AS TO THE ADMISSIBILITY OF

Application No. 15245/89
by Adolf HOLZINGER
against Austria

The European Commission of Human Rights sitting in private on 18 February 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 21 March 1989 by Adolf Holzinger against Austria and registered on 20 July 1989 under file No. 15245/89;

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 particular facts of the case

The applicant is an Austrian citizen, born in 1934. He lives in Hallein.

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

On 19 September 1984 proceedings were instituted against the applicant by his former lawyer for recovery of costs in connection with various proceedings in which the applicant had instructed the lawyer. A guardian (Sachwalter) for all purposes was appointed on 28 November 1984. The applicant had had a guardian ad litem since 8 August 1984.

On 7 May 1985 the Salzburg Regional Court (Landesgericht) found for the applicant's former lawyer. The applicant's appeal of 4 July 1985 was heard by the Linz Court of Appeal (Oberlandesgericht) on 10 December 1985. The appeal was successful in that the judgment of 7 May 1985 was set aside and the case was returned to the first instance court.

On 14 March 1986 the applicant, through his guardian and representative, requested that further evidence be taken. On 21 April 1986 the Regional Court, pursuant to Article 258 of the Code of Civil Procedure (Zivilprozessordnung), found that both the application of 10 April 1986, and a further application the applicant had made and two applications by the plaintiff, were inadmissible. The proceedings were adjourned. At the resumed hearing on 14 July 1986, the Court's attempt to reach a settlement was unsuccessful. The Court declined to accept any further evidence from the applicant personally without the agreement of the guardianship judge. The proceedings were again adjourned.

On 3 September 1986 a new guardian was appointed as the former guardian had retired. On 22 May 1987 the applicant requested postponement of the hearing in the case until after 15 July 1987, as his guardianship was about to end. The Court granted the request on 26 May 1987, adjourning the case to 9 September 1987. The applicant was informed on 20 August 1987 that the oral hearing in the case had been fixed for 9 September 1987, and that he was required to be represented. At the hearing on 9 September 1987, the applicant's representative attempted, unsuccessfully, to read from the submissions the applicant had made which had already been found inadmissible. After an altercation with the judge, the applicant left the court room. The judge refused the applicant's lawyer's request for the applicant to be heard because it was irrelevant or, in the alternative, because the case was ready for decision. The applicant made a complaint to the President of the Salzburg Regional Court about the judge. The application was rejected on 9 December 1987 after the Court, on 30 September 1987, had required the applicant to submit his complaint in due form.

The Salzburg Regional Court gave its second judgment on the case on 14 January 1988. The applicant was ordered to pay the sum now claimed by the former lawyer with costs. The applicant's appeal of 15 February 1988 was rejected, after an oral hearing, by the Linz Court of Appeal on 15 November 1988, received by the applicant's lawyer on 6 December 1988. The appeal decision largely confirmed the substantive decision of 14 January 1988, and amended the costs position. The decision provided that no further appeal (Revision) was possible. The applicant's extraordinary further appeal (außerordentliche Revision) of 12 January 1989 was rejected by the Supreme Court (Oberster Gerichtshof) on 31 January 1989. The applicant's lawyer received the decision on 1 March 1989.

Relevant Domestic Law

The Code of Civil Procedure (Zivilprozeßordnung) provided at the relevant time as follows:

(German)

> "§414. (1) Das Urteil ist auf Grund der mündlichen Verhandlung, und zwar wenn möglich, sogleich nach Schluß derselben zu fällen und zu verkünden. Mit dem Urteile sind die Entscheidungsgründe zu verkünden. Die Verkündung des Urteiles ist von der Anwesenheit beider Parteien unabhängig.
> ...
> §415. Wenn das Urteil nicht sofort nach Schluß der mündlichen Verhandlung gefällt werden kann, ist es binnen

acht Tagen nach Schluß der Verhandlung, ... zu fällen. Verkündet wird das Urteil in diesen Fällen nicht.
...
§502. (1) Gegen die Urteile der Berufungsgerichte findet die Revision statt.
...
(4) Ist die Revision nicht schon nach den Abs. 2 und 3 unzulässig, so ist sie überdies nur zulässig, wenn

1. die Entscheidung von der Lösung einer Rechtsfrage des materiellen Rechts oder des Verfahrensrechts abhängt, der zur Wahrung der Rechtseinheit, Rechtssicherheit oder Rechtsentwicklung erhebliche Bedeutung zukommt, etwa weil das Berufungsgericht von der Rechtsprechung des Obersten Gerichtshofs abweicht oder eine solche Rechtsprechung fehlt oder uneinheitlich ist, oder ...

§503. (2) ...die Revision [kann] überdies nur begehrt werden, weil das Urteil des Berufungsgerichts auf der unrichtigen Lösung einer Rechtsfrage des materiellen Rechts oder des Verfahrensrechts beruht, der erhebliche Bedeutung im Sinn des §502 Abs. 4 Z. 1 zukommt."

(Translation)

"Article 414 (1). The judgment shall be based on the oral hearing and, whenever possible, shall be delivered and pronounced immediately after the close of the hearing. Reasons are to be given when the judgment is pronounced. Pronouncement of the judgment does not depend on the parties being present.

Article 415. If it is not possible for the judgment to be delivered immediately after the close of the oral hearing, it shall be delivered ... within eight days after the close of the hearing. In such cases the judgment shall not be pronounced.

Article 502 (1). A further appeal may be made against the judgments of the appeal courts.
...
(4) If a further appeal is not inadmissible for the grounds set out in paras. 2 and 3 above, it is in any event only admissible where

1. the decision turns on a question of substantive or procedural law which is of particular importance for the preservation of legal consistency, legal certainty or the development of the law, for example because the appeal court diverges from the case-law of the Supreme Court or because such case-law does not exist or is not uniform ...

Article 503 (2). ... moreover, a further appeal [may] only be requested on the ground that the judgment of the appeal court is based on an incorrect assessment of a question of substantive or procedural law which is of particular importance within the meaning of Article 502 para. 4(1)."

COMPLAINTS

1. The applicant considers that the proceedings were not determined within a reasonable time and that judgment was not "pronounced

publicly", as required by Article 6 para. 1 of the Convention. These complaints were first raised by the applicant in his application form dated 22 June 1989, submitted to the Commission on 28 June 1989.

2. The applicant also considers, inter alia, that the courts were partial, that the further appeal was not allowed where it should have been, that he was not allowed to defend himself properly and that his various challenges of the judge were unsuccessful. He refers to Articles 6 paras. 1 and 3, and also to Article 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The applicant first wrote to the Commission on 21 March 1989. This application was registered on 20 July 1989. On 3 September 1991 the Commission decided, pursuant to Rule 42 para. 2 (b) of the Rules of Procedure, to bring the application to the notice of the respondent Government and to invite them to submit observations on the admissibility and merits of the complaints concerning the publicity accorded to the judgments in the case and the length of the proceedings.

The Government's observations were submitted on 13 December 1991, and the applicant's observations in reply were submitted on 22 February 1992.

THE LAW

1. In his initial correspondence of 21 March 1989 with the Commission the applicant made various complaints about the proceedings, referring to the fairness of the proceedings, alleged bias on the part of the judge and the outcome of the proceedings. He refers to Articles 6 and 13 (Art. 6, 13) of the Convention in this respect.

With regard to the judicial decisions of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its established case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

It is true that in this case the applicant also complains of a violation of Articles 6 and 13 (Art. 6, 13) of the Convention. However, to the extent that these complaints are compatible with the provisions of the Convention, the Commission finds that they do not disclose any appearance of a violation of the Articles referred to.

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. In his application form of 22 June 1989, submitted to the Commission on 28 June 1989, the applicant also, and for the first time, alleged violation of Article 6 para. 1 (Art. 6-1) of the Convention by reason of the length of the proceedings and the absence of public pronouncement of the judgments in his case. Article 6 para. 1 (Art. 6-1) of the Convention provides, so far as relevant, as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a

reasonable time ... Judgment shall be pronounced publicly ..."

The Government consider that the Austrian reservation to Article 6 (Art. 6) of the Convention applies to the complaint concerning publicity of pronouncement of judgments, or that the applicant has not exhausted domestic remedies in this respect. In particular they point out that the applicant could have raised his complaint concerning Article 415 of the Code of Civil Procedure as a ground of nullity in his appeal to the Linz Court of Appeal. They also refer to Article 140 para. 1 of the Federal Constitution, which enables courts of second instance to apply to the Constitutional Court for determination of whether a law is constitutional. In any event they submit that both the complaint on the publicity of judgments and that relating to the length of the proceedings are manifestly ill-founded.

The Commission is not required to decide whether or not the facts alleged by the applicant in this respect disclose any appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention, nor is it required to decide on the questions relating to the Austrian reservation to Article 6 (Art. 6) of the Convention, as Article 26 (Art. 26) of the Convention provides that it "may only deal with the matter ... within a period of six months from the date on which the final decision was taken".

In the present case the final decision to be considered is the decision of the Linz Court of Appeal of 15 November 1988 on the applicant's ordinary appeal, served on the parties on 6 December 1988. The applicant's complaints concerning the length of the proceedings and the absence of public pronouncement of the judgments, however, were first submitted to the Commission on 28 June 1989 in the application form of 22 June 1989, that is, more than six months after the applicant received this decision (cf. Nos. 8603/79 et al., Dec. 18.12.80, D.R. 22 p. 147, at p. 189/190). Furthermore, examination of the case does not disclose the existence of any special circumstances which might have interrupted or suspended the running of that period. In particular, in connection with the complaint concerning the length of the proceedings, there is no indication - and the Government do not so submit - that it would have been open to the applicant to contend that the length of the proceedings amounted to a legal question of particular importance.

In connection with the complaint concerning the publicity of judgments, the Commission notes that the provisions relating to pronouncement are set out in Articles 415 and 416 of the Code of Civil Procedure. The Government do not allege non-exhaustion of domestic remedies in this respect as they consider that the final decision in the case is the decision of the Linz Court of Appeal of 15 November 1988, served on the parties on 6 December 1988. However, even if it were possible that an extraordinary further appeal could, in certain circumstances, amount to an effective remedy within the meaning of Article 26 (Art. 26) of the Convention, the Commission notes that the applicant did not attempt to raise this matter in his extraordinary further appeal, and that he failed to comply with the formalities for such an appeal.

As a result, the Commission finds that the decision of the Supreme Court of 31 January 1989 may not be taken into account in determining the final decision for the purposes of Article 26 (Art. 26) of the Convention.

It follows that this part of the application has been introduced out of time and must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission	President to the Commission
(H. C. KRÜGER)	(C. A. NØRGAARD)