AS TO THE ADMISSIBILITY OF
Application No. 23806/94
by Horst KLEINBICHLER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1995, 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
G.B. REFFI
B. CONFORTI
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 15 March 1994 by Horst KLEINBICHLER against Austria and registered on 5 April 1994 under file No. 23806/94;

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, born in 1941, is an Austrian national. He is currently detained at the prison of the Klagenfurt Regional Court. Before the Commission he is represented by Mr. D. Clementschitsch, a lawyer practising in Villach.

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

A. Particular circumstances of the case

In early September 1978 a fire destroyed a restaurant owned by the applicant. Subsequently, on 18 September 1978, preliminary investigations (Voruntersuchung) were opened against the applicant on the suspicion of fraud. In these and all the subsequent proceedings the applicant was represented by Mr. Clementschitsch.

On 27 January 1981 the Klagenfurt Public Prosecutor's Office (Staatsanwaltschaft) preferred the indictment against the applicant. He was charged inter alia with attempted aggravated fraud. He was accused of having instigated R.Th. and E.M. to set fire to his restaurant in order to obtain insurance monies from the B. insurance company.

On 5 October 1981 the trial was opened at the Klagenfurt Regional Court (Landesgericht), sitting as a court of two professional judges and two lay judges (Schöffengericht). Judge Orasche participated as a professional judge.

On 25 March 1983 the Klagenfurt Regional Court acquitted the applicant. It noted in particular that R.Th. and E.M. had been acquitted from the charge of arson by the Augsburg Regional Court for lack of sufficient proof. The Regional Court further noted that it had not been able to hear E.M. However, it had heard R.Th., who had denied that the applicant had instigated him to set fire to his restaurant. The statement of a further witness, namely E.T., who had incriminated the applicant, was not sufficient to invalidate the statements made by the applicant and R.Th.

In subsequent civil proceedings, which lasted from 1983 to 1987, the applicant obtained judgments from the competent courts, which ordered the B. insurance company to pay him insurance monies of altogether about ATS 6,4 million. It appears that payment was made to the applicant in 1987 and 1988.

On 4 November 1991 the Klagenfurt Public Prosecutor's Office requested that the criminal proceedings against the applicant be reopened. Judge Greller, being the head of the competent department of the Klagenfurt Regional Court, transferred the file to the investigating judge, requesting him to hear the applicant on the request to reopen the proceedings. Subsequently, on 15 November 1991 Judge Greller requested a German court for judicial assistance as regards the questioning of witness E.M. He submitted that the matter had to be dealt with urgently and requested that E.M. be heard by the German police authorities and that officers of the Austrian police department, which was investigating the case, be allowed to be present.

On 22 November 1991 the Klagenfurt Regional Court, sitting in camera as a senate of three judges (Drei-Richter-Senat), namely Judge Greller, Judge Lutschounig and Judge Orasche, decided to reopen the proceedings against the applicant. The Regional Court found in particular that R.Th., who had, in the former proceedings denied that the applicant had requested him to set fire to his restaurant, had now confessed that he and E.M. had actually done so. E.M. had made a corresponding confession. Having regard in particular to the false statement made by R.Th. in the former proceedings, and taking into account that the prosecution of the offence was not yet statute-barred, the Public Prosecutor's request to reopen the proceedings in accordance with S. 355 of the Code of Criminal Procedure (Strafprozeßordnung) was justified. Consequently, the acquittal had to be set aside.

On 31 December 1991 the Graz Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal. It found in particular that the Klagenfurt Regional Court had been duly composed. A judge, who had participated in the earlier proceedings, in the present case Judge Orasche, was not excluded by law from participating in the decision on the reopening of these proceedings, under S. 68 of the Code of Criminal Procedure. Furthermore, the Regional Court had rightly found that the conditions for reopening the proceedings were met. In particular, the prosecution of the offence was not yet statute-barred. The duration of the proceedings against the applicant had interrupted the limitation period. Contrary to the applicant's view, the confessions of R.Th. and E.M., which had only been made in 1991, constituted new facts. In view of these confessions, which were also supported by the statements made by E.T. in the former proceedings, there was a high probability that the applicant would now be convicted.

On 28 February 1992 the Public Prosecutor's Office preferred the indictment against the applicant, charging him with aggravated fraud. He was accused of having instigated R.Th. and E.M. to set fire to his restaurant and to have subsequently deceived employees of the B.

insurance company causing them to pay him altogether ATS 6,4 million.

On 23 March 1992 the applicant appealed against the indictment. He submitted in particular that the prosecution of the offence was already statute-barred. He argued that the duration of the former proceedings had not been in conformity with Article 6 of the European Convention on Human Rights and should therefore not have interrupted the limitation period. As regards the charge, he pointed out that he had not deceived employees of the insurance company, as the latter had only paid him upon judgment of the competent civil courts.

On 23 April 1992 the Graz Court of Appeal dismissed the applicant's appeal. As regards the question whether the prosecution of the offence was statute-barred, it referred to its decision of 31 December 1991. It added that the duration of the proceedings had mainly been due to the complexity of the case and the conduct of the applicant.

On 6 July 1992 the trial was reopened before the Klagenfurt Regional Court sitting again as a court of two professional judges, namely Judge Greller and Judge Lutschounig, and two lay judges. The applicant had already on 30 June 1992 brought a motion, claiming that the two professional judges were disqualified from participating at the trial on the ground that they had decided on the reopening of the proceedings. This motion had been dismissed by the President of the Regional Court on 3 July 1992. The applicant repeated it at the trial. However, the Regional Court also dismissed it. The trial was continued on 23 July, 20 August, 17 September, 15 October, 13, 16, 17 and 18 November 1992.

On 23 July 1992 the witnesses R.Th. and E.M., who had not been summoned for this date, appeared at the trial. The applicant requested that they should not be heard as the defence did not have time to prepare for their questioning. He also indicated that he wanted to confront them with witnesses of the defence. The Regional Court dismissed this request and, subsequently, heard the two witnesses.

R. Th. submitted in particular that he had not appeared at the trial on 6 July 1992 inter alia for fear that he might still be prosecuted in Austria on charges of arson. However, meanwhile he had been assured by the police officers, who had investigated the case, that there were no proceedings pending against him. E.M. also stated that he had been assured that he did not risk anything, if coming to Austria. As regards the events in 1978, R. Th. stated that, in the summer of 1978, he had met the applicant, who had asked him whether he knew someone who would set fire to his restaurant. He had then offered to do so against payment of a certain percentage of the insurance sum and he and the applicant had arranged the details for carrying out their plan. The applicant had gone to Italy, while he and E.M. had, in the night of 7 to 8 September 1978, set fire to his restaurant. They put candles into plastic bowls filled with fuel, to ensure that they were already at a safe distance when the candles would burn down and light the fire. He and E.M. had met the applicant in Italy early in the morning of 8 September 1978 and had received part of their payment. The applicant had never paid them the rest. E.M. also stated that he and R.Th. had set fire to the applicant's restaurant.

On 15 October 1992 the Public Prosecutor's Office amended the indictment. The applicant was still charged with aggravated fraud. However, it was assumed that he had not deceived employees of the insurance company but organs of the competent civil courts, thereby causing them to give judgments, obliging the B. insurance company to pay him altogether ATS 6,4 million. Thereupon, the applicant claimed that the charge was not the same any more and requested that the whole trial be repeated. Further, the applicant requested that B.Sch. and L.F. be heard as witnesses.

On 18 November 1992 the Klagenfurt Regional Court convicted the applicant of aggravated fraud and sentenced him to three and a half years' imprisonment.

The Regional Court found that the applicant had caused R.Th. and E.M. to set fire to his restaurant. Subsequently, he had deceived organs of the competent civil courts about the origin of the fire and had thereby caused them to decide in his favour, obliging the B. insurance company to pay him about ATS 6,4 million. In establishing these facts, the Court found that the applicant's defence that he had not instigated R.Th and E.M. to commit arson, was not credible. It referred in particular to the statements made by the witnesses R.Th. and E.M. It also considered the opinion of a fire expert, which it had ordered and which had confirmed the plausibility of the description given by R.Th. of how he had set fire to the applicant's restaurant.

As regards the applicant's request to hear B.Sch., the Court found that he had not witnessed any of the relevant events, but had just confirmed E.M.'s alibi in the proceedings against the latter. As E.M. had meanwhile confessed to having participated in setting fire to the applicant's restaurant, there was no need to hear B.Sch. Moreover, the request had been made at a very late stage and was apparently aimed at delaying the proceedings. The same held true as regards the applicant's request to hear L.F. Further, the applicant had failed to show why this witness would be able to make a statement on whether or not the applicant had met R.Th. and E.M. on 8 September 1978. In any case, this question was not relevant.

Finally, the Court found that the witnesses R.Th. and E.M., whose questioning the applicant had opposed, had to be heard immediately, as there was, in the circumstances, a probability that they might not appear in court again. Moreover, a confrontation of these witnesses with other witnesses had not proved necessary. In any case, the applicant had failed to specify the factual issue in relation to which he wanted such a confrontation.

On 14 December 1993 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity and his appeal (Nichtigkeits-beschwerde und Berufung).

As regards his complaint that the two professional judges, namely Judge Greller and Judge Lutschounig were excluded from participating in the renewed trial or that they were at least biased, the Supreme Court found that their participation in the decision to reopen the proceedings against the applicant, did not constitute a reason for disqualification within the meaning of S. 68 para. 2 of the Code of Criminal Procedure. It was true that they had to examine the new evidence when taking the decision to reopen the proceedings. However, they did not anticipate the evaluation of evidence in the renewed proceedings and there was also no reason to assume that they would be biased within the meaning of S. 72 of the Code of Criminal Procedure.

As regards the rejection of various requests for the taking of evidence by the applicant, the Supreme Court found that they did not violate the applicant's defence rights. It confirmed the reasoning of the Regional Court. In particular, witness B.Sch. had already in the former proceedings proved incapable of making any precise statements. It was not clear how he could invalidate E.M.'s statement who now incriminated himself by admitting that he participated in setting fire to the applicant's house. The Supreme Court equally dismissed the applicant's complaint that the Regional Court should not have heard R.Th. and E.M. on 23 July 1992, as the defence had had no possibility to prepare for their questioning. It found that the contents of these witnesses' statements, which had led to the reopening of the proceedings, had long been known to the defence.

As regards the applicant's complaint about the amendment of the

indictment at the hearing of 15 October 1992, the Supreme Court found that the indictment in the renewed proceedings had referred to the damage caused to the insurance company by the payment of the insurance sum which it made in 1987 and 1988. Thus, it had already related not only to the attempt to deceive employees of the B. insurance company but, without explicitly saying so, also to the deception of the civil courts which had only occurred after the applicant had been acquitted.

B. Relevant domestic law

1. Rules concerning disqualification of or challenge to a judge

S. 68 of the Code of Criminal Procedure (Strafprozeßordnung) governs the disqualification (Ausschließung) of judges.

S. 68 para. 2 provides that a judge shall be disqualified from participating or deciding in the trial proceedings if he has acted as investigating judge in the same case or if he has participated in the decision on the appeal against the indictment. If a trial has to be repeated following an appeal or a plea of nullity, judges who have participated in the first trial are disqualified from participating in the new trial.

After the time of the relevant facts, a paragraph 3 has been added to S. 68 by amendment of 1993, Federal Law Gazette (Bundesgesetzblatt) 1993/526, which entered into force on 1 January 1994. It provides that a judge who has acted as investigating judge in the same case or has participated in the former trial, is disqualified from deciding on a request for reopening of the proceedings and from participating in the new trial.

S. 72 allows the parties to the proceedings to challenge (ablehnen) a judge, if they can show that there are reasons for doubting his complete impartiality.

2. Rules governing the reopening of proceedings

According to S. 355, the Public Prosecutor may only request the reopening of proceedings, as regards an offence of which the accused has been acquitted, if it is not yet statute-barred and if the judgment has either been based on a forged document or a false statement or has been obtained by bribing or another offence (subpara. 1) or if the acquitted makes a confession or if there are new facts, which alone or in connection with evidence obtained in the former proceedings appear suitable to serve as a basis for the punishment of the accused (subpara. 2).

S. 357 provides that the request for a re-opening of the proceedings has to be lodged with the court of first instance, which has conducted them previously (para. 1). The investigating judge has to inquire into the facts underlying the request. Subsequently, in cases under S. 355, the accused has to be heard. The court of first instance decides upon the reopening of the proceedings, sitting in camera (para. 2). An appeal may be lodged against this decision within two weeks with the court of second instance (para. 3).

S. 358 states that the decision to reopen the proceedings sets aside the former judgment as far as the offence is concerned, in regard of which the reopening is granted.

According to S. 359, the decision to reopen the proceedings restores them to the stage of preliminary investigations. The investigations are to be conducted or completed, having regard to the decision granting the reopening of the proceedings and to the new evidence. The provisions on the discontinuation of the preliminary investigations and on preferring the indictment do also apply (para. 1). If the new proceedings reach trial stage, a new judgment has

to be given (para. 2). The same remedies which are available against any other judgment may be brought against this judgment (para. 5).

COMPLAINTS

1. The applicant complains under Article 6 of the Convention about two aspects of the proceedings relating to the reopening of the criminal proceedings against him.

Firstly, he complains under Article 6 para. 1 that the Klagenfurt Regional Court, when deciding on reopening the criminal proceedings against him, was not an impartial tribunal. He submits that Judge Orasche was disqualified from participating in this decision, as he participated in the former trial. He argues that this view was confirmed by the subsequent 1993 amendment of S. 68 of the Code of Criminal Procedure.

Secondly, he complains under Article 6 para. 3 (c) that the decision to reopen the proceedings was taken in camera and that he had no possibility to defend himself either in person or through counsel.

2. The applicant also complains under Article 6 para. 1 of the Convention that the Klagenfurt Regional Court, when convicting him following the new trial in the reopened proceedings, was not an impartial tribunal. He submits that Judge Greller was disqualified from participating in the new trial, as he had, prior to the decision to reopen the proceedings, requested a German Court under letters rogatory to hear E.M. as a witness. Further, Judges Greller and Lutschounig were disqualified from participating in the new trial as they had participated in the decision to reopen the proceedings and had thereby examined the new facts and evaluated the probability of his conviction in the new proceedings.

3. Further, the applicant complains under Article 6 para. 2 that the presumption of innocence was violated by the reopening of the proceedings against him, which is only admissible if the prosecution of the offence at issue is not yet statute-barred. He submits in particular that the duration of the former proceedings was excessive and should therefore not be calculated as having interrupted the limitation period. Further he submits that the statements made by R.Th. and E.M. did not constitute new evidence.

4. Finally, the applicant complains under Article 6 para. 3 that his defence rights were violated in the reopened proceedings.

a. He submits under Article 6 para. 3 (b) that he did not have enough time to prepare his defence. He argues that the preliminary investigations did not last long enough and that the Public Prosecutor's Office, at the trial on 15 October 1992, amended the indictment, thus, changing the accusation.

b. He submits under Article 6 para. 3 (d) that his requests to hear B.Sch. and L.F. as witnesses were dismissed. Further he complains that the witnesses R.Th. and E.M. were heard at the trial of 23 July 1992 against his objection. Moreover, he claims that they were wrongly informed that no further criminal proceedings could be conducted against them in Austria. In his opinion, the prosecution of their offences was not yet statute-barred.

THE LAW

1. The applicant complains under Article 6 (Art. 6) of the Convention about two aspects of the proceedings relating to the reopening of the criminal proceedings against him. Firstly, he complains under Article 6 para. 1 (Art. 6-1) that the Klagenfurt Regional Court, when deciding on reopening the criminal proceedings against him, was not an impartial tribunal. Secondly, he complains

under Article 6 para. 3 (c) (Art. 6-3-c) that the decision to reopen the proceedings was taken in camera.

The Commission, recalling its constant case-law that Article 6 (Art. 6) does not apply to proceedings concerning the reopening of a trial, finds that only the new proceedings, after the reopening has been granted, can be regarded as concerning the determination of a criminal charge (No. 7761/77, Dec. 8.5.87, D.R. 14, p. 173 with further references). Thus, the applicant's complaints about the reopening of the criminal proceedings against him are incompatible ratione materiae.

It follows that this part of the application is incompatible ratione materiae within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains under Article 6 para. 1 (Art. 6-1) of the Convention that the Klagenfurt Regional Court, when convicting him following the new trial in the reopened proceedings, was not an impartial tribunal.

Article 6 para. 1 (Art. 6-1), so far as relevant reads as follows:

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

The applicant submits in particular that Judge Greller was disqualified from participating in the new trial, as he had, prior to the decision to reopen the proceedings, requested a German Court under letters rogatory to hear E.M. as a witness. Further, Judges Greller and Lutschounig were disqualified from participating in the new trial as they had participated in the decision to reopen the proceedings and had thereby examined the new facts and evaluated the probability of his conviction in the new proceedings.

The Commission recalls that the existence of impartiality for the purposes of Article 6 para. 1 (Art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see Eur. Court H.R. De Cubber judgment of 26 October 1984, Series A no. 86, pp. 13-14, paras. 24-26; Hauschildt judgment of 24 May 1989, Series A no. 154, p. 21, para. 46).

The applicant has not alleged that there was any personal bias on the part of the judges in question. The main thrust of his argument is that Judges Greller and Lutschounig, when sitting as trial judges lacked objective impartiality, as they had performed certain functions or taken decision at the pre-trial stage. Therefore, it falls to be examined whether the applicant's fear as regards the impartiality of these judge was objectively justified (Hauschildt judgment, loc. cit., para. 48).

In this context, the Commission recalls that the mere fact that a trial judge has also made pre-trial decisions in the case cannot be held as in itself justifying fears as to his impartiality. What matters is the scope and nature of these decisions (Hauschildt judgment, loc. cit., p. 22, paras. 50-51; Sainte-Marie judgment of 16 December 1992, Series A no. 253-A, p. 16, para. 32; Nortier judgment of 24 August 1993, Series A no. 267, p. 15, para. 33).

As regards the function exercised by Judge Greller prior to the decision on the reopening of the proceedings, the Commission observes that he, being the head of the competent court department, transferred the file to the investigating judge, requesting him to hear the

applicant on the question of reopening the proceedings. Further, he requested a German court for judicial assistance as regards the questioning of one witness. However, he heard neither the applicant nor any witnesses himself. The Commission finds that there are no circumstances to indicate that Judge Greller acquired any detailed knowledge of the case or of the person of the accused, which would have put him at risk of forming a pre-conceived opinion about the question of the applicant's guilt (De Cubber judgment, loc. cit., p. 15-16 para. 29; Hauschildt judgment, loc. cit., p. 22-23, paras. 51-52).

Judges Greller and Lutschounig, when deciding on the reopening of the proceedings against the applicant, had to decide, in accordance with S. 355 of the Austrian Code of Criminal Procedure, whether the new facts presented by the prosecution appeared suitable to serve as a basis for the applicant's punishment either alone or in connection with the evidence obtained in the former proceedings. This may have occasioned misgivings on part of the applicant, which cannot, however, necessarily be treated as objectively justified.

The Commission observes that the decision granting the reopening of the proceedings restores the proceedings to the stage of preliminary investigations. According to S. 359 para. 1 of the Code of Criminal Procedure these investigations may either be discontinued or lead to a new indictment. If the case, like the present one, attains trial stage, the court proceeds to a full hearing of the case. Furthermore, as the Supreme Court pointed out in its decision of 14 December 1993, the Austrian legislation does not exclude judges, who ruled on the reopening of the proceedings, from participation in the new trial.

Having regard to the rules of the Austrian Code of Criminal Procedure, the Commission finds that the questions which Judges Greller and Lutschounig had to answer when deciding on the reopening of the proceedings, were not the same as those which were decisive for the new judgment. They only had to ascertain summarily whether the prosecution had shown prima facie grounds for the reopening of the proceedings (Hauschildt judgment, loc. cit., p. 22, para. 50; Sainte-Marie judgment, loc. cit., p. 16, para. 33; Nortier judgment, loc. cit., p. 16, para. 35).

In conclusion, the Commission finds that the applicant's fear that Judges Greller and Lutschounig lacked impartiality cannot be regarded as objectively justified.

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.

3. Further the applicant complains under Article 6 para. 2 (Art. 6-2) that the presumption of innocence was violated by the reopening of the proceedings against him, which is only admissible if the prosecution of the offence at issue is not yet statute-barred and if there are new facts. He submits in particular that the duration of the former proceedings was excessive and should therefore not be calculated as having interrupted the limitation period. Further he submits that the statements made by R.Th. and E.M. did not constitute new facts.

As far as the applicant can be understood as complaining that the Austrian courts did not correctly apply the law, the Commission recalls that it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except were it considers that such errors might have involved a possible violation of the Convention (No. 21283/93, Dec. 5.4.94, D.R. 77-A, pp. 81, 88). Article 6 para. 2 (Art. 6-2) of the Convention requires that no representative of the State declares that a person is guilty of having committed an offence before that guilt is established by a court (No. 7986/77, Dec. 3.10.78, D.R. 13, p. 73). The contested

findings that specific requirements for reopening the proceedings were met, do not contain any finding of guilt. The Commission, therefore, finds that the applicant's submissions do not raise an issue under Article 6 para. 2 (Art. 6-2) 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.

4. The applicant complains under Article 6 paras. 3 (b) and (d) (Art. 6-3-b, 6-3-d) that his defence rights were violated in the renewed proceedings.

Article 6 para. 3 (Art. 6-3), so far as relevant, reads as follows:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> b. to have adequate time and facilities for the preparation of his defence;
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

The Commission recalls that the guarantees in paragraph 3 of Article 6 (Art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (Art. 6-1). The question of a violation of these provisions must, therefore, be examined having regard to the proceedings as a whole (see Eur. Court H.R. Windisch judgment of 27 September 1990, Series A no. 186, p. 9, para. 23).

a. The applicant submits under Article 6 para. 3 (b) (Art. 6-3-b) that he did not have enough time to prepare his defence. In this respect, he argues that the preliminary investigations did not last long enough and that the Public Prosecutor's Office, at the trial on 15 October 1992, amended the indictment, thus, changing the accusation.

As regards the applicant's complaint that the preliminary investigations in the renewed proceedings did not last long enough, the Commission notes that the decision to reopen the proceedings was taken on 22 November 1991. Thereby they were restored to the state of preliminary investigations in accordance with S. 359 para. 1 of the Code of Criminal Procedure. The indictment against the applicant was preferred on 28 February 1992 and the trial was reopened on 6 July 1992. Moreover, in the renewed proceedings, the applicant was represented by Mr. Clementschitsch, who had also acted as his counsel in the former proceedings and was, thus, familiar with the file. The Commission finds that the applicant failed to show in what respect the duration of the preliminary investigations violated his right to prepare his defence.

Further, as regards the applicant's complaint that the indictment was changed during the trial, the Commission notes that the Public Prosecutor's Office, at the trial on 15 October 1992, amended the indictment. It was no longer assumed that the applicant had deceived employees of the insurance company but that he had deceived organs of the civil courts, thereby obtaining judgments obliging the insurance company to pay him ATS 6,4 million. The applicant was still charged with aggravated fraud.

The Commission finds that the amendment of the indictment served to clarify one legal aspect of the charge against the applicant. However, it neither changed the legal classification of the offence nor did it introduce essentially new facts. In this respect the Commission attaches weight to the fact that the applicant himself, in his appeal

against the indictment of 23 March 1992, had pointed out that he had not deceived employees of the insurance company, as the latter had only paid him upon judgment of the competent civil courts. Moreover, the amendment was made more than one month before the end of the trial. The applicant, assisted by counsel, still had four hearings, namely those held on 13, 16, 17 and 18 November 1992, to present his arguments relating to the amended charge. In these circumstances, the Commission finds that the applicant failed to show that the contested amendment of the charge infringed his defence rights.

b. The applicant submits under Article 6 para. 3 (d) (Art. 6-3-d) that his requests to hear B.Sch. and L.F. as witnesses were dismissed. Further, he complains that the witnesses R.Th. and E.M. were heard at the trial of 23 July 1992 against his objection. Moreover, he claims that they were wrongly informed that no further criminal proceedings could be conducted against them in Austria. In his opinion, the prosecution of their offences was not yet statute-barred.

As regards the last of these complaints, the Commission refers to the above-mentioned case law, according to which it is in general not competent to deal with alleged errors in the application of domestic law. As regards the further complaints, the Commission recalls that, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. More specifically, Article 6 para. 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses; it does not require the attendance and examination of every witness on the accused's behalf (see Eur. Court H.R. Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

In the present case, the applicant's requests to hear B.Sch. and L.F as witnesses were refused by the Klagenfurt Regional Court inter alia for lack of relevance. The Court also dismissed the applicant's motion that R.Th. and E.M. should not be heard at the trial of 23 July 1992, as they had not been summoned for this date and the defence was not prepared for their questioning. It found that there was a risk that they might not appear again in court. The Supreme Court confirmed these decisions. As regards the witnesses R.Th. and E.M. it added that the contents of their statements had led to the reopening of the proceedings and had long been known to the defence.

In these circumstances, the Commission finds no sufficient grounds to form the view that there were any special circumstances which could prompt the conclusion that either the failure to hear the witnesses B.Sch. and L.F. or the hearing of R.Th. and E.M. was incompatible with Article 6 (Art. 6) of the Convention.

In conclusion, the Commission finds that there are no indications in the file that the applicant, represented by counsel, could not duly present his defence or that the proceedings were otherwise unfair.

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.

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)