AS TO THE ADMISSIBILITY OF

Application No. 26510/95
by H. S.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 28 February 1996, 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
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 26 January 1995 by H. S. against Austria and registered on 14 February 1995 under file No. 26510/95;

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 is an Austrian citizen born in 1939 and residing in Neumarkt (Austria). Before the Commission he is represented by Mr. S. Holter, a lawyer practising in Grieskirchen.

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

A. Particular circumstances of the case

On 3 March 1993 the Grieskirchen District Administrative Authority (Bezirkshauptmannschaft) issued a penal order (Straferkenntnis) against the applicant. It found that on 17 February 1993 the applicant had driven his car under the influence of alcohol. After having smashed into a parked car, he had left the place of the accident, had gone home, had taken his second car and had driven back to the place of the accident. When he returned home from there a police officer had already been waiting for him and a breathalyser test had been taken which showed that the applicant had been under the influence of alcohol. When the applicant had been driving with his second car he also had failed to put on the interchangeable number plates.

The District Administrative Authority convicted the applicant

under the Road Traffic Act (Straßenverkehrsordnung) on two counts of drunk driving and of having failed to maintain the minimum distance from the roadside (which was the cause of the accident). It further convicted the applicant under the Motor Vehicles Act (Kraftfahrzeug-gesetz) of having driven a car without number plates. As regards the convictions of drunk driving the District Administrative Authority sentenced the applicant to two fines of 10000 AS or 200 hours of imprisonment in default each. As regards the other convictions the District Administrative Authority imposed fines of 500 As and 1000 AS or 15 and 30 hours of imprisonment in default respectively.

The applicant, assisted by counsel, appealed. He submitted, inter alia, that the result of the breathalyser test had not been reliable as he had drunk alcohol when he had returned home after the accident.

On 24 March 1994 the Upper Austria Independent Administrative Panel (Unabhängiger Verwaltungssenat), after an oral hearing in which it heard witnesses and a medical expert, dismissed the appeal.

Thereupon the applicant lodged a complaint with the Administrative Court (Verwaltungsgerichtshof).

On 24 June 1994 the Administrative Court, relying on Section 33a of the Administrative Court Act (Verwaltungsgerichtshofgesetz), declined to deal with the applicant's complaint. This decision was served on the applicant's lawyer on 11 August 1994.

On 1 September 1994 the Grieskirchen District Administrative Authority issued a further penal order against the applicant. It found that the applicant after the accident on 17 February 1993 had failed to comply with his obligation under the Road Traffic Act to participate in the establishment of the circumstances of an accident. He had left the scene of the accident and had drunk alcohol in order to hide his state of inebriation. The District Administrative Authority sentenced him to a fine of 2 000 AS or 60 hours of imprisonment in default. The applicant did not appeal.

B. Relevant domestic law

1. Articles 129a and 129b in the version of the 1988 Amendment of the Federal Constitution (Federal Law Gazette No. 1988/685) provided for the institution of Independent Administrative Panels.

Independent Administrative Panels deal, inter alia, with appeals against penal orders issued by administrative authorities. Their members are lawyers, appointed by the Regional Government for a term of office of at least 6 years. They are independent and must not receive instructions. They can only be dismissed from office upon a decision of the Independent Administrative Panel itself.

The Upper Austrian Regional Act of 11 October 1990 on the Independent Administrative Panel (Oberösterreichisches Verwaltungs-senatsgesetz, LGBl. 1990/90) repeats to a large extent the provisions of the Federal Constitution. Section 3 para. 3 of the Act provides that members are appointed for an indefinite term of office.

2. Section 33a of the Administrative Court Act (Verwaltungs-gerichtshofgesetz), as in force from 1 January 1991, reads as follows:

> "The Administrative Court may decline to deal with a complaint against a decision of an Independent Administrative Panel in an administrative criminal case, if no prison sentence or a fine exceeding AS 10,000 has been imposed and the Administrative Court's decision would not involve the determination of a legal question of fundamental importance. A legal question of fundamental

importance is involved in particular if the challenged decision of the Independent Administrative Panel is at variance with the Administrative Court's case-law, if no such case-law exists or if the legal questions at issue have not been answered uniformly in the Administrative Court's case-law."

3. Section 99 para. 1 (a) of the Road Traffic Act (Strassenverkehrs-ordnung) provides that whoever drives or attempts to drive a car under the influence of alcohol or drugs commits and administrative offence, punishable by a fine between 8000 and 50000 AS or imprisonment in default between one and six weeks.

Section 99 para. 2 (a) of the Road Traffic Act provides, inter alia, that whoever, involved in a road accident as the driver of a car, fails to comply with his he duty to participate in the establishment of the relevant facts commits an administrative offence, punishable by a fine between 500 and 30000 AS or imprisonment in default of between twenty-four hours and six weeks.

Section 17 para. 1 of the Road Traffic Act provides, inter alia, that the driver of a car has to maintain a minimum safety distance when passing by another car. Section 99 para. 3 (a) provides that the failure to comply with the above duty is an administrative offence punishable by a fine of up to 10000 AS or imprisonment in default of up to two weeks.

The Motor Vehicle Act (Kraftfahrzeuggesetz) provides that the owner of more than one car may register all his cars under one license plate. In such a case he receives an interchangeable license plate which he has to put on the car he is actually using. He is not allowed to use more than one car at the same time. Section 49 of the Motor Vehicles Act, which deals with license plates, provides in paragraph 6 that a motor vehicle may only circulate if it has the necessary license plates attached. Section 134 para. 1 provides that the failure to comply with the duties mentioned in the Motor Vehicles Act is an administrative offence punishable by a fine of up to 30000 AS.

COMPLAINT

The applicant complains that the Administrative Court's refusal to deal with his complaint violated Article 2 of Protocol No. 7.

He further complains under Article 4 of Protocol No. 7 about the penal order of 1 September 1994. He submits that this conviction and the conviction of 3 March 1993 of drunk driving concern the same offence as in both cases his conviction was based on the same facts, namely that he had drunken alcohol. He submits further that the Administrative Court has constantly held that the obligation to participate in the establishment of the circumstances of an accident included the prohibition against drinking alcohol after the accident had occurred and before the establishment of the circumstances had taken place since the possible drunkenness of the driver is a relevant element. In view of this case-law an appeal against the penal order of 1 September 1994 and subsequent complaints to the Administrative Court and Constitutional court would have clearly no prospect of success and would be ineffective.

THE LAW

1. The applicant complains that the Administrative Court's refusal to deal with his complaint violated Article 2 of Protocol No. 7 (P7-2), which, insofar as relevant, reads 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, having regard to the nature of the applicant's offences as a failure to comply with a specific regulation, their qualification under domestic law as administrative criminal offences and the severity of the punishment involved, finds that the applicant was convicted of criminal offences within the meaning of Article 2 of Protocol No. 7 (P7-2) (see mutatis mutandis Eur. Court H.R., Öztürk judgment of 21 February 1984, Series A no. 73, p. 18, para. 50; Gradinger judgment of 23 October 1995, Series A no. 328-C, paras. 35-36).

The Commission observes that the District Administrative Authority cannot be considered as a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (see e.g. Gradinger v. Austria, loc, cit., para. 51; Umlauft v. Austria, Comm. Report 19.5.94, para. 42) and consequently not as a tribunal for the purpose of Article 2 of Protocol No. 7 (P7-2).

However, having regard to the criteria developed in its case-law by the Court for the qualification of tribunals under Article 6 para. 1 (Art. 6-1) of the Convention and the relevant domestic provisions on the institution of Independent Administrative Panels, the Commission finds that the Upper Austrian Independent Administrative Panel has to be regarded as a tribunal within the meaning of Article 2 para. 1 of Protocol No. 7 (P7-2-1) (see mutatis mutandis Eur. Court H.R., Ringeisen judgment of 16 July 1971, Series A no. 13, p.39, para. 95; Sramek judgment of 22 October 1984, Series A no. 84, pp. 17-18, paras. 36-38; Ettl judgment of 23 April 1987, Series A no. 117, pp. 17-19, paras. 34-41).

Article 2 of Protocol No. 7 (P7-2) thus applies to the applicant's convictions by the Upper Austrian Independent Administrative Panel and he was therefore in principle entitled to a review of his convictions or sentences by a higher tribunal.

The Commission recalls that reference to the grounds for review being governed by law in the second sentence of paragraph 1 of Article 2 of Protocol No. 7 (P7-2-1) clearly shows that the Contracting States have a discretion as to the modalities for the exercise of the right to review. Thus, different rules govern review by a higher tribunal in the various Member States of the Council of Europe. In some member States a person wishing to appeal to the highest tribunal must apply for leave to appeal. Such a right to apply for leave to appeal to a higher court can in itself be regarded as a review within the meaning of Article 2 of Protocol No. 7 (P7-2) (No. 18066/91, Dec. 6.4.94, D.R. 77, p. 37; No. 20087/92, Dec. 26.10.95, D.R. 83, p. 5). Decisions given by the Administrative Court pursuant to Section 33a of the Administrative Court Act may be equated to decisions given on applications for leave to appeal (No. 26808/95, Dec. 16.1.96, unpublished).

In the present case the Administrative Court, which had the competence to review the Independent Administrative Panel's decision of 17 December 1993, decided pursuant to Section 33a of the Administrative Court Act not to deal with the applicant's complaint.

In these circumstances the Commission does not find any appearance of a violation of the applicant's right under Article 2 of Protocol No. 7 (P7-2) to a review of his conviction or sentence by a higher tribunal.

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 further complains under Article 4 of Protocol No. 7 (P7-4) about the penal order of 1 September 1994. He submits that this conviction and the conviction of 3 March 1993 of drunk driving concern the same offence as in both cases his conviction was based on the same facts, namely that he had drunk alcohol.

Article 4 para. 1 of Protocol No. 7 (P7-4-1) reads as follows:

> "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 4 of Protocol No. 7 (P7-4), as under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The Commission observes that the applicant did not appeal against the penal order of the Grieskirchen District Administrative Authority of 1 September 1993.

The applicant submits that in view of the Administrative Court's case-law an appeal against and subsequent complaints to the Administrative Court and Constitutional Court would clearly have no prospect of success and thus be ineffective remedies.

However, he has not shown that the Administrative Court's case-law which he is referring to has any relation to his complaint that he has been convicted again for the same offence. Thus, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant from compliance with the requirement of exhaustion of domestic remedies as regards his complaint under Article 4 of Protocol No. 7 (P7-4).

It follows that the applicant has failed to comply with the requirement of exhaustion of domestic remedies under Article 26 (Art. 26) of the Convention.

Accordingly this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) 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)