AS TO THE ADMISSIBILITY OF

Application No. 28867/95
by M. K.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 August 1995 by M. K. against Austria and registered on 5 October 1995 under file No. 28867/95;

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 is an Austrian citizen, born in 1957 and residing in Vienna. He is at present unemployed. Before the Commission he is represented by Mr. G. Grone, a lawyer practising in Vienna.

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

a. The pre-trial stage

On 8 August 1993 the Investigating Judge at the Vienna Regional Court (Landesgericht) questioned the applicant, who was suspected of having had sexual relations with a boy, R.R., born in 1980 and of having intimidated another person, W.K. The applicant admitted that R.R. had visited him in his apartment on several occasions but denied having had sexual relations with him.

On 13 August 1993 the Investigating Judge heard W.K. as a suspect. He stated that he had had sexual contacts with R.R. and also with his sister A.R, born in 1983. Furthermore, on various occasions in the applicant's flat and at an indoor swimming pool he had witnessed

sexual contact between the applicant and R.R.

On the same day the Investigating Judge questioned R.R. and his sister A.R. According to the transcript of the hearing it had not been possible to question R.R. as he acted aggressively and left the court room. A.R. stated that at the applicant's apartment she had had sexual relations with W.K., while the applicant had such relations with R.R.

Subsequently, the Vienna Public Prosecutor's Office (Staatsanwaltschaft) drew up a bill of indictment against the applicant. It charged him with sexual abuse of persons under fourteen years of age (Unzucht mit Unmündigen) under Section 207 of the Penal Code and compulsion (Nötigung) under Section 105 of the Penal Code.

b. The trial

On 15 November 1993 the trial against the applicant commenced before the Vienna Regional Court. The Court first heard the applicant who pleaded not guilty. It then heard R.R.'s mother, who stated, inter alia, that her son was in a hospital for psychiatric treatment and would stay there until February 1994. The Court read out a letter dated 29 October 1993 by the head of the paediatric department for psychosomatic medicine of the hospital where R.R. was treated. According to this letter R.R. was under psychiatric treatment and at the present time it would be harmful for his mental health to appear at the trial. When questioned by the Court, the court-appointed medical expert confirmed this view. The Court then heard W.K. and adjourned the trial for the taking of further evidence.

On 1 December 1993 the trial continued. The Court heard the psychiatric expert who had meanwhile, on 24 November 1993, examined R.R. at the hospital. The expert stated that R.R. had given him a detailed account of his sexual activities with the applicant. The trial was adjourned to 15 December 1993 because one of the lay judges fell ill.

On 15 December 1993 a further court hearing took place. As one of the lay judges had been replaced, the Court decided to restart the trial. Again the court heard the applicant. It further heard police officers M., V., L. on the circumstances of the questioning of W.K. by the police, as it had been submitted by the defence that undue pressure had been exercised on W.K. in order to obtain a statement incriminating the applicant. The Court further heard W.K. as witness and the Investigating Judge who had questioned W.K. on 13 August 1993. At the end of the hearing the applicant requested the court to take further evidence, namely to hear the victim R.R. and his sister A.R., Ms. I.W. and Ms. E.E.S. The Court dismissed the request to hear the two children but granted the other requests for taking of evidence and adjourned the trial.

On 23 December 1993 a further court hearing took place. The Court heard further witnesses, inter alia, Ms. I.M. and Ms. E.E.S, two witnesses requested by the defence. The latter stated that she was not aware of any homosexual relationships of the applicant. At the end of the court hearing the applicant requested the taking of further evidence, namely the hearing of Ms. G.H. who would state that R.R. had told her that he had not talked to the psychiatric court expert about sexual relations with the applicant and Ms. T.K. who would state that the applicant had told her that he had never had homosexual relations. This request was rejected by the Court as it found that both persons would merely be hearsay witnesses.

c. The Regional Court's judgment

On 23 December 1993 the Regional Court convicted the applicant of sexual abuse of persons under fourteen years of age (Section 207 of the Penal Code) and compulsion (Section 105 of the Penal Code) and

sentenced him to eighteen months' imprisonment.

The Court found that in May 1991 the applicant had become acquainted with R.R., who had been 11 years old at that time, and started a sexual relationship with the boy which lasted until 1993. In 1992 the applicant had met W.K., who previously had a sexual relationship with R.R. and W.K. became aware of the applicant's sexual relationship with R.R. When the applicant realised that criminal proceedings for suspicion of sexual abuse of minors had been instituted against him, he threatened W.K. with acts of violence in order to prevent the latter from making incriminating statements.

As regards the assessment of evidence, the Court noted that the victim R.R. could not be heard by the court. However, the psychiatric expert, who had examined the victim, had been heard and had been able to make clear and exact statements on the applicant's relationship with R.R. His statements coincided with the statements of the victim's parents and in particular with the statement of W.K. Although the latter initially had been hesitant to incriminate the applicant he then confirmed his previous statements made before the police and before the Investigating Judge. The court added that during the questioning of W.K. it had got the clear impression that the applicant had tried to influence this witness. As regards the applicant's allegation that police officers had exercised undue pressure in order to extort incriminating statements from W.K., the Court found that such allegations were not credible. They had not been maintained by W.K. and the police officer, whom the applicant had indicated had not even been on duty at the time the statements were taken by the police.

d. Appeal proceedings

On 25 March 1994 the applicant filed a plea of nullity and an appeal against the sentence. He submitted that the witness W.K. had given evidence at the trial although he had not been duly informed of his right not to give evidence. The Regional Court had refused to hear witnesses requested by the defence, namely R.R., A.R., G.H. and T.K. The Regional Court had not dealt sufficiently with his defence that he merely had a friendship relationship with R.R. and that no sexual acts had occurred. Furthermore, according to the results of the taking of evidence, the victim R.R. had started a sexual relationship with the applicant on his own initiative and had expressed sympathy for the applicant throughout the criminal investigations. In such circumstances there could be no question of abuse as any sexual contacts had taken place with the consent of R.R.

On 15 December 1994 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity. As regards the sentence it ordered that twelve months of the applicant's sentence be suspended for a probationary period of three years.

The Supreme Court noted that the Regional Court had relied on the statements of the psychiatric expert who had been heard at the trial and to whom the victim R.R. had given a detailed account of his sexual relationship with the applicant. The Regional Court had also relied on other witnesses who had incriminated the applicant, namely the victim's parents, the witness W.K., police officers conducting the preliminary investigations and the Investigating Judge.

As regards the applicant's complaint that W.K. had been heard although this witness could have relied on a right not to give evidence, the Supreme Court found that W.K. could not have invoked any right not to give evidence, as the provisions of the 1993 Amendment of the Code of Criminal Procedure, which granted such a right to persons against whom criminal proceedings were pending at the time they had the obligation to give evidence, only entered into force in January 1994, while the trial against the applicant had taken place earlier.

The Supreme Court found that the Regional Court had acted correctly when refusing to hear the witnesses requested by the defence.

As regards the request to hear R.R. as witness, it noted that a court may refuse to hear as a witness the minor victim of a sexual offence if that court, on the basis of concrete elements and in particular the expert opinion of a child psychiatrist, is convinced that the hearing of the victim could lead to irreparable psychological harm, even if the questioning were carried out with the utmost delicacy. In such circumstances the accused's right to question the victim exceptionally must give way to the interests of the minor victim. In the present case the letter of the head of the paediatric department for psychosomatic medicine of 29 October 1993 and the oral statements of the court-appointed expert on 15 November 1993 and 1 December 1993 had shown that R.R. had been under psychiatric treatment because he suffered from a serious trauma and that a confrontation with the events at issue in court would have seriously harmed his now positive psychological development. In such circumstances the interests of the victim R.R. prevailed over the interests of the applicant in questioning him.

Moreover, R.R. had refused to make any statements before the police and before the Investigating Judge, and it could have been reasonably expected that he would do the same before the trial court. Nevertheless, the applicant had not even alleged that there had been reasons to assume that R.R. would be willing to give evidence before the trial court.

For the same reasons the Regional Court had also to refused to hear his sister A.R. as witness. According to the file also she had been the victim of sexual abuse, was in psychiatric care at a hospital and it was apparent that a new hearing as witness on the sexual practices which were the subject of the present criminal proceedings before the trial court would have had a damaging effect on her. Thus, the same objections spoke against the hearing of her by the trial court as were relevant for her brother.

Moreover, in the circumstances of the case it would have been up to the applicant to show for what reasons it could be expected that A.R., who had stated before the Investigating Judge that she had witnessed sexual acts between her brother and the applicant, would make statements to the contrary. From the other evidence taken there were no indications that, as implicitly alleged, her previous statements had been wrong. The request to hear her as witness thus amounted to an inadmissible "fishing expedition" (Erkundungsbeweis).

Contrary to the applicant's opinion the impossibility to hear R.R. and A.R. as witnesses did not render the trial unfair within the meaning of Article 6 of the Convention, as Article 6 paras. 1 and 3 (d) did not give the accused an unlimited right to have witnesses heard on his behalf and it was sufficient that there was sufficient corroborating evidence to verify statements of persons who could not be heard directly by the court. In this respect the Supreme Court referred to the Asch judgment of the European Court of Human Rights (Eur. Court HR, Asch v. Austria 26 April 1991, Series A no. 203).

Also the Regional Court's refusal of the applicant's request to hear T.K. and G.H. as witnesses did not infringe his defence rights. It had been irrelevant to the proceedings whether the applicant had stated to T.K. that he did not have any homosexual experience, as such general remarks to third persons could not form the basis of a reliable conclusion as to the true sexual orientation of the applicant. G.H. had been requested to be heard as a witness to give evidence that R.R. had told her that he had not talked to the court-appointed expert as to his sexual experiences with the applicant. Even if she would have made such a statement this would not tell anything about the truthfulness of R.R.'s statements made to her.

Insofar the applicant complained that his conviction was unlawful as the victim R.R. had been consenting and had accepted sexual contacts with the applicant of his own will, which excluded an "abuse", the Supreme Court found that abuse within the meaning of Section 207 of the Penal Code consisted in profiting from the low age of the minor whose lack of sexual maturity to form his own free will was presumed by the law. Whether the victim under the age of 14 years was consenting or not was therefore irrelevant under the law.

COMPLAINTS

The applicant complains about his conviction, the sentence imposed and the alleged unfairness of the criminal proceedings leading thereto. He invokes Article 3, Article 5 para. 1 (a) and Article 6 paras. 1, 2 and 3 (d) of the Convention.

He submits that the Regional Court had not correctly assessed the evidence before it; that the Regional Court had relied on the statements of W.K., although this witness had not been informed of his right to refuse to give evidence; that the Regional Court had failed to hear A.R., R.R., T.K. and G.H. as witnesses and that although the composition of the Regional Court changed on 15 December 1993, some witnesses, the court expert and the mother of A.R. and R.R., were not heard again but their statements made at the previous court hearing were merely read out.

Under Article 8 and 14 of the Convention the applicant complains that his conviction of sexual abuse of minors violated his right to private life and was discriminatory since it was apparent that R.R., who had considerable sexual experience, was consenting.

THE LAW

1. The applicant complains about his conviction, the sentence imposed and the alleged unfairness of the criminal proceedings leading thereto. He invokes Article 3 (Art. 3), Article 5 para. 1 (a) and Article 6 paras. 1, 2 and 3 (d) (Art. 5-1-a, 6-1, 6-2, 6-3-d) of the Convention.

a. Insofar the applicant complains about his conviction and the sentence imposed the Commission recalls that under Article 19 (Art. 19) of the Convention its sole task is to ensure observance of the engagements undertaken by the High Contracting Parties in the Convention. It is not competent to examine applications concerning errors of fact or law allegedly committed by the competent national authorities, to whom it falls, in the first place, to interpret and apply domestic law (No. 11826/85, Dec. 9.5.89, D.R. 61, p. 138; No. 19890/92, Dec. 3.5.93, D.R. 74, p. 234).

b. Insofar the applicant complains about the alleged unfairness of the proceedings the Commission finds that these complaints fall to be considered under Article 6 (Art. 6) of the Convention. It further finds that it is appropriate to examine these submissions from the angle of paragraph 1 taken together with the principles inherent in paragraph 2 and 3 of Article 6 (Art. 6-2, 6-3), as the guarantees in paragraph 2 and 3 are specific aspects of the general concept of fair trial set fourth in paragraph 1 (Eur. Court HR, Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, para. 29; Doorson v. the Netherlands judgment of 26 March 1996, para. 66, to be published in Reports 1996-I).

Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention, insofar as relevant, read 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. ...

3. Everyone charged with a criminal offence has the following minimum rights:
...

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 as a general rule it is for the national courts, and in particular the courts of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce (Eur. Court HR, Barbera, Messegue and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 31, para. 68). More specifically, Article 6 para. 3 (d) (Art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the autonomous sense given to that word in the Convention system; it does not require the attendance and examination of every witness on the accused's behalf (cf. Eur. Court HR, Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

With regard to the hearing of witnesses, a distinction should be made between witnesses against and witnesses for the accused. In respect of the former, an accused should, as a rule, be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making the statement or at some later stage. In respect of the witnesses on behalf of the accused, only exceptional circumstances could lead the Convention organs to conclude that a refusal to hear such witnesses violated Article 6 (Art. 6) of the Convention (cf. Vidal v. Belgium, Comm. Report 14.1.91, Series A no. 235-B, pp. 38-39, paras. 47-49; Bricmont v. Belgium judgment, op. cit., p. 31, para. 89). Thus, the complete silence in a judgment as to why the court rejected the hearing of a witness for the defence is not consistent with the concept of a fair trial which is the basis of Article 6 (Art. 6) of the Convention (Vidal v. Belgium judgment, op. cit. pp. 32-33, paras. 33-34).

The applicant submits that the Regional Court had failed to hear A.R., R.R., T.K. and G.H. as witnesses.

aa. As regards the failure to hear R.R. as witness the Commission observes that at the time of the applicant's trial R.R. had been in intensive psychiatric care at a hospital. After having obtained information on R.R.'s state of health, and after having questioned the court-appointed expert on this issue, the Regional Court decided not to call him as a witness for reasons of health. In its judgment of 15 December 1994 the Supreme Court carefully examined whether the failure to summon R.R. as a witness infringed the applicant's defence rights but answered this question in the negative. The Supreme Court found that a court may only refuse to hear as a witness the minor victim of a sexual offence if that court, on the basis of concrete elements and in particular the expert opinion of a child psychiatrist, is convinced that the hearing of the victim could lead to irreparable psychological harm, even if the questioning were carried out with the utmost care. It found that in the proceedings at issue the Regional Court, relying on expert advice, had come to the conclusion that R.R. could not be expected to appear at the trial because a confrontation with the events at issue could seriously harm his psychological development.

In this respect the Commission recalls further that the interests

of witnesses and victims are in principle protected by the Convention, in particular Article 8 (Art. 8), which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence be balanced against those of witnesses or victims called to testify (Eur. Court HR, Doorson v. the Netherlands judgment, op. cit., para. 70; Baegen v. the Netherlands, Comm. Report 20.10.94, para. 77; Finkensieper v. the Netherlands, Comm. Report 17.5.95, para. 66).

The Commission finds that in the particular circumstances of the case the Regional Court and the Supreme Court have properly weighed the interests of R.R. against the applicant's interests and have given sufficient reasons why R.R. could not be expected to give evidence at the trial.

The Commission notes, however, that the Regional Court, after having decided that R.R. could not be summoned as witness, instructed the court-appointed expert to examine R.R. The expert did so and on 1 December 1993 presented the result of his examination at the trial. The statements of the expert also contained an account of R.R.'s statements about his sexual relationship with the applicant.

The Commission therefore finds that the statements of R.R. as related to the court by the expert had been of some importance to the proceedings, as the Regional Court based the applicant's conviction inter alia on the statements of the expert. In such a situation it might have been preferable to hear R.R. in person, but for the reasons pointed out above the Austrian courts considered that R.R. could not be expected to give evidence at the trial. Subject to the rights of the defence being respected, it was therefore open to the national court to have regard to the expert's statements on his examination of R.R., in view of the fact that it could consider it to be corroborated by other evidence before it (see Eur. Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, pp. 10-11, para. 28). The Regional Court relied on the statements of W.K., who had been present when the applicant had met R.R. in his apartment. W.K. appeared in court, gave evidence and could be questioned by the applicant and his lawyer. The applicant, who was aware of the identity of R.R., had also been present when the expert was heard and his lawyer questioned him as well. Furthermore, the applicant did not object to the court's instruction to have R.R. examined and interviewed by the expert, did not request that his lawyer be present on this occasion and did not object to the expert making his statement at the trial. Moreover, the Regional Court relied on the statements of further witnesses, who all had been heard at the trial.

bb. As regards the failure to hear A.R. the Commission observes that also she, who was three years younger than her brother, was in intensive psychiatric care as being the victim of sexual abuse. The Regional Court refused to summon her as a witness for the same reasons as it had refused to summon R.R.

The Commission finds that in respect of this requested witness also the Austrian courts have given sufficient reasons why she could not be expected to give evidence at the trial.

cc. As regards the failure to hear T.K and G.H., the Commission notes that the applicant at the last court hearing, on 23 December 1993, requested the hearing of these witnesses. This requests was refused by the Regional Court as it found that both persons would merely be hearsay witnesses. In its judgment of 15 December 1994 the Supreme Court confirmed this approach and found that the evidence of T.K. and G.H. had been irrelevant to the proceedings.

Also in this respect the Commission finds that the Austrian

courts have given sufficient reasons why the hearing of these persons as witnesses had not been relevant for the proceedings.

dd. As regards the applicant's submission that the Regional Court had relied on the statements of W.K., although this witness had not been informed on his right to refuse to give evidence, the Commission finds that the possibility not to give evidence is a privilege afforded to a person who is called upon to give evidence and which has the purpose of avoiding that this person, in particular when he or she is a member of the accused's family, be put in a moral dilemma (see Eur. Court HR, Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, para. 30). It is not a privilege designed to facilitate the accused's defence.

In the present case W.K. appeared at the trial and gave evidence. The applicant does not argue that he could not properly question this person. Rather, as is apparent from the transcripts of the court hearings, the applicant could and did question this witness.

Accordingly the failure to hear the witnesses requested by the applicant and the hearing of W.K. as a witness did not unduly restrict the rights of the defence, and did not render the proceedings, considered as a whole, 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.

3. The applicant further complains that the criminal proceedings against him had been unfair in that notwithstanding a change in the composition of the Regional Court in the hearing of 15 December 1993, some witnesses, the court expert and the mother of A.R. and R.R., were not heard again but their statements made at the previous court hearing merely were read out.

However, the Commission is not required to decide whether the above facts alleged by the applicant disclose any appearance of a violation of the applicant's rights under Article 6 (Art. 6) of the Convention as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The Commission recalls that in order to have exhausted domestic remedies an applicant must have expressly raised before the national authorities the complaint brought before the Commission (No. 24722/94, Dec. 10.4.95, D.R. 81, p. 130).

The Commission notes that at the hearing on 15 December 1993 the applicant did not request that these witnesses be heard again by the Regional Court in its new composition, nor did he oppose the reading out of their previous statements by the Regional Court. Furthermore, he did not raise the complaint he is now bringing before the Commission in his plea of nullity.

The Commission therefore finds that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention.

It follows that this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

4. Under Articles 8 and 14 (Art. 8, 14) of the Convention the applicant complains that his conviction of sexual abuse of minors violated his right to private life and was discriminatory since it was apparent that R.R., who had considerable sexual experience, was consenting.

Article 8 (Art. 8) of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls that the prohibition of homosexual acts, even in the absence of any criminal proceedings, constitutes an interference with the rights under Article 8 (Art. 8) of the Convention of the persons concerned (cf. Eur. Court HR, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 18, para. 41; Norris v. Ireland judgment of 26 October 1988, Series A no. 142, pp. 17-18, paras. 35-38; Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259, pp. 10-11, paras. 17-24). A fortiori, a criminal conviction would constitute an interference with these rights.

The Commission recalls further that in two previous cases it has found that Section 209 of the Austrian Criminal Code, which prohibits homosexual relations between a person who has attained the age of nineteen with a person who has attained the age of fourteen but not the age of nineteen years, constitutes a measure necessary in a democratic society. The Commission had regard in particular to the fact that this provision did not refer to homosexual activities between consenting male adults but between adults and minors within age brackets which the Commission found acceptable having regard to the State's margin of appreciation (cf. No. 17272/90, Zuckrigl v. Austria, Dec. 13.5.92, unpublished; No. 22646/93, Dec. 26.6.95, unpublished).

In the present case the applicant's conviction was based on Section 207 of the Austrian Penal Code which prohibits sexual abuse of persons under fourteen years of age. The Commission finds that his conviction constitutes a measure which may be regarded as necessary in a democratic society for the "protection of the rights and freedoms of others" and the "protection of morals". In view of the low age of the persons protected by the law, less than fourteen years, the Commission finds that the fact that the relevant law considers any alleged consent of the protected person to be irrelevant to a conviction, cannot render the measure disproportionate or discriminatory.

Accordingly there is no appearance of a violation of the applicant's rights under Article 8 (Art. 8) of the Convention alone or in conjunction with Article 14 (Art. 8+14) of the Convention.

It follows that also 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.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber