AS TO THE ADMISSIBILITY OF

Application No. 26632/95
by Ulrike MAYER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 4 September 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
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 25 January 1995 by Ulrike MAYER against Austria and registered on 3 March 1995 under file No. 26632/95;

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 1960 and residing in Dornbirn. Before the Commission she is represented by Mr. E. Hagen, a lawyer practising in Dornbirn.

A. Particular circumstances of the case

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

In 1986 the applicant's father J.G., who at that time ran a butcher's shop, had considerable debts. In order to continue his business, he took a loan of ATS 250.000 and, as security, signed as guarantor a bill of exchange (Wechselbürge) in the amount of DEM 50.000. Three months later J.G. received money from the applicant's husband in order to pay back the loan.

In autumn 1989 J.G. was again in financial difficulties. The applicant decided to sell real property belonging to her in order to enable J.G. to settle his debts. With the help of J.G. she drew up a list of J.G.'s creditors. The applicant's real estate was sold, the proceeds of the sale given to J.G. and his creditors, according to the list, were paid. It was further agreed that upon his retirement J.G. would assign his pension payments to the applicant.

On 6 January 1991 J.G. retired. On 23 February 1991 the applicant and J.G. concluded a written agreement by which J.G. assigned a part of his pension to the applicant. The Old Age Pension Authority for the Self Employed (Sozialversicherungsanstalt der Gewerblichen Wirtschaft) was informed of this agreement and subsequently transferred parts of J.G.'s pension to the applicant.

Meanwhile, the bill of exchange which J.G. had signed as guarantor in 1986 was passed on to the R. Savings Bank in Germany. On 3 April 1987 the Savings Bank filed an action on the bill of exchange against J.G. with the Feldkirch Regional Court (Landesgericht). On 20 December 1989 the Regional Court found against J.G. and this decision entered into force. On 28 February 1990 the Savings Bank requested the enforcement of the judgment of 20 December 1989. Subsequently, a seizure in enforcement (Pfändung) of the furniture at J.G.'s apartment took place. Since property claims by third persons (J.G.'s wife and the sister of the applicant) were raised with regard to the objects seized, the enforcement proceedings were discontinued. On 12 June 1990 J.G. made an oath of disclosure of his assets (Offenbarungseid). It appears that J.G. did not inform the applicant of these developments.

On 24 July 1992 the Old Age Pension Authority for the Self Employed was served an order of the Enforcement Court (Exekutionsgericht) by which it was ordered to pay J.G.'s pension to the Savings Bank. The Pension Authority informed the Savings Bank of the agreement between J.G. and the applicant concerning the assignment of the pension payments.

On 15 December 1992 the Savings Bank filed an action under Section 2 para. 3 of the Debtors Voidable Dispositions Act (Anfechtungsordnung) against the applicant. The Savings Bank requested the court to find that the assignment of J.G.'s pension claims to the applicant was invalid.

On 24 June 1993 the Regional Court dismissed the action. It found that under Section 2 para. 3 of the Debtors Voidable Dispositions Act, the plaintiff had to prove that within two years before the action had been filed the challenged transaction had taken place and that the persons involved in the transaction were close relatives. The plaintiff was not required to prove that the debtor had acted with the intention to cause him damage, nor that the person against whom the action was directed had any knowledge of the debtor's intention, nor that this person had acted in negligent ignorance (schuldhafte Unkenntnis) of the debtor's intention. It was up to the defendant to prove that he had acted in good faith and any remaining uncertainties had to be interpreted against him.

In the present case the applicant had succeeded in proving that there had been no intention to cause damage to the Savings Bank by the challenged transaction. When the list of J.G.'s creditors had been drawn up in 1989 she had examined J.G.'s balance sheets and had asked him about the existence of any other debts not mentioned therein. In the list finally drawn up, the Savings Bank was not mentioned as creditor. Also when assigning his pension claims to the applicant, J.G. did not mention to her the debt he had with the Savings Bank. Other enquiries she could not have been expected to undertake. The fact that in 1990 enforcement proceedings against J.G. were pending was not relevant as the applicant had not been informed of them.

The Savings Bank appealed. It submitted that the applicant had acted negligently, as she had failed to make enquiries with the Enforcement Court. If she would have done so, she would have found out about J.G.'s debt with the Savings Bank.

On 29 October 1993 the Innsbruck Court of Appeal

(Oberlandesbgericht) dismissed the appeal. It found that the applicant had acted with the necessary diligence. The Court of Appeal noted that J.G. had assigned orally his pension claim to the applicant in 1989. At that time no enforcement proceedings had been pending against J.G., so that any enquiries with the Enforcement Court would have been superfluous.

The Savings Bank lodged an extraordinary appeal on points of law (außerordentlicher Revisionsrekurs) with the Supreme Court (Oberster Gerichtshof).

On 22 June 1994 the Supreme Court granted the extraordinary appeal. It noted that according to the Court of Appeal J.G. had orally assigned his future pension payments to the applicant already in 1989. The Supreme Court found however that under the Social Security Act pension payments could only be validly assigned to third persons with the consent of the Pension Institution. The pension authority had given its consent only after it had received a written statements of assignment by J.G. on 11 March 1991. At that time the applicant could easily have found out the existence of J.G.'s debts by enquiring with the Enforcement Court. There was nothing to show that it would have been unreasonable to expect her to make such enquiries. According to her own statement the purpose of the assignment was to avoid J.G. having to incur new debts. Thus, the unreliability of J.G. had been clear to the applicant. Also the development of J.G.'s financial situation, in particular the fact that in the past numerous enforcement proceedings had been brought against him, showed him as a person who had lost sight of all his different financial obligations. In such circumstances the applicant should not have trusted the word of J.G. Applying an average measure of diligence the applicant should have made enquiries with the Enforcement Court before concluding a transaction with J.G. Therefore, the applicant did not act with the necessary diligence.

The Supreme Court also found that there were no doubts about the constitutionality of the reversal of burden of proof under Section 2 para. 3 of the Debtors Voidable Dispostions Act. It was justified to impose a heavier onus of proof on close relatives than on other persons who conclude transactions with a debtor, as close relatives have in general an easier and better access to information about the financial situation of a debtor. The purpose of the reversal of proof was therefore to make up for the disadvantage in the obtaining of information by persons who were not in such a close relationship.

B. Relevant domestic law

Under Section 2 para. 3 of the Debtors Voidable Disposition Act (Anfechtungsordnung) creditors may apply to set aside a transaction which has been concluded between the debtor and close relatives, unless the other party at the time of the transaction did not know, or was not bound to know about the debtor's intention to cause prejudice to the creditor. The time limit for filing such an action is two years. Close relatives are defined in Section 4 of the Act and include spouses, persons living with the debtor in an extramarital relation and persons who are related to the debtor in lineal consanguinity or collateral consanguinity up to the fourth degree.

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention about the Supreme Court's judgment, given in the proceedings under the Debtors Voidable Dispositions Act against her and the alleged unfairness of these proceedings. She submits that the distribution of the onus of proof in these proceedings rendered the proceedings unfair and violated the principle of equality of arms. The general rule of onus of proof, namely that the party asserting a claim had to prove that the conditions for the granting of the claim were fulfilled, was

reversed to the disadvantage of the defendant merely on the ground that the defendant had a family relationship with a debtor of the plaintiff.

2. The applicant further complains under Article 14 in conjunction with Article 6 para.1 of the Convention that the provisions of the Debtors Voidable Dispositions Act were discriminatory, as there was no reason why the reversal of the onus of proof was only imposed on close relatives while other persons, like former spouses or persons who have a close private and business relationship with the debtor are, not subject to this onus of proof.

3. Lastly, the applicant complains that the provisions of the Debtors Voidable Dispositions Act violate the right to respect for family life under Article 8 of the Convention, as they prevent close relatives from helping those members of their family in financial difficulties.

THE LAW

1. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention about the Supreme Court's judgment in the proceedings under the Debtors Voidable Dispositions Act against her and the alleged unfairness of these proceedings.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads as follows:

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

Insofar the applicant complains about the Supreme Court's judgment, 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 to 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 (cf. No. 21283/93, Dec. 5.4.94, D.R. 77 p. 81; Eur. Court H.R., Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, para. 61; Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17, para. 29).

The applicant submits that the distribution of the onus of proof in these proceedings rendered the proceedings unfair and violated the principle of equality of arms.

The Commission recalls that the principle of equality of arms is only one feature of a wider concept of a fair trial and implies that each party shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-a-vis his opponent (see, Eur. Court HR, Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19, para. 33; Stran Greek Refineries S.A. and Stratis Andreadis v. Greece judgment of 9 December 1994, Series A no. 301-B, para. 46).

The Commission recalls further that Article 6 para. 1 (Art. 6-1) of the Convention does not, as such, regulate the allocation of the burden of proof. A provision laying down, in the context of a civil dispute, a presumption of responsibility may therefore be regarded as infringing the fairness of a trial only if and insofar as it can result in an imbalance between the parties (No. 11941/86, Dec. 5.10.88, D.R. 57 p. 100). In the context of criminal proceedings Article 6 (Art. 6) requires Contracting States to confine presumptions of fact or law provided for in their criminal law within reasonable limits which take into account the importance of what is at stake and

maintain the rights of the defence. In particular a presumption so established by law must not be an irrebuttable one (Eur. Court HR, Pham Hoang v. France judgment of 25 September 1992, Series A no. 243, pp. 21-22, paras. 33-34).

The Commission observes that the Debtors Voidable Dispositions Act imposes on the plaintiff in proceedings thereunder the obligation to prove that a transaction of his debtor has occurred which was to his detriment, that the other person involved in the transaction was a close relative, and that the transaction had taken place within two years of the challenge of the transaction. If a creditor has succeeded in establishing these issues it is presumed that the other party had the intention to cause him damage. However, this presumption is rebuttable, as the defendant may prove that he had no knowledge of any such intent of the debtor, in particular by showing that he had acted in good faith. The defendant succeeds in proving this, if he shows that he has made the necessary enquiries into the financial situation of the debtor and has verified that the intended transaction could not cause damage to any existing creditor.

In the present case, in the view of the Supreme Court, the applicant failed to prove that she had acted in good faith as she had failed to undertake the specific enquiries referred to by the Supreme Court. Having regard to the careful examination of this issue by the Supreme Court on the basis of all the material in the file, the Commissions cannot find that its decision was arbitrary, or that the applicant, who was represented by counsel in the proceedings, could not properly argue her case and rebut the presumption of law operated under the Debtors Voidable Dispositions Act. The Commission therefore finds that, in the circumstances of the present case, the principle of equality of arms was not infringed as the applicant was not placed at a substantial disadvantage vis-a-vis her opponent.

The Commission therefore finds that there is no appearance of a violation of the applicant's right to a fair hearing under Article 6 para. 1 (Art. 6-1) 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.

2. The applicant further complains under Article 14 in conjunction with Article 6 para. 1 (Art. 14+6-1) of the Convention that the provisions of the Debtors Voidable Dispositions Act were discriminatory, as there was no reason why the reversal of the onus of proof was only imposed on close relatives while other persons, like former spouses or persons who had a close private and business relationship with the debtor are, not subject to this onus of proof.

The Commission, assuming that the reversal of the burden of proof in the proceedings against the applicant under the Debtors Voidable Dispositions Act raises an issue which comes within the ambit of Article 6 para. 1 (Art. 6-1) of the Convention, has examined her complaint under Article 14 in conjunction with Article 6 para. 1 (Art. 14+6-1) of the Convention.

Article 14 (Art. 14) of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission recalls that for the purpose Article 14 (Art. 14) of the Convention a difference in treatment is discriminatory only if

it has no objective and reasonable justification (Eur. Court HR, Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, p. 32, para. 24).

In the present case, the provisions of the Debtors Voidable Dispositions Act were applied to the applicant as she was the daughter of the debtor, and thus a close relative within the meaning of the Act. Having regard the findings of the Supreme Court, according to which it is justified to treat close relatives differently from other persons who conclude transactions with a debtor as the former have in general an easier and better access to information about the financial situation of a debtor, the Commission finds that this difference in treatment is based on an objective and reasonable criterion. Accordingly, the applicant has not been discriminated against in her right to a fair trial as guaranteed by Article 6 para. 1 (Art. 6-1) 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.

3. Lastly, the applicant complains that the provisions of the Debtors Voidable Dispositions Act violate the right to respect for family life under Article 8 (Art. 8) of the Convention, as they prevent close relatives from helping those members of their family in financial difficulties.

The Commission, having examined the applicant's remaining complaint as it has been submitted by her, finds that it does not disclose any appearance of a violation of the rights and freedoms set out in 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