AS TO THE ADMISSIBILITY OF

Application No. 23867/94
by Josef PRINZ
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 10 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
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 28 March 1994 by Josef PRINZ against Austria and registered on 13 April 1994 under file No. 23867/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 8 March 1996 and the observations in reply as well as further comments and documents submitted by the applicant between May and August 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1945, is an Austrian national and resident at Stein. When lodging his application, he was detained in a psychiatric hospital at Mauer. He was later transferred to an institution in Göllersdorf.

The applicant's previous application No. 17844/89 relating to the alleged unfairness of criminal proceedings was declared inadmissible in 1991.

A. Particular circumstances of the present case

The facts, as submitted by the parties, may be summarised as follows.

On 4 October 1993 the Krems Regional Court (Landesgericht), before which the applicant was represented by official defence counsel, ordered that he be detained in an institution for mentally deranged offenders (Anstalt für geistig abnorme Rechtsbrecher), pursuant to S. 21 para. 1 of the Penal Code (Strafgesetzbuch). The Regional Court found that the applicant had intimidated numerous persons by threats of murder, but that he could not be held responsible because he was suffering from a mental illness. The applicant had, in several letters addressed to judicial authorities and lawyers, respectively, stated his intention to murder particular judges and lawyers, mentioning also either his "list of death" or details of the threatened offence.

In its decision, the Regional Court noted that the applicant had twelve previous convictions, inter alia of intimidation, coercion, bodily injury and property offences. The offences at issue in the pending proceedings had started in the context of civil proceedings, which had been instituted by the Austrian Attorney General's Department (Finanzprokuratur), claiming compensation for damages of AS 2,000 caused by the applicant in the context of a burglary. In a judgment of October 1991, the St. Pölten District Court (Bezirksgericht) had decided against the applicant. The applicant had filed counter-claims for compensation in respect of an illness suffered while serving a prison sentence and had threatened with terrorist attacks. Following the institution of criminal proceedings against him concerning the above threat, the applicant commenced addressing written threats of murder to various persons involved in these criminal proceedings, in particular judges and lawyers.

Furthermore, having heard two psychiatric experts, the Regional Court considered that the applicant suffered from a mental illness, namely paranoia querulans. He had a system of fixed ideas and a missionary devotion to implement his plans. His mental disturbances, combined with the further symptoms of aggressiveness, his cruelty and recklessness entailed a high risk for third persons. The Regional Court regarded a faculty opinion on these matters as unnecessary, taking into account that the two experts largely concurred in their opinions and that there were no contradictions or shortcomings within the meaning of the relevant provision of the Code of Criminal Procedure (Strafprozeßordnung).

Moreover, the Regional Court considered that it had not been required to hear the judges and other victims concerned, as requested by the applicant. In this respect, the Regional Court observed that the question of whether these persons had in fact been intimidated was irrelevant for legal reasons, the offence of intimidation being committed in case of threats of such a nature as to intimidate third persons in general, if the offender intended to intimidate. The Regional Court, having regard to the details stated in the applicant's various letters, found that his threats of murder were of such a nature as to intimidate third persons in general, and he had in fact intended to intimidate the persons concerned. Considering his mental illness, there was also a risk of further offences of the same kind.

The written judgment was served upon the applicant's official defence counsel on 29 October 1993.

The applicant, assisted by his official defence counsel, filed a plea of nullity (Nichtigkeitsbeschwerde) with the Supreme Court (Oberster Gerichtshof), challenging the dismissal of his requests for the taking of further evidence as well as the part of the legal reasoning and the findings as to his dangerousness in future. He further lodged an appeal (Berufung). Defence counsel did not file any grounds of appeal, and did not request that the applicant be permitted to attend the Supreme Court hearing. On 15 February 1994 the applicant personally filed submissions with the Supreme Court. According to the applicant, he also requested the Supreme Court for leave to attend the hearing of his plea of nullity and appeal, but this request was to no

avail.

On 2 March 1994 the Supreme Court held the hearing on the plea of nullity and the appeal in the absence of the applicant who was represented by his official defence counsel. The Supreme Court rejected the plea of nullity as well as the appeal.

The Supreme Court, in its judgment, found that the rejection by the trial court of the applicant's requests for the taking of evidence did not impair the rights of the defence. In particular, the Supreme Court confirmed the reasoning of the trial court that the applicant had failed to show any contradictions or shortcomings in the expert opinions which would be the only reasons to justify a faculty opinion. Moreover, the question of whether the victims had in fact been intimidated had been irrelevant. The Supreme Court also confirmed the legal qualification of the offences committed by the applicant. Finally, in the context of the applicant's appeal, the Supreme Court examined his arguments challenging the trial court's findings as to his dangerousness in future. In this respect, the Supreme Court considered that the prognosis was reliably founded on the psychiatric expert opinions and was confirmed by the general impression conveyed by the applicant's criminal acts.

The decision was received at the registry of the Krems District and Regional Court on 17 March 1994.

B. Relevant domestic law

a. Placement in an institution for mentally ill offenders

S. 21 of the Austrian Penal Code (Strafgesetzbuch) provides as follows:

> "1. If a person commits an offence punishable with a term of imprisonment exceeding one year, and if he cannot be punished for the sole reason that he committed the offence under the influence of a state of mind excluding responsibility (S. 11) resulting from a serious mental or emotional abnormality, the court shall order him to be placed in an institution for mentally ill offenders, if in view of his person, his condition and the nature of the offence it is to be feared that he will otherwise, under the influence of his mental or emotional abnormality, commit a criminal offence with serious consequences.
>
> 2. If such a fear exists, an order for placement in an institution for mentally ill offenders shall also be made in respect of a person who, while not lacking criminal responsibility, commits an offence punishable with a term of imprisonment exceeding one year under the influence of his severe mental or emotional abnormality. In such a case the placement is to be ordered at the same time as the sentence is passed."

b. Plea of nullity and appeal against sentence

A first-instance court judgment given by a Regional Court can be challenged by a plea of nullity to the Supreme Court on specific grounds enumerated in S. 281 para. 1 of the Code of Criminal Procedure. In general, the Supreme Court conducts a public hearing on the plea of nullity which may also be combined with a public hearing on appeals against sentence. As regards hearings on a plea of nullity, S. 286 of the Code of Criminal Procedure provides that if the accused is under arrest, the notice of hearing given to him shall mention that he may only appear through counsel.

The sentence as such can be challenged by way of an appeal against sentence. It may concern both points of law (in particular whether mitigating or aggravating circumstances have been correctly

taken into account) and factors relating to the assessment of the sentence. As regards the personal appearance of the accused at appeal hearings, S. 296 para. 3, second sentence, of the Code of Criminal Procedure provides that an accused who is detained shall be brought before the court if he has made a request to this effect in his appeal or counter-statement or otherwise if his personal presence appears necessary in the interest of justice.

COMPLAINTS

1. The applicant complains that both the proceedings before the Regional Court and the Supreme Court were unfair. He invokes Article 6 paras. 1, 2 and 3 (a), (b), (c) and (d) of the Convention.

a. The applicant complains in particular that he was not promptly informed about the accusations against him, that he did not receive a copy of the bill of indictment and was refused a copy of the files. He also complains that he had no sufficient time to prepare his defence at the trial and that, following the forced appointment of an official defence counsel, he could not effectively defend himself in person. He further considers that the Regional Court incorrectly refused his requests to hear witnesses.

b. As regards the proceedings before the Supreme Court, the applicant complains about the failure to permit his presence at the hearing of his plea of nullity and of his appeal.

2. Finally, the applicant submits that his confinement to an institution for mentally deranged offenders pending the proceedings before the Supreme Court and the bad treatment in the institution amount to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 March 1994 and registered on 13 April 1994.

On 29 November 1995 the Commission decided to communicate to the respondent Government the applicant's complaint that he was not present at the Supreme Court's hearing on his appeal.

The Government's written observations were submitted on 8 March 1996. The applicant submitted observations in reply and further comments and documents between May and August 1996.

THE LAW

1. The applicant complains that both the proceedings before the Regional Court and the Supreme Court were unfair. He invokes Article 6 paras. 1, 2 and 3 (a), (b), (c) and (d)
(Art. 6-1, 6-2, 6-3-a, 6-3-b, 6-3-c, 6-3-d) of the Convention.

Article 6 (Art. 6), so far as relevant, provides as follows:

"1. 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. ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

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;
..."

a. The applicant complains in particular that he was not promptly informed about the accusations against him, that he did not receive a copy of the bill of indictment and was refused a copy of the files. He also complains that he had no sufficient time to prepare his defence at the trial and that, following the forced appointment of an official defence counsel, he could not effectively defend himself in person. He also considers that the Regional Court incorrectly refused his requests to hear witnesses.

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 in 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, pp. 81, 88 and Eur. Court HR, 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).

In the circumstances of the present case, the Commission, having regard to all material before it, finds that the applicant's submissions regarding the preliminary investigations as well as the trial proceedings before the Regional Court do not disclose any appearance of a breach of Article 6 (Art. 6). The Commission considers in particular that the applicant, assisted by official defence counsel, could effectively ensure his defence at these stages of the proceedings. Moreover, the Regional Court's decisions to reject the applicant's requests to take further evidence were reasoned by the lack of relevance of the circumstances to be proven and cannot be objected to under Article 6 (Art. 6).

It follows that the applicant's complaints in these respects are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

b. As regards the proceedings before the Supreme Court, the applicant complains about the failure to allow his presence at the hearing concerning both his plea of nullity and his appeal against sentence.

aa. The Government claim that the applicant's complaint that he could not attend the Supreme Court hearing of his appeal should be rejected as inadmissible for non-exhaustion of domestic remedies by virtue of Articles 26 and 27 (Art. 26, 27) of the Convention. They point out

that he failed to request his attendance at the hearing of his appeal in accordance with S. 296 para. 2 of the Austrian Code of Criminal Procedure.

Under Article 26 (Art. 26) of the Convention, the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. Normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. Article 26 (Art. 26) also requires that any procedural means that might prevent a breach of the Convention should have been used (cf. Eur. Court HR, Akdivar v. Turkey judgment of 16 September 1996, para. 66, to be published in the Reports of Judgments and Decisions for 1996). In this context, it has been recognised that Article 26 (Art. 26) must be applied with some degree of flexibility and without excessive formalism; it is essential to have regard to the particular circumstances of each individual case (cf. Akdivar judgment, op. cit., para. 69).

In the present case, the Commission considers that the question whether the applicant ought to have requested leave to attend the hearing of his appeal is so closely related to the merits of the applicant's complaint under Article 6 (Art. 6) that it cannot be separated.

bb. The Government submit that the hearing before the Supreme Court did not involve any question which would have necessitated the applicant's personal attendance.

The applicant objects to the Government's views. He submits inter alia that his appeal against sentence related to the question of his confinement to an institution for mentally deranged offenders.

The Commission considers, in the light of the parties' submissions, that this part of the application raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Commission concludes, therefore, that the applicant's complaint that he could not attend the Supreme Court hearing is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

2. As regards the remainder of complaints, the Commission finds that, even assuming compliance with Article 26 (Art. 26) of the Convention, the applicant's submissions concerning his confinement to an institution for mentally deranged offenders pending the proceedings before the Supreme Court and his general allegations of bad treatment in this institution, do not disclose any appearance of a violation of Convention rights, in particular of Article 3 (Art. 3). 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.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint that he was not present at the hearing before the Supreme Court;

and, unanimously,

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber