AS TO THE ADMISSIBILITY OF

Application No. 23193/94
by Karl KOSEK
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 17 May 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

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 23 December 1993 by Karl KOSEK against Austria and registered on 6 January 1994 under file No. 23193/94;

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

The applicant, born in 1938, is an Austrian national residing in Vienna. In the proceedings before the Commission he is represented by Mr. A. Friedberg, a lawyer practising in Vienna.

A. The particular circumstances of the case

On 24 March 1993 the applicant, a car dealer by profession, bought a car from B.W. for AS 280,000. The registration papers, which carried B.W.'s name, were also handed over to the applicant. Subsequently, criminal proceedings were instituted against B.W. on the suspicion of having fraudulently obtained the car from A.W.

On 30 April 1993 officers of the Economic Police of the Vienna Federal Police Authority (Wirtschaftspolizei der Bundespolizei-direktion) seized the car and the registration papers on the applicant's premises. They acted of their own motion without a warrant of seizure by the investigating judge. It appears that the applicant was suspected of having received stolen property. However, the

investigations against him were discontinued.

On 3 May 1993 the applicant requested the Vienna Regional Criminal Court (Landesgericht) to lift the seizure of the car and the papers or to take a formal decision to uphold it. Moreover, he declared that he joined the criminal proceedings against B.W. as a private party (Privatbeteiligter). In these and the subsequent proceedings the applicant was represented by counsel.

On 19 May 1993 the investigating judge (Untersuchungsrichter) at the Regional Court, referring to S. 1425 of the Civil Code (Allgemeines bürgerliches Gesetzbuch), decided that the car and the relevant papers be deposited at the Favoriten District Court (Bezirksgericht). The investigating judge found that different persons had asserted claims with regard to the car, which could not be decided upon in the criminal proceedings. He listed four persons as being concerned by the deposit (Erlagsgegner), i.e. the applicant, the car dealer A. W., the suspect B.W., and the company for which the suspect had worked.

On 3 September 1993 the investigating judge dismissed a further request by the applicant to lift the seizure in his favour. He found that the decision of 19 May 1993 had transferred the competence to decide the issue to the Favoriten District Court. The said decision had been served on the applicant's counsel on 4 June 1993 and the applicant had not lodged a complaint against it.

On 22 September 1993 the Favoriten District Court accepted the deposit. It found that the car and the papers would only be handed over to one of the four persons concerned upon a concerted written request by all four of them or on the basis of a final and enforceable court decision.

On 30 September 1993 the applicant lodged an appeal (Beschwerde) against the investigating judge's decision of 3 September 1993. He submitted in particular that the seizure of the car and its registration papers was unlawful in that the investigating judge never issued a warrant of seizure. Moreover, the seizure was not necessary for the criminal investigation at issue, as it would have been sufficient to make a photo of the car and copies of the registration papers. Finally, the applicant complained that the deposit of the car with the Favoriten District Court as ordered by the decision of 19 May 1993 and confirmed by the decision of 3 September 1993 was not in accordance with the law. S. 1425 of the Civil Code related to civil proceedings and could not serve as a legal basis for the deposit of items which had been seized in the course of criminal proceedings.

On 27 October 1993 the Review Chamber (Ratskammer) of the Vienna Regional Criminal Court dismissed the applicant's appeal. It found that B.W. was under strong suspicion of having fraudulently obtained the car at issue from A.W. He had registered the car under the name of the company for which he was working as a manager and had then sold it to the applicant. Following the seizure of the car, the applicant and A.W. both requested to lift the seizure in their favour. In view of these contradictory claims the investigating judge decided on 19 May 1993 that the car be deposited at the Favoriten District Court. As regards the applicant's complaint against the decision of 3 September 1993, which had dismissed his renewed request to lift the seizure, the Review Chamber found that it was not relevant any more, as the seizure had already been lifted as a result of the decision to deposit the car at the district court. Finally, the Review Chamber found that it was not called upon to decide whether the seizure of the car by the officers of the Vienna Federal Police Authority had been in accordance with the law. However, it appeared that there was a suspicion of having received stolen property against the applicant and that, therefore, the police officers feared that he might sell the car.

By letter of 20 March 1995 the applicant submitted that he had

meanwhile brought an action before the competent civil courts and had obtained a judgment in default (Versäumungsurteil) against the other persons concerned by the deposit of the car, which had, however, not yet become final.

B. Relevant domestic law

1. Code of Criminal Procedure (Strafprozeßordnung)

SS. 139 to 143 concern the search of premises and the seizure of objects.

According to S. 139 the home and other premises of a person may be searched if there are reasonable grounds to believe that a person suspected of a criminal offence is hiding there, or that objects relevant for the investigation are to be found.

S. 143 states that if objects are found, which might be relevant for the investigation, they have to be seized.

According to S. 47 a person whose rights have been violated by an offence may join the criminal proceedings until the opening of the trial on the basis of his claims under civil law and thereby becomes a private party (Privatbeteiligter).

S. 367 para. 1 provides that, if objects belonging to a private party are found among the possessions of the accused, a co-accused or an accomplice or in a place where they were deposited by one of these persons, the Court has to order that they be returned as soon as the judgment becomes final. With the consent of the accused, the object at issue may be returned immediately.

According to S. 367 para. 2 an object belonging to a private party may be returned by the investigating judge before the trial if the object is not needed as evidence any more (subpara. 1) and if neither the accused nor a third person claim to have a right to this object and if there are no other circumstances which would cast doubt on the rights of the person requesting the return (subpara. 2).

S. 367 para. 3 provides that if a request for the return of objects is dismissed under para. 2 subpara. 2, the seizure has to be lifted and the object has to be deposited at the competent district court in accordance with S. 1425 of the Civil Code.

According to S. 113 of the Code of Criminal Procedure, anyone who considers that his rights have been infringed by a decision of the investigating judge may, in the course of the preliminary investigations, lodge an appeal with the Review Chamber.

2. Civil Code (Allgemeines bürgerliches Gesetzbuch)

S. 1425 of the Civil Code provides that the debtor, who is unable to fulfil his obligation, inter alia because the creditor is unknown, absent or unwilling to accept payment, may request that the item he owes to the creditor be deposited in court. If he has lawfully done so and if the creditor has been notified of the deposit, the deposit has the effect of settling the debt.

COMPLAINTS

1. The applicant complains under Article 1 of Protocol No. 1 that the seizure of the car was unlawful in that it was not in accordance with S. 143 of the Code of Criminal Procedure. He submits in particular that the seizure was not necessary for the investigation, as it would have been sufficient to make a photo of the car and copies of the papers. Moreover, as regards the subsequent deposit of the car at the Favoriten District Court, he submits that there was no legal basis for

applying S. 1425 of the Civil Code in the course of criminal proceedings.

2. Further, the applicant complains under Article 6 of the Convention that his property was seized without proper proceedings. He submits in particular that the Vienna Regional Criminal Court failed to decide on his request that the seizure be lifted. Instead, it ordered the deposit of the car with the District Court, thereby preventing that it be returned to him.

THE LAW

1. The applicant complains under Article 1 of Protocol No. 1 (P1-1) about the seizure of his car and its subsequent deposit at the Favoriten District Court.

Article 1 of Protocol No. 1 (P1-1) reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Commission finds that the seizure of the car and its subsequent deposit do not concern a deprivation of property within the meaning of paragraph 1 of Article 1 (Art. 1-1), but must be considered as control of the use of property falling within the scope of the second paragraph of this Article.

The Commission recalls that this paragraph requires that the interference with a person's peaceful enjoyment of his possessions is lawful and serves a legitimate aim. Moreover the interference must be proportionate, achieving a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, whereby the State enjoys a wide margin of appreciation (see Eur. Court H.R., Fredin judgment of 18 February 1991, Series A no. 192, pp. 16-17, paras. 48-51; Agosi judgment of 24 October 1986, Series A no. 108, p. 18, para. 52).

a. The applicant complains that the seizure of the car was not in accordance with S. 143 of the Code of Criminal Procedure. He submits in particular that it was not necessary for the investigation, as it would have been sufficient to make a photo of the car and copies of the papers.

The Commission recalls that the power of the Convention organs to review compliance with domestic law is limited (Eur. Court H.R., Fredin judgment loc. cit., p. 16, para. 50). The Commission notes that S. 143 of the Code of Criminal Procedure, which states that objects that might be relevant for the investigations, have to be seized, leaves a certain discretion to the authorities. However, it appears that this discretion has to be exercised with a view to the suspicion which prevails at the time of the seizure. In this respect, the Review Chamber, in its decision of 27 October 1993, found that at the time of the seizure there was a suspicion against B.W. of having fraudulently obtained the car. Further, there was a suspicion against the applicant of having received stolen property and, eventually, a danger that he might sell the car. In these circumstances, the Commission finds that there is nothing in the applicant's submissions to indicate that the

seizure of the car at issue was unlawful.

The Commission further finds that the contested seizure served a legitimate aim, i.e. the safeguarding of evidence in the course of criminal proceedings.

As regards the proportionality of the interference, the Commission finds that, according to the file, the seizure of the car was based on the suspicion of criminal offences against B.W. and against the applicant, respectively. Moreover, the seizure is only a provisional measure which was, according to the Review Chamber, lifted as a result of the investigating judge's decision to deposit the car at the district court. In these circumstances, the Commission finds that the seizure complained of was not disproportionate.

b. The applicant also complains that the subsequent deposit of the car at the Favoriten District Court was unlawful. He submits that there was no legal basis for applying S. 1425 of the Civil Code in the course of criminal proceedings.

In the present case, the applicant joined the criminal proceedings against B.W. as a private party and requested that the car be returned to him. In his decision of 19 May 1993 the investigating judge, finding that different persons had asserted claims with regard to the car, decided that the car be deposited at the Favoriten District Court in accordance with S. 1425 of the Civil Code. Upon the applicant's appeal, this decision was confirmed by the Review Chamber on 27 October 1993.

As regards the lawfulness of the measure complained of, the Commission notes in particular that S. 367 para. 3 of the Code of Criminal Procedure refers to S. 1425 of the Civil Code. It states that, if a request by a private party for the return of objects has to be dismissed because, inter alia, more than one person claims to have a right to this object, the seizure has to be lifted and the object has to be deposited at the competent district court. Thus, the applicant's submissions do not suffice to conclude that the measure complained of was contrary to Austrian law.

The Commission further considers that the interference at issue pursued a legitimate aim, namely to secure the car until a decision about conflicting claims be taken by a civil court.

As regards the proportionality of the interference, the Commission notes that the car was deposited at the district court on the ground that different persons had asserted claims to it. According to the file, civil proceedings to pursue these claims are available to the persons who are, like the applicant, concerned by the deposit. In these circumstances, the Commission finds that the measure complained of was not disproportionate.

If 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. Further, the applicant complains under Article 6 (Art. 6) of the Convention that his property was seized without proper proceedings. He submits in particular that the court failed to decide on his request that the seizure be lifted. Instead, it ordered the deposit of the car with the district court, thereby preventing that it be returned to him.

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

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

The Commission finds that this complaint raises the question whether the applicant had access to a court competent to decide whether the seizure of the car be lifted and whether it be returned to him, decisions which involve a determination of the applicant's civil rights within the meaning of Article 6 (Art. 6).

a. As regards the seizure, the Review Chamber of the Vienna Regional Criminal Court, in its decision of 27 October 1993, stated explicitly that the decision of 19 May 1993 to deposit the car at the Favoriten District Court had the effect of lifting the seizure. The Commission notes that S. 367 para. 3 of the Code of Criminal Procedure provides that if a request for the return of objects has to be dismissed, inter alia on the ground that more than one person claims to have a right to the seized object, the seizure has to be lifted and the object has to be deposited at the district court. Thus, the applicant had access to a court, which actually decided on the lifting of the seizure.

b. As regards the subsequent deposit of the car, the Commission notes that the Favoriten District Court, when accepting the deposit of the car on 22 September 1993, stated that it would be handed over to one of the persons concerned on the basis of a final and enforceable court decision. Meanwhile, the applicant has, in civil proceedings, obtained a judgment in default against the other persons concerned by the deposit. Although this judgment is not yet final, it shows that the applicant has access to the civil courts in order to obtain the return of the car.

It follows that this part of the application is also 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)