AS TO THE ADMISSIBILITY OF

Application No. 17540/90
by Christian Neumayr
against Austria

The European Commission of Human Rights sitting in private on 8 September 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA

Mr. M. de SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 26 September 1990 by Christian Neumayr against Austria and registered on 10 December 1990 under file No. 17540/90;

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

A. The particular circumstances of the case

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

The applicant, born in 1959, is an Austrian national. He is resident at Obertrum, Austria, and a clerk by profession. Before the Commission, he is represented by Mr. G. Reiter, a lawyer practising in Salzburg.

On 23 August 1989 the Investigating Judge at the Salzburg Regional Court (Landesgericht), in the context of criminal proceedings against Mr. S., the applicant and others, ordered the search of the notary office of Mr. H. G. Brunner, a public notary practising in

Salzburg, in order to find documents and files concerning the suspects, who were listed in an annex to the search warrant. Such documents, except information submitted by the notary's clients, were to be seized. The Regional Court referred to S. 139 and S. 143 of the Austrian Code of Criminal Procedure (Strafprozeßordnung). The Court instructed the Vienna Economic Police (Wirtschaftspolizei), together with the Salzburg Federal Police Directorate (Bundespolizeidirektion), to execute the search. A representative of the Salzburg Notaries' Association should be invited to the search.

The Regional Court found in particular that Mr. S., the applicant and others were suspected of having committed fraud, fraudulent conversion and bankruptcy offences in that they had, in leading positions in various companies, issued real property shares while the corresponding property was sold to other persons. The commercial registry showed that various transactions concerning at least one of the firms involved were concluded in the notary's office. The Regional Court therefore assumed that documents and files concerning this firm, which were of paramount importance for the further inquiries, could be found. The Court referred in particular to a contract concluded between four of the suspects on 3 June 1985.

Referring to SS. 143 and 152 para. 1 (1) of the Code of Criminal Procedure, the Court ordered that all communications to the notary containing information from his clients were to be exempted from the search and seizure, not however other incriminating material, such as documents of a client kept by the notary.

On 12 September 1989, at 10 hrs., two officials of the Federal Ministry of the Interior (Bundesministerium für Inneres) presented the search and seizure warrant to Mr. Brunner in his office. They asked him to deliver the documents concerned voluntarily. Mr. Brunner refused. In this respect, he referred to a decision of the Salzburg Notaries' Association of 31 July 1989 according to which the request of the Investigating Judge to deliver the documents concerned contravened S. 37 paras. 1 and 3 of the Regulations on Notaries (Notariatsordnung), in conjunction with S. 152 para. 1 (2) of the Code of Criminal Procedure. Thereupon, the civil servant conducting the search agreed that the documents could be deposited with the Notaries' Association within two weeks where they would be sealed and kept until judicial review of the search and seizure warrant. As from 11 hrs., a member of the Salzburg Notaries' Association had been present.

The complaint which Mr. Brunner lodged with the Judges' Chamber (Ratskammer) at the Salzburg Regional Court was dismissed on 5 October 1989. The Judges' Chamber found that the search of the notary's office was in accordance with S. 139 para. 1 of the Code of Criminal Procedure, as well as S. 37 of the Regulations on Notaries. The Austrian and the Salzburg Notaries' Association also unsuccessfully lodged complaints about the search and seizure warrant.

On 23 October 1989 the Salzburg Regional Court ordered the seizure of the documents deposited at the Notaries' Association.

On 27 March 1990 the Judges' Chamber at the Salzburg Regional Court rejected the applicant's complaint about the search and seizure warrant of 23 August 1989 on the ground that he had failed to show how far this decision had affected him, in particular that the warrant applied to documents concerning his private matters or otherwise his relationship with Mr. Brunner.

On 23 May 1990 the Linz Court of Appeal (Oberlandesgericht) dismissed the applicant's hierarchical complaint (Aufsichtsbeschwerde). The Court of Appeal referred to an earlier decision dismissing the hierarchical complaint of the Austrian Notaries' Association about the search warrant concerned. Furthermore, it noted that the decision of the Judges' Chamber of 27 March 1990, denying the applicant, one of the

accused in the criminal proceedings concerned, the right to lodge a complaint, had been incorrect. However, it did not show any incorrect practice in general necessitating hierarchical measures.

On 10 July 1990 the documents which had been seized in October 1989 were transmitted to the Salzburg Regional Court in sealed envelopes. On 1 August 1990 the Judges' Chamber at the Salzburg Regional Court ordered that the documents in question be examined by the Investigating Judge, information obtained from clients being excluded. Further appeals lodged by Mr. Brunner remained unsuccessful.

On 28 November 1990 the Investigating Judge at the Salzburg Regional Court examined the documents concerned. Various documents contained in three envelopes, a legal opinion on articles of association of a company and annexes, as well as copies of other contracts, were seized. Some documents were given back.

On 23 January 1991 the Judges' Chamber at the Salzburg Regional Court, upon Mr. Brunner's complaint, decided that all documents contained in the first envelope, and some of the documents contained in the second and the third envelopes be given back to him. The remainder of the complaint was dismissed. The Judges' Chamber considered in particular that S. 152 para. 1 (2) of the Code of Criminal Procedure covered any information which defence or other counsel, notaries and trustees received, in their professional capacity, from their clients. As regards the documents which continued to be retained, namely three copies of a contract on a holding company (Zusammenarbeits- und Holdinggesellschaftsvertrag), three letters of a tax advising firm to a tax office, as well as a record of the meeting of the supervisory board of a limited company which had been certified by Mr. Brunner on 7 July 1989 and filed by him with the commercial registry at the Feldkirch Regional Court, the Judges' Chamber found that they had not been established at Mr. Brunner's office, nor had they been intended for his information and they had not only been produced for his files.

On 31 January 1992 the Austrian Supreme Court dismissed the plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) lodged by the Attorney General (Generalprokuratur) against the continued retention of one of the documents, i.e. the record of the meeting of the supervisory board of a limited company.

In the detailed reasoning of its decision, the Supreme Court noted that the Code of Criminal Procedure did not explicitly provide for any limitations on the seizure of objects. The Supreme Court then examined the ratio of the accused person's right to refuse statements and the different situations entitling witnesses to refuse testimony, and their implication for the seizure of objects. It noted that the notary, as the defence counsel, lawyer or economic consultant, were only entitled to refuse evidence supplied in the confidential context of their professional relationship with their clients. The primary purpose of this provision was not to protect the professional secrecy of lawyers, notaries etc., but to protect the defence rights of the accused so that there was no risk that information given to his defence counsel could be used by the prosecution to his disadvantage. The provision had been extended to notaries and economic consultants in view of their possible involvement in the defence.

The Supreme Court continued that limitations on the seizure of objects had to be seen against this background. The seizure of documents kept by persons belonging to this professional group was only prohibited to the extent that the objects, in particular documents, had been produced with their assistance and that the fact that they kept such a document was necessarily linked to the contract with their client. Thus only written information by their clients, and written material on their inquiries in fulfilment of their contract, i.e. file

notes, or information obtained by third persons in relation to their contract were covered by the prohibition on seizure. Furthermore, the prohibition extended to the product of the work of counsel or the notary for the client, unless this document, or copies thereof, had been made public, e.g. had been recorded in public registries, or if correspondence with public authorities was concerned.

As regards three copies of the contract on a holding company, the Supreme Court considered that they had been sent to Mr. Brunner to give an advisory opinion and therefore did not constitute information, but evidence which already existed. The same applied to three letters which had been sent to a tax office. The record on the meeting of the supervisory board of a limited company had already been entered in the commercial registry at the time of its seizure.

B. Relevant domestic law

S. 113 of the Code of Criminal Procedure provides in particular that, in the course of preliminary investigations or of the proceedings after indictment, any person affected by a decision taken or by a delay caused by the Investigating Judge may lodge a complaint with the Judges' Chamber at the Regional Court, which decides upon the complaint in camera after having heard the Investigating Judge and the Public Prosecutor.

SS. 139 to 149 of the Code of Criminal Procedure concern the search of premises and persons and the seizure of objects.

S. 139 para. 1 provides in particular that a search may only be carried out if there is a reasonable suspicion that there are objects, the possession or examination of which are relevant for a particular criminal investigation. According to S. 140 paras. 1 and 2, a search should in general only be carried out after having previously heard the person concerned, and only if the objects to be sought are not voluntarily surrendered and if the reasons resulting in the search have not been eliminated. The person concerned need not be heard where there is imminent danger.

S. 143 para. 1 of the Code of Criminal Procedure provides that, if objects relevant for the investigation or subject to forfeiture or confiscation are found, they have to be listed and taken into safe-keeping at the court or kept by the court or seized. The provision refers, in this respect, to S. 98 according to which objects in safe-keeping have to be placed in an envelope to be sealed by the court, or a label preventing any substitution or confusion has to be attached.

S. 152 para. 1 exempts lawyers, notaries and business trustees from the obligation to give evidence as witnesses in respect of information given to them in the exercise of their function.

S. 37 of the Regulations on Notaries provides that the notary is obliged to keep confidentiality concerning the deliberations in his presence unless he has to give information according to the Regulations on Notaries.

COMPLAINTS

The applicant complains that the search and seizure warrant of 23 August 1989 concerning the notary's office of Mr. Brunner in Salzburg violated his rights under Article 8 of the Convention. The applicant, in respect of the proceedings relating to the search and seizure warrant, also invokes Article 6, in particular Article 6 para. 3 (c), of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 26 September 1990 and registered on 10 December 1990.

On 6 January 1992 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 10 April 1992 the Government submitted their observations. The applicant submitted his observations in reply on 15 June 1992.

THE LAW

1. The applicant complains that the search and seizure warrant of 23 August 1989 violated his rights under Article 8 (Art. 8) of the Convention.

Article 8 (Art. 8) of the Convention, so far as relevant, states:

> "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 ... for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others."

The Government submit that the applicant cannot claim to be victim of a violation of his Convention rights in respect of the warrant of 23 August 1989 which concerned Mr. Brunner's office. They also contend that the applicant lodged this complaint out of time, as he had not duly stated it in his first correspondence with the Commission, but only in a later letter. They further point out that this warrant had not been executed, and that the applicant had failed to show that any of his correspondence with Mr. Brunner had been affected by the later procedure. In any event, the warrant complained of was justified under Article 8 para. 2 (Art. 8-2).

The applicant submits that the warrant of 23 August 1989 affected him in his capacity as accused in the criminal proceedings concerned, and could extend to his correspondence with Mr. Brunner. The formulation was not sufficient to make clear that information from clients was to be excluded. He submits that he had sent to Mr. Brunner one of the documents which continued to be seized, namely the copy of a contract on a holding company.

The Commission notes that on 23 August 1989 the Investigating Judge at the Salzburg Regional Court, in the context of criminal proceedings against the applicant and others, ordered the search of Mr. Brunner's office in order to find documents and files concerning the suspects, and the seizure of such documents, except information submitted by his clients. The search was in fact not carried out, on the condition that the documents concerned were brought to the Salzburg Notaries' Association where they were to be kept pending the judicial review of the search and seizure warrant. The Austrian courts confirmed the lawfulness of the warrant concerned, and the documents were then seized, transmitted to the Salzburg Regional Court and inspected by the Investigating Judge. Some documents continued to be retained.

The Commission, assuming compliance with the conditions under Article 26 (Art. 26) of the Convention, considers that the search and seizure warrant concerned extended to incriminating material in the criminal proceedings against, inter alia, the applicant. Such documents at the notary's office could relate to information about the

applicant. Having regard to the fact that the warrant was in fact not executed, and that the applicant did not show that the procedure related to information and data which were protected by his rights under Article 8 para. 1 (Art. 8-1), the question arises whether the applicant may claim to be a victim, within the meaning of Article 25 para. 1 (Art. 25-1), and whether there was an interference with his rights under Article 8 para. 1 (Art. 8-1) of the Convention.

However, the Commission leaves this question open, as the measure complained of is anyway justified under paragraph 2 of Article 8 (Art. 8-2) for the following reasons.

The Commission finds that the search and seizure warrant was based on S. 139 and S. 143 of the Austrian Code of Criminal Procedure, as confirmed by the Judges' Chamber at the Salzburg Regional Court and also the Austrian Supreme Court, and was thus "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

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The interference pursued a legitimate aim within the meaning of Article 8 para. 2 (Art. 8-2), namely the prevention of crime.

As regards the question of necessity, the Commission recalls that, in Article 8 para. 2 (Art. 8-2) as in several other provisions of the Convention, the phrase "necessary in a democratic society" implies the existence of a "pressing social need". The Contracting States enjoy a margin of appreciation in assessing whether such a need exists, but this goes hand in hand with a European supervision which covers the basic legislation and the decisions applying it, even those given by an independent court (Eur. Court H.R., Barfod judgment of 22 February 1989, Series A no. 149, p. 12, para. 28; Silver and Others judgment of 25 March 1983, Series A no. 61, pp. 37 - 38, para. 97).

The Commission considers that, in the context of the criminal proceedings against the applicant and other suspects, the reasons adduced by the Investigating Judge to issue the warrant of 23 August 1989, as confirmed by the Austrian courts, are relevant to the legitimate aim pursued.

The Commission further notes that the criminal proceedings, in the context of which the warrant complained of was issued, were, inter alia, directed against the applicant. The warrant explicitly privileged information obtained from clients, and also envisaged the presence of a representative of the Salzburg Notaries' Association on the occasion of the search. The fact that, upon Mr. Brunner's objections, the search was not carried out, and he himself deposited the documents concerned at the Notaries' Association, where they were kept sealed until termination of the judicial review, excluded any risk of excess. The Commission also notes that one of the documents which continued to be retained, namely the copy of a contract on a holding company, had been sent by the applicant. However, there is no indication that any material concerning the applicant, which was not related to the criminal proceedings against him, had been affected.

In these circumstances, the Commission, balancing the applicant's interests and the public interest in the prevention of crime, considers that there is nothing to show that the measure complained of was disproportionate. The Austrian authorities did not go beyond the margin of appreciation left to the national authorities under paragraph 2 of Article 8 (Art. 8-2) of the Convention.

It follows that the applicant's complaint under Article 8 (Art. 8) is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant has further invoked Article 6 para. 3 (c) (Art. 6-3-c) of the Convention and Article 1 of Protocol No. 1 (P1-1)

in respect of his above complaint. Article 6 para. 3 (c) (Art. 6-3-c) of the Convention guarantees a right to adequate legal representation, to be seen in the general context of Article 6 para. 1 (Art. 6-1) and the fairness of the criminal proceedings as a whole. Article 1 of Protocol No. 1 (P1-1) ensures the right to the peaceful enjoyment of possessions.

The Commission finds that the warrant of 23 August 1989 formed part of the criminal proceedings against the applicant and did not, as such, constitute a separate procedure for the purposes of Article 6 (Art. 6) of the Convention. The Commission cannot find that this aspect rendered the proceedings as a whole unfair.

Furthermore, the applicant's submissions do not disclose any appearance of a violation of his property rights under Article 1 of Protocol No. 1 (P1-1).

Consequently, 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, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission — President of the Commission

(M. de Salvia) — (C.A. Nørgaard)