AS TO THE ADMISSIBILITY OF

Application No. 16493/90
by K.P.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 1 September 1993, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
N. BRATZA

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 19 March 1990 by K.P. against Austria and registered on 23 April 1990 under file No. 16403/90;

Having regard to:

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

- the observations submitted by the respondent Government on 22 May 1992 and the observations in reply submitted by the applicant on 13 July 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1946. He lives in Seyring and is represented before the Commission by Mr. K. Bernhauser, lawyer, of Vienna.

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

The applicant was convicted on 18 July 1989 by the Korneuburg District Court (Kreisgericht) of various smuggling offences. He was ordered to pay a fine of AS 80,000 with three weeks' detention in default. The Korneuburg prosecuting authority (Staatsanwaltschaft) and the Vienna customs authority (Zollamt) appealed against the sentence.

In accordance with Article 294 para. 5 of the Code of Criminal Procedure (Strafprozeßordnung) the applicant, who was at liberty, was summoned to appear at the appeal hearing. From 6 March 1990 until 16 May 1990, the applicant was detained on remand in connection with offences not related to the present application. The applicant's lawyer states that some days before the appeal hearing, the applicant's then lawyer telephoned the office of the Vienna Court of Appeal (Oberlandesgericht), requesting that arrangements should be made for

the applicant to appear at the hearing. The Government point out that no record of any such conversation exists in the case-file. At the hearing on 12 March, which the applicant's lawyer attended according to a file note of the applicant's lawyer of 14 March 1990, the Court was put on notice that the applicant was in detention on remand. According to the applicant, the hearing proceeded without him. The Government refer to the record, which states that the applicant was present.

At the end of the hearing, the Court of Appeal increased the fine imposed on the applicant to AS200,000 with two months' detention in default.

On 30 September 1991 the applicant made a request for the record of the appeal hearing to be amended. The request was denied on 14 October 1991, the Vienna Court of Appeal finding, inter alia, as follows:

> "According to the contents of the record of the appeal hearing ... [the applicant] was also present at that hearing. It cannot be concluded from the contents of the record of the appeal hearing whether he was produced from detention on remand that had been imposed on him in another case.
>
> The submission by the prison management of 27 September 1991 only states that he was detained on remand from 6 March 1990 until 16 May 1990, that he was served no summons for the appeal hearing (because he had already received it) and - as the prison management's records show - that the [applicant] was not produced for the appeal hearing, although the question remains open whether the prison management's records are complete."

COMPLAINTS

The applicant complains that the sentence in his case was increased on the prosecution's appeal and in his absence. He alleges a violation of Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 19 March 1990 and registered on 23 April 1990.

On 13 January 1992 the Commission decided to communicate the application to the respondent Government. The Government submitted their observations on 22 May 1992 and the applicant submitted his observations in reply on 13 July 1992.

THE LAW

The applicant alleges a violation of Article 6 (Art. 6) of the Convention in that he was not present at his appeal hearing, on which occasion his sentence was increased.

Article 6 (Art. 6) of the Convention provides, so far as relevant, as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

The Government underline that the applicant knew of the date of the appeal hearing but made no request to the prison authorities where he was detained for permission to attend, that there is no confirmation that his representative asked for him to be present before the hearing or when the hearing began, and that although a request was made (belatedly) for the appeal record to be amended to indicate that the

applicant was not present, no request was made for the addition to the record of a request for him to attend. They consider that Article 6 (Art. 6) did not, in any event, require the applicant's attendance at the appeal hearing in the present case as the applicant was able to make, in writing and before the hearing, any comments he had on the prosecutor's appeal, and as he was represented by a lawyer who did attend the hearing.

The applicant repeats that the lawyer who attended the appeal hearing confirms that he told the court that the applicant was detained. He considers that there was no need for him to request the prison authorities for permission to attend as his lawyer was dealing with the matter. The applicant contests that the decision for the Vienna Court of Appeal was one which could simply be dealt with on the papers. He points out that questions of sentencing require the sentencing court to form its own impression of the defendant.

The Commission first recalls that Article 6 (Art. 6) of the Convention applies to proceedings relating to an appeal against sentence such as that in the present case (cf. Eur. Court H.R., Kamasinski judgment of 19 December 1989, Series A no. 168, p. 44 para. 106, where, due to the nature of the charges, the appeal against sentence was to the Supreme Court, and No. 12350/86, Kremzow v. Austria, Comm. Rep. 20.5.92, pending before the European Court of Human Rights, paras. 90 - 102, also concerning proceedings before the Supreme Court). The Commission observes, however, that the factual background to the present case is fundamentally different from that in that Kremzow case. In that case the applicant fell under the limb of Article 296 para. 3 of the Code of Criminal Procedure (Strafprozeßordnung) which deals with defendants who are detained. The present applicant who was at liberty at the time, was summoned under the other limb relating to defendants who are at liberty. It remains in principle for a defendant summoned whilst at liberty to decide for himself whether he wishes to attend the appeal hearing or not.

The Commission notes that there is disagreement in the present case as to the facts. The Government consider that the applicant has not established that he made the requests he claims, and that he was actually present at the hearing; the applicant maintains the contrary. The Commission has taken note of the comments of the prison authorities, of the other defendants and of the representative of one of those defendants and considers that the applicant was not in fact present at the appeal hearing on 12 March 1990.

The Commission next finds that it cannot be said that the applicant indicated any particular desire to attend the appeal hearing. The representative who attended court on 12 March 1990 states that he informed the court that the applicant was in detention on remand, but he does not hint that the applicant wished to attend, or that he so informed the court. Moreover, whilst an application was made for the record to be amended to exclude reference to the applicant's presence, none was made for the addition of the alleged request for the applicant to be brought to the hearing. Finally in this respect, the Commission notes that the applicant knew of the date of the hearing, and it might have been expected that he would mention the matter to the prison authorities if he had any desire to attend.

In the unusual circumstances of the present case, that is where a defendant is initially informed of the date of an appeal hearing on the footing that he is not in detention, and is subsequently detained in connection with other matters with the result that he never received the information provided to a defendant who is detained throughout, the Commission finds that an applicant who is fully aware of the date of his appeal hearing, and also is represented throughout, but who fails to evince interest in that appeal hearing, cannot subsequently complain if the hearing proceeds in the presence of the lawyer, but not the

applicant.

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, by a majority

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (A. WEITZEL)