AS TO THE ADMISSIBILITY OF

Application No. 27025/95
by P. ST.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
N. BRATZA
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

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 20 February 1995 by P. ST. against Austria and registered on 12 April 1995 under file No. 27025/95;

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, born in 1961, is an Austrian national. He is currently detained at Josefstadt prison in Vienna. In the proceedings before the Commission he is represented by Mr. F. Knöbl, a lawyer practising in Vienna.

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

On 27 February 1993 the applicant was taken into detention on remand on the suspicion of having, since 1988, sexually abused his daughter, born in 1980. In these and the following proceedings the applicant was represented by counsel.

On 8 March 1993, in the course of the preliminary investigation (Voruntersuchung), the applicant requested that a medical examination of his daughter be carried out in order to clarify whether anal intercourse had taken place as alleged by her. On 15 March 1993 he repeated this request and added that it would be ascertainable if such an act had been carried out between an adult man and a girl aged between eight and thirteen. Further, he submitted that his daughter had obtained her knowledge about the alleged sexual acts by watching pornographic videos, which he kept in the apartment.

On 26 July 1993 the trial against the applicant was opened before the Vienna Regional Criminal Court (Landesgericht für Strafsachen), sitting as a court of two professional and two lay judges (Schöffengericht). The applicant pleaded not guilty. Then the court heard the applicant's daughter as a witness. It also heard the applicant's wife and a number of other members of his family as well as the police officer to whom his daughter had made her statement. Further, it heard an expert in youth psychiatry as regards the ability of the applicant's daughter to testify and as regards the possibility that she had been influenced by watching pornographic videos. The defence put a number of questions to the applicant's daughter, the expert and some of the other witnesses.

Subsequently, the applicant requested that a medical examination of his daughter be carried out as she would have sustained injuries as a consequence of the anal intercourse alleged by her. He also requested that the opinion of a medical expert be taken in order to prove that his daughter would necessarily have sustained injuries from such intercourse and that these injuries would still be ascertainable and to take the opinion of an expert in the field of homosexuality in this context. Further, he requested a medical examination of his penis as it showed a particularity, namely a birth mark, which his daughter must have noticed if the alleged acts had actually taken place. The court dismissed the first request and reserved its decision as regards the others. The hearing was adjourned.

On 23 September 1993 the applicant requested that one of the pornographic videos which he kept in the apartment be shown at the trial in order to prove that it contained scenes which were similar to the incidents described by his daughter. He further requested that the psychiatric expert be questioned as to how far his daughter could have been influenced by watching such a film. He also repeated the requests for the taking of evidence on which the court had not yet decided.

According to the applicant, his counsel, prior to the hearing, requested the presiding judge to make the necessary arrangements for showing the pornographic video in court. However, the presiding judge told him that he would dismiss the respective request for the taking of evidence.

On 10 November 1993 the Vienna Regional Criminal Court continued the trial. The applicant again pleaded not guilty. The court then heard the school-friend of the applicant's daughter, to whom she had first mentioned that she had been abused by her father as well as the school psychologist, to whom she had subsequently given an account of the events. The defence put a number of questions to both witnesses.

At the end of the questioning, the defence made further requests for the taking of evidence. According to the minutes defence counsel repeated his request as regards a medical examination of the applicant's daughter. Further, he requested that the pornographic video in question be shown to the psychiatric expert and that he extend his opinion to the question whether the applicant's daughter, inspired by this film, had invented her allegations against him. The court dismissed all requests for the taking of further evidence as being irrelevant.

At the close of the hearing the Regional Court convicted the applicant of sexual abuse of a minor (Unzucht mit Unmündigen) and abuse of his parental authority (Mißbrauch eines Autoritätsverhältnisses) and sentenced him to two years' imprisonment, of which sixteen months were suspended on probation.

The court found that the applicant had repeatedly, from 1988 until January 1993 sexually abused his daughter, born in 1980, in that he had called her to the bathroom of the apartment and had forced her

to satisfy him either with her hand or orally. In 1990 he had once penetrated her anally but had stopped after a few movements. A second time he had intended to carry out anal intercourse but desisted in view of the girl's resistance. Finally, in the beginning of 1993 the applicant had forced his daughter to take a bath with him and had put his finger into her vagina.

In establishing the facts the court relied primarily on the statement of the applicant's daughter. It found that the account she had given of the events at issue was credible. Having regard to the personal impression she had made, the court found that she was not capable of wrongly accusing her father. In assessing her statements the court pointed out in particular that she had made her submissions repeatedly and that she had described details of the sexual acts which she could not know at her age unless she had actually been the victim of these acts. The court described the applicant's daughter as shy and reserved. Consequently, she had first confided her story to her school-friend, had then given the first detailed description of the events to the school psychologist and had repeated these statements before a female police officer and the investigating judge. At the trial she had made her statement in tears but had confirmed her earlier submissions. Further, the court relied on the expert opinion of the youth psychiatrist, according to which she was capable of realizing the consequences of her statements, and did not show any tendency to invent things or to act for the sake of attracting attention.

As regards the applicant's defence that his daughter had obtained her knowledge about the alleged sexual acts by watching some pornographic videos, the court noted in particular that the youth psychiatrist had excluded the possibility that the allegations against her father were only a projection of what she might have seen in a film. The applicant's daughter had denied seeing such films. Further, the court noted that the presiding judge had looked through the videos at issue. However, they did not contain any scenes similar to the incidents described by the applicant's daughter. Further, the court noted the applicant's argument that there had always been other persons in the apartment who would have noticed the incidents at issue. However, from the statements of the witnesses heard it could not be inferred that the applicant and his daughter were never alone in the apartment. Moreover, it was possible that the applicant was in the bathroom with her while other persons, in particular children, were present.

Further, the court dealt with the applicant's requests for the taking of evidence. As to the request for a medical examination of his daughter, the court noted that the incident at issue had taken place more than three years ago and that the applicant's daughter had stated that she had not been injured. Thus, no traces would be ascertainable any more. As to the applicant's request for examination of his penis, the court noted that his daughter had made use of her right to refuse an answer to this question. Finally, it was not clear, why the applicant had requested that an expert for homosexuality be heard.

On 1 March 1994 the applicant filed a request for rectification of the minutes. He claimed that several requests for the taking of evidence had not been entered in the minutes. He claimed that, at the second hearing, he had requested a medical examination of his penis, as it showed particularities, in order to prove that his daughter did not know them and had never even seen him naked. His request for a medical examination of his daughter had been recorded incompletely. He had requested an examination in order to clarify the question whether anal intercourse with a girl of about nine years, was possible without injuries. Finally, he had requested that the psychiatric expert amend his opinion.

On 2 March 1994 the applicant filed a plea of nullity and an appeal (Nichtigkeitsbeschwerde und Berufung). He referred in particular

to his requests for the taking of evidence of 15 March and 23 September 1993. Moreover, he claimed that he had requested a medical examination of his penis. Finally, he had requested that the psychiatric expert amend his opinion as regards the possible influence of the said pornographic videos on his daughter's statement. He complained that all his requests, some of which had not been entered in the minutes, had been dismissed. Further, the applicant complained that the court had exclusively relied on his daughter's statements which it found credible although she had not been able to answer relevant questions at the hearing.

On 19 April 1994 the Regional Court dismissed the applicant's requests for the rectification of the minutes. It noted that it had obtained a statement of the keeper of the minutes (Schriftführer). According to her statement and the recollection of the presiding judge the requests at issue had not been made as claimed by the applicant and the minutes were, thus, correct.

On 10 August 1994 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity.

The Supreme Court found that the formal requirements for raising a plea of nullity were not met as regards any requests for the taking of evidence which had not been made or repeated at the hearing at which the judgment was given. According to the minutes, the applicant had only made two requests at the hearing of 10 November 1993, namely that a medical examination of his daughter be carried out and that the pornographic videos be shown to the psychiatric expert who should then extend his opinion to the question of a possible influence of such films on the statements of the applicant's daughter. As to the first request the Supreme Court found that, given the lapse of time a lack of ascertainable traces would not exclude that anal intercourse had taken place. Moreover, such intercourse had only been carried out once with a few movements and had been attempted a second time. As regards the second request, the Supreme Court found that the psychiatric expert, at the hearing of 26 July 1993, had dealt with the applicant's arguments as regards the possible influence of pornographic videos on his daughter's statements. The applicant had failed to show why a further questioning of the expert would have been necessary. The Supreme Court concluded that the applicant's defence rights had not been violated by the refusal of his requests for the taking of evidence. The applicant's further submissions were an attempt to challenge the Regional Court's assessment of evidence and were as such inadmissible.

On 13 October 1994 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal against the sentence. Upon the Public Prosecutor's appeal and having regard to a further conviction of 27 May 1993 by the Donaustadt District Court (Bezirksgericht) which had found the applicant guilty of having assaulted his wife, the court changed the sentence to three years' imprisonment, not suspended on probation.

COMPLAINTS

The applicant complains under Article 6 about the unfairness of the criminal proceedings against him. He complains in particular that his requests for the taking of evidence were dismissed. Further, he submits that some of his requests for the taking of evidence were not recorded in the minutes. The applicant also complains that the presiding judge was biased. In this respect he alleges that the latter told him before the hearing of 10 November 1993 that he would dismiss his request to show a particular pornographic video in court. The applicant claims that a motion challenging the judge for bias, which is in principle available under the Code of Criminal Procedure, would

not have offered prospects of success.

THE LAW

The applicant complains under Article 6 (Art. 6) of the Convention that the criminal proceedings against him were unfair and that the presiding judge at the Regional Court was biased.

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

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

a. As to the applicant's complaint that his requests for the taking of evidence were dismissed, the Commission recalls that the admissibility of evidence is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to asses the evidence before them. The Commission's task is to ascertain whether the proceedings, considered as a whole, were fair (Eur. Court HR., Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, para. 43).

In the present case the Supreme Court found that the applicant had failed to fulfil the formal requirements for raising a plea of nullity as regards any requests for the taking of evidence which had not been made or repeated at the hearing at which the judgment was given, i.e. the one on 10 November 1993. The Commission finds that, in this regard, the applicant has failed to exhaust domestic remedies in accordance with Article 26 (Art. 26) of the Convention (cf. No. 13467/87, Dec. 10.7.89, D.R. 62 p. 269). As regards the two requests for the taking of evidence, which the applicant, according to the minutes, had made at the hearing of 10 November 1993, the Supreme Court gave detailed reasoning for finding that the first one was irrelevant and that the second one had essentially been dealt with. It concluded that the applicant had not been unduly restricted in his defence rights by their rejection.

The Commission notes that the Regional Court dealt extensively with the question of the credibility of the applicant's daughter. Apart from the personal impression, which she had made, the court had regard to the fact that, at the trial, she had confirmed the statements which she had made earlier to various persons, including her school-friend, the school psychologist and a police officer. All of these persons as well as the applicant's daughter were heard as witnesses and the applicant, assisted by counsel, had the possibility to question them. Further the court heard a psychiatric expert, who dealt inter alia with the question raised by the defence, whether the allegations by the applicant's daughter could have been influenced by watching a pornographic video.

The Commission further notes the applicant's related complaint that some of his requests for the taking of evidence were not entered in the minutes. The Commission observes that a remedy was available to the applicant in this respect, namely a request for the rectification of the minutes. However, the Regional Court dismissed the said request by decision of 19 April 1994, stating that according to the recollection of the keeper of the minutes and the presiding judge the requests at issue had not been made as claimed by the applicant.

In the circumstances of the case, the Commission finds that the applicant failed to show that the taking of evidence was arbitrary and therefore contrary to Article 6 para. 1 (Art. 6-1) of the Convention.

b. As to the applicant's complaint that the presiding judge at the Regional Court was biased, the question arises whether the applicant

has exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention.

The Commission recalls that a remedy within the meaning of this Article must be effective, that is capable of rectifying directly the situation complained of (cf. No. 18079/91, Dec. 4.12.91, D.R. 72 p. 263). The applicant claims that a motion challenging the presiding judge for bias, though available in principle, would not have been effective. However, the Commission is not required to decide upon this question, as the complaint is inadmissible for the following reasons.

The Commission recalls that the existence of impartiality for the purpose of Article 6 para. 1 (Art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (Eur. Court HR., Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28).

The applicant alleges that the presiding judge at the Regional Court told him before the hearing of 10 November 1993 that he would dismiss his request to show the pornographic video in court. However, having regard to its above findings concerning the taking of evidence, the Commission considers that the applicant's submissions do not suffice to put the personal impartiality of the presiding judge into doubt. The applicant failed to submit any other facts. His fear that the said judge lacked impartiality can, therefore, not be regarded as objectively justified.

It follows that 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