AS TO THE ADMISSIBILITY OF

Application No. 27951/95
by Burkhard HIRN
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 27 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 22 May 1995 by Burkhard HIRN against Austria and registered on 24 July 1995 under file No. 27951/95;

Having regard to:

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

- the observations submitted by the respondent Government on 17 April 1996 and the observations in reply submitted by the applicant on 12 July 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, an Austrian citizen born in 1947, resides in Feldkirch (Austria). He is a lawyer by profession.

A. Particular circumstances of the case

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

On 18 March 1994 the applicant filed with the Bludenz District Court (Bezirksgericht) a civil action in summary proceedings (Mahnklage) against P.H. claiming an amount of 1800 AS for services rendered. In the form the applicant used for filing the action, he put his name in the area marked "plaintiff" (Kläger) while he put his and his associate's name in the area marked "counsel for plaintiff"

(Klagevertreter).

Following an objection (Einspruch) raised by P.H., the District Court instituted ordinary proceedings and summoned the applicant on 17 May 1994 for a hearing on 15 June 1994, which, according to the summons, should have lasted from 10.45 a.m. to 11.30 a.m.

On 30 May 1994 the District Court informed the applicant that the hearing was postponed to 13 July 1994 and informed him that the hearing should last from 11.30 a.m. to 12.15 a.m.

On 7 July 1994 the applicant submitted a written statement to the District Court in which he argued further his claim against P.H. and proposed that the court hear him personally as means of evidence (Parteienvernehmung).

On 13 July 1994 the hearing took place before the District Court. The applicant did not attend the hearing but was represented by Mr. D., a junior lawyer (Rechtsanwaltsanwärter). The District Court decided to take evidence by examining documents and by hearing the parties. The District Court heard the defendant P.H. and inspected the file of P.H.'s divorce proceedings to which the applicant's claim related. Thereupon the applicant's representative requested the District Court to adjourn the hearing for submitting documents and to hear the applicant personally. The District Court refused to grant an adjournment. It found that the applicant had duly been summoned for the hearing but had not appeared and had not given valid reasons for not doing so. Subsequently the District Court pronounced judgment and dismissed the applicant's claim.

On 7 September 1994 the applicant appealed. He submitted that he had not been summoned correctly for the hearing since from the summons served on him it had not been clear that the District Court had had the intention to hear him as a party. The District Court had used form no. A 4 (Formblatt A 4) by which the addressee is summoned as representative of the plaintiff (Klagevertreter). If the District Court had had the intention to summon him as a party it should have used form no. C 1 (Formblatt C 1) which expressly mentions that the plaintiff would be heard as a party and had to appear in person. His right to be heard by the court had therefore been violated.

On 21 October 1994 the Feldkirch Regional Court (Landesgericht) dismissed the applicant's appeal. It found that the applicant had not been properly summoned to the court hearing because the District Court had used the wrong form. However he had been aware of the hearing and had been represented therein. The District Court's failure to hear him as a party was therefore a procedural mistake (Verfahrensmangel) but did not constitute a ground of nullity (Nichtigkeitsgrund). The ground of nullity provided for in Section 477 para. 1 (4) of the Code of Civil Procedure (Zivilprozeßordnung), namely that a party had been unlawfully excluded from the proceedings, was only met if the participation in the proceedings had been made "impossible" for the party but not, as in the present case, if it only had been rendered "difficult". Since the applicant's claim did not exceed the value of 15.000 AS he could only rely on grounds of nullity. The Regional Court also noted that no further appeal lay against this decision. This decision was served on the applicant on 30 November 1994.

On 7 December 1994 the applicant lodged an extraordinary appeal on points of law (außerordentlicher Revisionsrekurs) to the Supreme Court (Oberster Gerichtshof).

On 12 December 1994 the Bludenz District Court rejected the extraordinary appeal as inadmissible. It found that no further appeal lay against the Regional Court's decision. On 2 January 1995 the applicant appealed.

On 13 January 1995 the Regional Court confirmed the District Court's decision of 12 December 1994.

Meanwhile, on 2 January 1995, the applicant had introduced an action for nullity (Nichtigkeitsklage) under Section 529 of the Code of Civil Procedure against the District Court's judgment of 13 July 1994 and the Feldkirch Regional Court's appeal decision of 21 October 1994. He submitted that in the proceedings at issue he had not been properly heard by the court.

Under Section 529 of the Code of Civil Procedure an action for nullity may be introduced against a judgment which has become final if a judge excluded by law has decided the case or if the party has not been present or represented in the proceedings. A party is, however, prevented from introducing an action for nullity if the ground of nullity has already been unsuccessfully raised in appeal proceedings.

On 10 January 1995 the Feldkirch Regional Court rejected the applicant's action for nullity as inadmissible. It found that in his action the applicant relied on the argument that he had not been heard in the proceedings at issue. However, he had raised this ground of nullity without success already in the previous proceedings. He was therefore barred from filing an action for nullity based on the same ground. His action had therefore to be rejected as inadmissible.

On 25 January 1995 the applicant appealed.

On 6 April 1995 the Supreme Court dismissed the applicant's appeal against the Regional Court's decision of 10 January 1995. It found that the Regional Court had acted correctly when rejecting the applicant's action for nullity.

B. Relevant domestic law

Section 146 of the Code of Civil Procedure provides for an application for proceedings to be reinstituted (Wiedereinsetzung in den vorigen Stand) by a party who had failed to appear in time at a court hearing or had failed to take a procedural step in time for which a time-limit has been set. Reinstitution of the proceedings requires that the person requesting it has been prevented from taking the procedural step by an unforeseeable or insurmountable obstacle. Reinstitution of the proceedings has also to be granted if the failure was the party's own fault, provided that there was only a slight degree of negligence. A request for proceedings to be reinstituted cannot be based on reasons which the court had already found to be insufficient for granting an extension of a time limit or an adjournment of a hearing.

The Commentary of Strohanzl, referring to case-law, states at marginal note 9 to Section 146 that the failure to hear a party could not lead to proceedings being reinstituted because the hearing of a party was not a procedural step but a means of evidence. However, it is a valid reason for an application for proceedings to be reinstituted that the person requesting it had failed to make a request for an adjournment or had failed to apologize for his or her failure to appear in court (Strohanzl, Jurisdiktionsnorm und Zivilprozeßordnung, Vienna 1990, 14th Edition, p. 492).

Section 440 para. 4 of the Code of Civil Procedure provides that in proceedings before a District Court the case should, if possible, be determined at the first oral hearing.

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention that the District Court violated the principle of equality of arms in

the civil proceedings in his action of 18 March 1994 because it heard the defendant but refused to hear him as well.

2. He further complains that the refusal of the Austrian courts to allow his claim against P.H. violated his right to property under Article 1 of Protocol No. 1 and the prohibition of forced or compulsory labour under Article 4 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 May 1995 and registered on 24 July 1995.

On 28 February 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 17 April 1996. The applicant replied on 12 July 1996.

THE LAW

1. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the District Court violated the principle of equality of arms in the civil proceedings in his action of 18 March 1994 because it heard the defendant but refused to hear him as well.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

The Government submit that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention. At the hearing of 13 July 1994 before the Bludenz District Court, the applicant's representative asked that the applicant's absence be excused because of a "professional engagement". The true reason, namely the failure to summon the applicant to be heard as a party, had not been known at the hearing. The applicant's representative also did not base his request for an adjournment on the failure to summon. Against that failure the applicant could have made an application for proceedings to be reinstituted in order to be heard as a party at a further hearing. The Government refer in this respect to case-law quoted in two Commentaries on the Code of Civil Procedure.

The Government submit further that in the proceedings at issue the principle of equality of arms had been respected, since the failure of the District Court to hear the applicant as a party was caused by his own mistakes. Moreover, the proceedings at issue concerned a very small claim and proceedings on such claims are normally conducted by the courts in a summary manner. The applicant, as a practising lawyer, must have been aware that in such summary proceedings evidence is taken right away in the first hearing. This had also been obvious from the timing of the hearing.

This is disputed by the applicant. He submits that the possibility to apply for proceedings to be reinstituted would not have been an effective remedy. The Commentary to which the Government refer states that the omission to hear a party could not lead to a reinstitution of the proceedings because the hearing of a party was not a procedural step but a means of evidence. Furthermore, Section 146 of the Code of Civil Procedure provides that an application for proceedings to be reinstituted can only be filed by a person who has been prevented from taking the procedural step by an unforeseeable and insurmountable obstacle. This requirement was not met in the present

case, because his representative had by mistake failed to examine the case file before the court hearing. If he had done so he would have found out that the true reason for the applicant's absence had been the court's failure to summon him properly. This mistake of his representative was, however, imputable to himself. Moreover, under Section 146 of the Code of Civil Procedure a reinstitution of the proceedings is only possible if an adjournment of the hearing could not be requested. In the present case, his representative, could have had based his request for an adjournment on the wrong summons of the applicant if he had consulted the case file in time.

The applicant submits further that in examining the fairness of the proceedings at issue the value of his claim is not relevant. From the timing of the hearing it could not be determined in what manner the judge intended to conduct the proceedings. It had been essential for the determination of his claim that the court heard him as a party because only he himself could have given the necessary clarifications. His representative had not been in a position to do so. The District Court therefore had deprived him of the possibility to prove the well-foundedness of his claim because it had not summoned him properly.

The Government submit that the applicant could have filed an application for proceedings to be reinstituted under Section 146 of the Code of Civil Procedure, in order to be granted a further hearing in which he could have been heard as a party. He has not done so and his application is therefore inadmissible for non-exhaustion of domestic remedies.

In the applicant's view, however, he could not have filed such an application for proceedings to be reinstituted. Having regard to the case-law referred to by the Government, the Commission finds that such an application in the present case was not excluded by the law as interpreted by the Austrian courts. The Commission notes in particular that according to the case-law quoted in the Commentary to which the Government refers, a valid reason for an application for proceedings to be reinstituted is that the person requesting it has failed to make a request for an adjournment or has failed to apologize for his or her failure to appear in court.

The applicant also submits that an application for proceedings to be reinstituted would have had no prospect of success. The Commission is not persuaded by his argument. It notes that the essence of the applicant's argument is that an application for proceedings to be reinstituted would have been bound to fail because of mistakes and omissions of his representative. Such failures, however, are imputable to the applicant. There is nothing to show that if the applicant or his representative had acted with due diligence an application for proceedings to be reinstituted would have had no prospect of success.

However, the Commission may leave open the issue whether or not the applicant has complied with the requirement of exhaustion of domestic remedies as required by Article 26 (Art. 26) of the Convention, because his complaint is, in any event, manifestly ill founded for the following reasons.

The Commission recalls that the principle of equality of arms is only one feature of a wider concept of fair trial and implies that each party shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-a-vis his opponent (Eur. Court HR, Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19).

In the present case, the applicant was summoned to an oral hearing before the District Court in his action of 18 March 1994. Before the hearing took place he requested on 7 July 1994 to be heard as a party. The applicant, who as a practising lawyer was familiar

with the forms of summons used by the courts, considered that his personal presence at the hearing of 13 July 1994 was not required and asked another lawyer to replace him. At the hearing the judge of the District Court, who was under the impression that the applicant had been summoned to appear personally before the court, refused a request for an adjournment of the hearing as he found that the applicant had failed to appear before the District Court without a proper excuse. The judge considered that the explanation given by the applicant's representative, namely, that the applicant had other professional engagements, was not a valid reason for granting an adjournment of the hearing. Thereupon, the District Court, after having heard the defendant who had appeared before the court, dismissed the applicant's claim. Appeal proceedings, and an action for nullity instituted by the applicant were to no avail, as the higher instances found that in cases of minor claims, like the present one, only grave deficiencies in the proceedings, like a party being left in proceedings without any representation at all, could lead to a quashing of a judgment and a fresh taking of evidence.

The Commission has to examine whether in the particular circumstances of the above proceedings the applicant had been placed at a substantial disadvantage vis-a vis his opponent, or, in other words, whether the applicant could have avoided a situation in which his opponent was heard by the court but not he himself.

The applicant argues that, relying on the summons form used by the District Court he could not have expected that at the first hearing the court would have heard him as a party. It was, however, the applicant himself who had asked the District Court to be heard as a party. Moreover, the hearing was scheduled for a duration of 45 minutes, which would appear remarkably long for a hearing in which the District Court would have merely taken a decision as to what evidence should be adduced in a quite simple matter. It could hardly have come as a surprise to the applicant that the District Court had been prepared to determine the case at its first (and only) hearing, since this is the normal course of events envisaged by Section 440 para. 4 of the Code of Civil Procedure. Having regard to these elements which must have been familiar to the applicant as an experienced lawyer, one would expect that he would have checked with the District Court whether his presence at the hearing was necessary or advisable. However, the applicant has not done so.

Moreover, as has been noted above, it is the applicant's own submission that his representative at the hearing of 13 July 1994 had failed to act with due diligence in that he had not checked the case file before the hearing took place. If his representative had done so he could have asked for an adjournment of the hearing on the ground that the applicant had not been properly summoned instead of justifying the applicant's absence on grounds of "another professional engagement".

The Commission therefore finds that, in the circumstances of the present case, there is no appearance of a violation of the applicant's right to a fair hearing under Article 6 para. 1 (Art. 6-1) of the Convention.

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 that the refusal of the Austrian courts to allow his claim against P.H. violated his right to property under Article 1 of Protocol No. 1 (P1-1) and the prohibition of forced or compulsory labour under Article 4 (Art. 4) of the Convention.

The Commission, assuming that the applicant has exhausted domestic remedies, has examined the remainder of the applicant's

complaints as they have been submitted by him, but finds that they do not disclose any appearance of a violation of his rights and freedoms set out in the Convention.

It follows that also the remainder 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, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber