FIRST CHAMBER

AS TO THE ADMISSIBILITY OF

Application No. 14503/89
by Peter MARGULIES
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 9 December 1991, the following members being present:

MM.J.A. FROWEIN, President of the First Chamber
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
H. DANELIUS
SirBasil HALL
C.L. ROZAKIS
MM.L. LOUCAIDES
A.V. ALMEIDA RIBEIRO
B. MARXER

Mr. M. de SALVIA, Secretary to the First 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 8 November 1988 by Peter Margulies against Austria and registered on 5 January 1989 under file No. 14503/89;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to:

- the Commission's decision of 13 February 1990 to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits;

- the observations submitted by the respondent Government on 30 May 1990 and the observations in reply submitted by the applicant on 3 July 1990;

Having deliberated;

Decides as follows:

THE FACTS

Particular facts of the case

The applicant is an Austrian citizen born in 1964. He lives in Vienna and he is represented in the proceedings before the Commission by Mr. T. Prader, lawyer, of Vienna.

The facts of the case may be summarised as follows.

The applicant was arrested by the police on 14 March 1985 and placed in detention on remand. He was suspected of having damaged and daubed buildings in Vienna by spraying mostly political slogans, parts of words and signs onto them. He was also suspected of unauthorised

possession of a can of tear gas (Articles 125 and 126 (1) (7) Criminal Code (Strafgesetzbuch) and Section 36 (1) (1) Weapons Act (Waffengesetz). He was further suspected of aiding a juvenile in the spraying activities. The applicant was questioned by police officers on 14 March and he denied the offences. On 15 March 1985 he was questioned again and admitted the spraying activities.

On 18 March 1985 the Public Prosecutor filed requests in the Vienna Juvenile Court (Jugendgerichtshof) (i) to institute proceedings in the case against the applicant and nine other co-defendants (two of them juveniles) on suspicion of, inter alia, criminal mischief and unauthorised possession of weapons, (ii) to obtain an expert opinion as to the amount of damage caused, (iii) to obtain chemical analysis from police laboratories for the purpose of determining whether the paint used in the sprayings was the same as that contained in spray cans found in house searches.

On 19 March 1985 the applicant was questioned by the investigating judge and he again admitted the spraying activities. On 20 March 1985 the Vienna Juvenile Court decided to institute preliminary investigations against the applicant. On 3 April 1985, the applicant was released from detention.

On 10 April 1985 the investigating judge requested a chemical analysis from police laboratories. On 27 July 1985 an expert was appointed to produce an opinion on the amount of damage caused. On 17 October 1985 the expert received the chemical analysis. On 6 December 1985 the expert submitted his opinion and this was sent to the investigating judge on 9 December 1985. On 16 December 1985 the Public Prosecutor filed several requests in the Vienna Juvenile Court including a request to assign the applicant's case to the Vienna Regional Court (Landesgericht für Strafsachen).

On 23 January 1986 the Vienna Juvenile Court agreed to this request. The Vienna Juvenile Court tried and on 5 May 1986 gave judgment in respect of the two juveniles who were suspected of having participated in the spraying activities.

On 22 February 1986 the applicant's case-file was sent to the Vienna Public Prosecutor.

On 19 March 1986 the Public Prosecutor filed a request for punishment (Strafantrag) in respect of the applicant with the investigating judge for transmission to the trial judge (Einzel-richter) under Section 483 of the Code of Criminal Procedure (Strafprozessordnung) on counts of criminal mischief and unauthorised possession of weapons. He also requested that certain proceedings against the applicant be dismissed.

On 2 April 1986 the investigating judge decided to dismiss part of the proceedings against the applicant and further to dismiss the entire proceedings against K., as a co-defendant. K. claimed compensation for his detention. The investigating judge decided to summon K. to reply to the Vienna Public Prosecutor's request that K. be denied such compensation.

On 13 October 1986 the investigating judge was able to question K. regarding the Vienna Public Prosecutor's request. K. maintained his claim for compensation.

On 23 October 1987 K.'s claim for compensation was dismissed by the Review Chamber (Ratskammer) of the Vienna Regional Criminal Court, and the Public Prosecutor's request to punish the applicant was transmitted to the trial judge along with the entire case-file.

The applicant's trial, in which he was accused with one other person took place on 28 December 1987. The applicant was convicted and

sentenced to 10 months' imprisonment, suspended for 3 years.

The hearing on appeals (Berufungen) brought by the applicant and the prosecutor was held before the Vienna Court of Appeal (Oberlandesgericht) on 18 March 1988. The conviction for the arms offence was quashed and the sentence was amended to one of 8 months' and 20 days' imprisonment. The new sentence was not suspended. The decision was served on the applicant's lawyer on 3 June 1988.

The applicant started to serve his sentence on 3 October 1988 and was released on parole on 23 January 1991.

Relevant domestic law

Article 113 of the Code of Criminal Procedure reads as follows:

(translation)

"Any person who feels aggrieved during the preliminary inquiries, preliminary investigation or ... by a decision of or delay caused by the investigating judge shall have the right to apply to the Review Chamber for decision and to submit his complaint either in writing or orally to the investigating judge or directly to the Review Chamber."

(original)

"Alle, die sich während der Vorerhebungen, der Voruntersuchung oder ... durch eine Verfügung oder Verzögerung des Untersuchungsrichters beschwert erachten, haben das Recht, darüber eine Entscheidung der Ratskammer zu verlangen und ihr Begehren entweder schriftlich oder mündlich beim Untersuchungsrichter oder unmittelbar der Ratskammer anzubringen."

COMPLAINTS

The applicant complains of the length of the criminal proceedings against him. He alleges a violation of Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 8 November 1988 and registered on 5 January 1989. On 13 February 1990 the Commission decided to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

The Government's observations were submitted on 30 May 1990 and the applicant's on 3 July 1990.

On 13 July 1990 the President of the Commission decided that the applicant should be granted free legal aid for his representation before the Commission.

On 7 November 1990 the Commission referred the application to the First Chamber.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention of the proceedings against him by virtue of

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

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

It is not in dispute that the proceedings against the applicant involved "the determination of ... [a] criminal charge" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

2. The Government submit that, in respect of a period between 13 October 1986 and 23 October 1987, during which time no decisions were taken in the applicant's case, the applicant has failed to exhaust domestic remedies by not having applied informally to the investigating judge or making a complaint under Article 113 of the Code of Criminal Procedure. The applicant submits that, during this period, the case-file was in any event not with the investigating judge but was with the Review Chamber of the Vienna Regional Court for a decision on a co-defendant's claim for compensation. Accordingly, he considers that an application under Article 113 was not open to him.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress.

It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15, para. 26, Commission's decision No. 9013/80, Dec. 11.12.82, D.R. 30, p. 96, p. 102).

The Commission has already held that where an applicant complains that he has not been tried within a reasonable time on a criminal charge, Article 26 (Art. 26) of the Convention does not require as a general rule that he should himself have taken steps to accelerate the proceedings. (see, e.g., No. 8261/78, Dec. 8.7.81, D.R. 25 p.157).

Accordingly, the Commission is unable to accept that the application, or part of it, should be declared inadmissible for non-exhaustion of domestic remedies.

3. The Government further submit that the proceedings themselves, with the exception of the period of 13 October 1986 until 23 October 1987, were conducted expeditiously. If the length of proceedings as a whole is taken into consideration, it must be considered reasonable.

The applicant submits that the relatively rapid proceedings before the courts once the trial had been scheduled cannot excuse the length of proceedings up to this date. He refers to the fact that he confessed on 15 and 19 March 1985 and also to the fact that the proceedings against two other people involved in the sprayings were completed in May 1986.

The Commission is required to have regard to the whole of the proceedings in the present case, although the period which calls for particular examination is the time up to the first instance judgment. The Commission finds that the case raises serious questions of fact and law which require an examination of the merits. The application is therefore not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention and no other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE
without prejudging the merits of the case

Secretary to the First Chamber	President of the First Chamber
(M. de SALVIA)	(J. A. FROWEIN)