witness was reliable. It based its findings of the applicant's guilt not only on the boy's statements but also on further evidence, in particular expert evidence.

It is true that the trial court also based its findings on declarations made by the applicant's wife before the police while at the trial she refused to give evidence. However, the use of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (Art. 6), provided that the rights of the defence have been respected, particularly by giving the defendant adequate and proper opportunities to challenge the evidence in question. (Eur. Court H.R., Asch judgment of 26 April 1991, Series

A, No. 203, page 10, paras. 27-31).

In the present case the applicant was given the opportunity to discuss his wife's version of the events and to put his own. However, in the light of the expert evidence, the result of the police inquiries, the statements made by the applicant's wife before the police and the statements of his step-son at the trial, the applicant's version was found to be clearly refuted.

In these particular circumstances it cannot be found that the proceedings in question disclose any appearance of a violation of Article 6 (Art. 6) of the Convention on account of the hearing of a five-year-old witness.

2. The applicant has further complained that a police report on which the trial court's judgment also relied was, contrary to the statements in the minutes, not read out at the trial. However, the Supreme Court rejected this complaint as being contradicted by the minutes and the applicant has not produced any evidence proving his allegation either before the Supreme Court or before the Commission. The Commission further observes that the use as evidence of statements obtained at the pre-trial stage is not in itself inconsistent with Article 6 (Art. 6) (see judgment cited before, para. 41). In the present case the trial court relied on various evidence and not exclusively on the report in question. There is consequently again no appearance of a violation of Article 6 (Art. 6).

3. It follows that 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 THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M. DE SALVIA) (J. A. FROWEIN)