AS TO THE ADMISSIBILITY OF

Application No. 23228/94
by M. A.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 11 May 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

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 16 September 1993 by M. A. against Austria and registered on 10 January 1994 under file No. 23228/94;

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 was born in Yugoslavia in 1966 and resides in Austria where he is serving a life sentence. He is represented by Mr. Karl Bernhauser, a lawyer practising in Vienna.

It follows from his statements and the documents submitted that on 17 March 1993 he was found guilty of murder and attempted murder by a jury at the Regional Court in Vienna (Geschworenengericht beim Landesgericht). He received a life prison sentence.

According to the indictment the applicant's wife had left him and for this reason he intended having her killed. In the summer of 1992 he tried to hire two compatriots to kill his wife. A certain M.N. did not accept but a certain G.S., who was constantly short of money, accepted the applicant's offer and was given money and a pistol. However, it was his intention not to execute the order. Consequently, he telephoned the applicant's wife who was living in Bratislava and warned her, at the same time advising her that she should disappear for a fortnight. Some days later, on 10 August 1992, the applicant entered the ground-floor apartment where G.S. lived with his companion and her seven year old son, I.B. The companion had already left the apartment as she usually started her work very early in the morning.

The applicant shouted at the sleeping G.S. and then immediately attacked him with a military knife, not leaving him any opportunity to defend himself. He inflicted more than twenty fatal knife wounds on G.S.

The boy, I.B., who slept in the same room, had been woken up by the noise and, under shock, first said that his step-father had been killed by batman and he also mentioned the name of a former friend of his mother, other than G.S. On 24 September 1992, an identification parade was arranged where the boy identified the applicant as the murderer. According to the indictment the main evidence was however furnished by genetic technology. In a garden near the scene of the crime, jeans and linen shoes had been found with blood stains and an analysis showed that the blood belonged both to the victim and the applicant who had a fresh wound on his shin bone which apparently was a result of having climbed a fence to reach the victim's apartment. The genetic identification of the blood clearly designated the applicant. An error was excluded in view of the fact that among ten thousand people only 54 would have the genetic combination found in the blood cells.

Furthermore, it is stated in the indictment that following publication of a photo of the linen shoes in the press, the applicant, who was known by friends to wear the same type of shoes, bought a pair, covered them with mud and made the police believe that he had been wearing them for some time. However, the sole was not worn out and in addition it had been discovered where the shoes had been bought shortly before. The saleswoman Mrs. S.S. gave evidence that the applicant expressly requested size 43 although his size is 41 or 42. This was considered to be evidence of collusive behaviour. Furthermore, the indictment indicates as evidence that a scent test was made with a police dog which clearly identified the shoes found near the scene of the crime as being the applicant's shoes.

The applicant's wife confirmed that she had been phoned by the victim and warned about the murder attempt shortly before G.S. was stabbed to death.

Finally, several witnesses were named to whom G.S. had talked about his deal with the applicant according to which he was supposed to kill the applicant's wife.

The applicant's plea of nullity (Nichtigkeitsbeschwerde) and appeal (Berufung) were rejected by the Supreme Court (Oberster Gerichtshof) decision of 12 August 1993.

The office of the General Prosecutor (Generalprokuratur) had in its observations on the applicant's plea of nullity pointed out that the child I.B. had not been considered to be a witness and therefore the statements made by the child during the pre-trial investigations had not been read out at the trial. Rather, the Public Prosecutor (Staatsanwalt) had argued at the trial that the child's statement could not be used as evidence, being of no probative value. On the other hand, as pointed out by the General Prosecutor, the child had designated the applicant at an identification parade as the murderer. In these particular circumstances the applicant should have submitted reasons demonstrating that nevertheless the child would give evidence in his favour. As he had failed to state such reasons, his plea of nullity was, in this respect, unfounded. It was further mentioned that the boy, who had apparently joined his mother, was still under shock which had likewise been taken into consideration by the trial court when rejecting the request in question. The Supreme Court followed this line of reasoning.

COMPLAINTS

The applicant points out that neither he himself nor his defense counsel were present when the child I.B. was heard in the pre-trial investigation proceedings and consequently he had no opportunity to put any questions to him. He therefore considers that the denial to hear the boy as witness violated his rights under Articles 6 para. 1 and 3 (d) of the Convention.

THE LAW

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 constant 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 the applicant alleges a violation of Article 6 (Art. 6) of the Convention complaining that an eye-witness of the murder, namely the child I.B., who was seven years old at the relevant time, was not heard as witness.

However, the Commission first notes that the statements made by I.B. during the pre-trial investigations were not used as evidence against the applicant at his trial. The public prosecution expressly rejected the possibility of having the boy's pre-trial statements read out at the trial considering that they had no probative value.

The applicant's conviction of murder seems mainly based on circumstantial evidence, in particular on the fact that shoes found near the scene of the crime were identified as being his, as well as jeans likewise found with blood stains which according to medical tests could clearly be linked both to the victim and the applicant.

In these particular circumstances there was no necessity for the defence to question I.B. on his pre-trial statements as they were not used against the applicant.

On the other hand there was likewise no reason to consider I.B. as a possible witness for the defence. Article 6 para. 3 (d) (Art. 6-3-d) of the Convention does not give the accused an absolute right to have witnesses heard. It is for the trial judge to decide whether or not evidence offered by the defendant is relevant or not (cf. No. 10563/83, Dec. 5.7.85, D.R. 44 p. 113).

In the present case the domestic courts pointed out that the boy had identified the applicant to be the murderer and consequently there was nothing to show that he might give evidence in the applicant's favour. In these particular circumstances it cannot be found that the applicant's request to hear the boy I.B. was arbitrarily rejected.

It follows that there is no appearance of a violation of Article 6 (Art. 6) and for these reasons must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 3 (Art. 27-3) 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) — (A. WEITZEL)