SUR LA RECEVABILITÉ

Application No. 23189/94
by Wilhelm PUTZ
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 6 September 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC

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 May 1993 by Wilhelm Putz against Austria and registered on 6 January 1994 under file No. 23189/94;

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

The applicant, born in 1936, is an Austrian national and resident in Bad Goisern. He is a civil engineer and businessman by profession. In the proceedings before the Commission he is represented by Mr. C. Schwab, a lawyer practising in Wels.

The applicant's previous Application No. 18892/91 concerns his complaints that he did not have a fair hearing by an impartial tribunal in respect of two Austrian court decisions imposing penalties upon him for "offences against the order in court", and that he had no effective remedy in respect of these court decisions. These complaints were declared admissible by the Commission on 3 December 1993. This case is presently pending before the Court.

In 1985 bankruptcy proceedings were opened against the applicant and in September 1985 preliminary investigations were instituted before the Wels Regional Court (Landesgericht) against him and others on the suspicion of inter alia bankruptcy offences. On 16 September 1985 the applicant was taken into detention on remand. In November 1985 the applicant's right to correspondence from the remand prison was limited to one letter of one page per day, except for correspondence with the liquidator and the defence counsel. On 1 July 1986 the Review Chamber

(Ratskammer) of the Wels Regional Court dismissed the applicant's appeals against the opening of the preliminary investigations, his detention on remand and the restriction of his right to correspondence as well as his complaints about the accounting expert.

Furthermore, in 1990 criminal proceedings under the Code of Financial Offences (Finanzstrafgesetz) were opened against the applicant before the Wels Regional Court. In these proceedings the applicant was assisted by the official defence counsel Mr. D. Jahnel.

In 1991 the criminal proceedings under the Code of Financial Offences were joined to the proceedings concerning the charges of inter alia bankruptcy.

On 29 August 1991 the Board of the Upper Austrian Lawyers' Chamber (Ausschuß der Rechtsanwaltskammer) dismissed the objection against the continuing appointment of Mr. D. Jahnel as official defence counsel regarding the tax offences. However, the Board decided that Mr. D. Jahnel was not required to exercise his duties as defence counsel as long as the applicant's defence was ensured by the two official defence counsel, Mr. Schwab and Mr. W. Jahnel, acting in the proceedings concerning the bankruptcy charges.

On 6 September 1991 the applicant inquired with the Lawyers' Chamber about his representation in the criminal proceedings under the Code of Financial Offences. He submitted that Mr. W. Jahnel had told him about the decision of 29 August 1991 and complained that he would no longer be adequately defended. He also stated that Mr. D. Jahnel had failed to inform him about the said decision. He therefore requested that Mr. D. Jahnel be released as defence counsel.

On 29 October 1991 the Second Division of the Board of the Lawyers' Chamber released Mr. D. Jahnel as official defence counsel.

On 14 November 1991 the Board of the Lawyers' Chamber dismissed the applicant's appeal. The Board considered that the applicant had no right to appeal against decisions on the appointment and release of official defence counsel under the relevant provision of the Lawyers' Regulations (Rechtsanwaltsordnung). Moreover, he could not claim to be aggrieved by the said decision, as he himself had requested his counsel's release by letter of 6 September 1991. As the decision of 29 October 1991 corresponded to his request, no particular reasoning had been necessary.

On 2 October 1992 the Constitutional Court (Verfassungs-gerichtshof) dismissed the applicant's complaints against the decisions of 29 August and 14 November 1991 on the grounds that they offered no prospect of success and were not excluded from the competence of the Administrative Court (Verwaltungsgerichtshof). The decision was served on 9 December 1992.

Meanwhile, on 21 November 1991 the Wels Regional Court had convicted the applicant of ordinary bankruptcy (fahrlässige Krida), of fraudulent conversion, of defamation, of having defrauded social security contributions and of tax evasion, i.e. offences under the Austrian Penal Code (Strafgesetzbuch), the Social Insurance Act (Allgemeines Sozialversicherungsgesetz) and the Code of Financial Offences. The Court had sentenced him to eighteen months' imprisonment on probation, and, as regards the tax offences, imposed a fine amounting to AS 59 million and a further sentence of six months' imprisonment. The period of his detention on remand of almost six months was to be counted towards these sentences.

On 27 May 1993 the Austrian Supreme Court (Oberster Gerichtshof), upon the applicant's plea of nullity (Nichtigkeitsbeschwerde), quashed the Wels Regional Court's judgment regarding his conviction of ordinary bankruptcy, of having defrauded social security contributions and of

tax evasion. To this extent, the Supreme Court referred the case to the Innsbruck Regional Court. The remainder of the applicant's plea of nullity was dismissed.

The Supreme Court found that the applicant's objections regarding the accountant expert and requests for an amendment of the expert evidence in view of further documentary material had been well-founded. As regards the accountant expert, the Supreme Court noted that he had already acted as expert on behalf of the liquidator in the context of the bankruptcy proceedings. Moreover, the relevance of the newly discovered documents could not be excluded.

As regards the applicant's conviction of fraudulent conversion and of defamation, the Supreme Court dismissed numerous complaints concerning the conduct of the trial proceedings and the refusal of requests lodged in the course thereof.

The Supreme Court considered in particular the applicant's submission that two of the judges of the Wels Regional Court should not have been sitting in the case at issue, as they had been acting in previous criminal proceedings against him. The Supreme Court found that the applicant had not shown that the judges concerned were disqualified in respect of the present proceedings. His arguments could not therefore be regarded as a ground of nullity. Moreover, the refusal of his request, lodged in the course of the trial, for a production of the files concerning the question of disqualification of judges in the context of the previous proceedings, had not thus violated his defence rights.

The Supreme Court also dismissed the applicant's complaint that he had not been duly assisted by defence counsel in the proceedings under the Code of Financial Offences. The Court noted that following the joinder of these proceedings with the proceedings concerning in particular the charges of fraud and bankruptcy offences, one of his official defence counsel appointed in the latter proceedings, who had at some stage intervened as counsel in the context of the criminal proceedings under the Code of Financial offences, had been present and ensured his defence at the trial hearings.

The Supreme Court also found that the applicant's complaint about the Regional Court's decision to dismiss his request, lodged in the course of the trial, for a complete copy of all files and postponement of the hearing for at least four weeks was unfounded. In this respect, the Supreme Court noted that the Regional Court had stated in its reasons that the applicant's counsel had sufficient time prior to the trial to update his defence files as compared to the court files and that he could further do so until the trial was continued.

The Supreme Court, having regard to all material before it, further considered that the Regional Court, having regard to the results of the taking of evidence so far, had properly refused to hear further witnesses as the applicant had failed to show the relevance of their statements. Moreover, findings regarding the expert as well as the amendment of the expert evidence were irrelevant regarding the charge of fraudulent conversion.

Finally, the Supreme Court found no shortcomings in the reasoning of the Regional Court's judgment.

The criminal proceedings before the Innsbruck Regional Court have not yet terminated.

Apparently in 1993 the applicant brought criminal charges against the official liquidator and others, including the judge at the Wels Regional Court who had been in charge of supervising the official liquidator, which he pursued in private prosecution proceedings. On 9 July 1993, following the applicant's motion to challenge all judges

of the Wels Regional Court for bias, the President of the Wels Regional Court informed the President of the Linz Court of Appeal (Oberlandesgericht) that, having regard to their personal relations to the above-mentioned judge as colleague, all judges were to be considered as biased in the proceedings against him.

COMPLAINTS

The applicant complains under Article 6 paras. 1 and 3 of the Convention about the criminal proceedings against him.

He considers that, following the decisions of the Board of the Upper Austrian Lawyers' Chamber of 29 August and 14 November 1991, he remained without the assistance of counsel for the defence against the charges under the Code of Financial Offences.

According to the applicant, his defence rights were also violated due to other circumstances, namely, the refusal to produce the court files concerning the question of disqualification of judges in the context of previous criminal proceedings against him impaired his defence rights, the restriction on his correspondence during his detention on remand, the alleged refusal of a complete copy of the court files and postponement of the trial and the dismissal of numerous requests for the taking of further evidence.

Furthermore, the Supreme Court had incorrectly denied the relevance of his complaints regarding the accountant expert with regard to his conviction of fraudulent conversion.

The applicant further submits that the Supreme Court, when considering his complaints about the taking of evidence, had regard to the contents of court files concerning related court proceedings.

The applicant also complains about the alleged lack of impartiality of the judges at the Wels Regional Court. In this respect, he notes that judges had been disqualified in previous criminal proceedings against him. Moreover, he had reproached one of their colleagues, who had been involved in the bankruptcy proceedings against him, with various violations of the law and negligence in supervising the official liquidator. Furthermore, in 1993, in the proceedings against inter alia this judge, all judges of the Wels Regional Court had declared themselves to be biased.

2. The applicant complains under Article 7 of the Convention that he had been wrongly convicted of defamation, alleging that the impugned statements had been justified.

3. As regards the restriction on his correspondence during his detention on remand, he also invokes Article 8 of the Convention.

THE LAW

1. The applicant complains about the criminal proceedings against him, which were conducted before the Wels Regional Court and the Supreme Court. He invokes Article 6 para. 1 and para. 3 (Art. 6-1, 6-3) of the Convention which, so far as relevant, provide as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> 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 Commission observes that the Supreme Court, in its judgment of 27 May 1993, quashed the applicant's conviction of ordinary bankruptcy, of having defrauded social security contributions and of tax evasion, and to this extent referred the case back to the Innsbruck Regional Court. The conviction of fraudulent conversion and defamation was confirmed.

b. The Commission recalls that the question of whether a trial conforms to the standards laid down in Article 6 (Art. 6) must be decided on the basis of an evaluation of the trial in its entirety (cf. No. 11058/84, Dec. 13.5.86, D.R. 47 p. 230 with further references). Accordingly, the applicant's complaints relating to the exercise of his defence rights in respect of the charges which are still pending before the Innsbruck Regional Court, inter alia the charges under the Code of Financial Offences, are premature.

c. The remainder of the applicant's complaints about the conduct of the proceedings relates in particular to the taking of evidence. It seems appropriate to look at these complaints from the points of view of paragraphs 1 and 3 of Article 6 (Art. 6-1, 6-3) taken together, especially as the guarantees in paragraph 3 represent aspects of the concept of a fair trial contained in paragraph 1 (Eur. Court H.R., Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29).

As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. More specifically, Article 6 para. 3 (d) (Art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it does not require the attendance and examination of every witness on the accused's behalf (cf., Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

In the present case, the applicant's requests to hear further witnesses were refused for their lack of relevance, taking into account the results of the Regional Court's taking of evidence as a whole. Having regard to all material before it, the Commission finds no sufficient grounds to form the view that there were any special circumstances which could prompt the conclusion that the failure to hear these witnesses was incompatible with Article 6 (Art. 6).

Furthermore, the applicant failed to show that, with the assistance of two defence counsel, he could not effectively ensure his defence in the proceedings before the Wels Regional Court. In this respect, the Commission notes the findings of the Supreme Court in its decision of 27 May 1993 that, following the joinder of the proceedings under the Code of Financial Offences with the proceedings concerning in particular the charges of fraud and bankruptcy offences, one of his official defence counsel appointed in the latter proceedings, who had at some stage intervened as counsel in the context of the proceedings

under the Code of Financial offences, had been present and ensured his defence at the trial hearings. Moreover, the restriction on his correspondence during his detention on remand did not impair his defence, as unlimited correspondence with his counsel was expressly permitted. As regards the refusal of the Wels Regional Court to have a completely new copy of the court files prepared in the course of the trial and to postpone the trial for that purpose, it is unclear whether and to what extent this decision had any bearing on the applicant's conviction of fraudulent conversion and defamation. In any event, the applicant's counsel had the possibility to update and complete his defence files in between the trial hearings. There is no indication, that the applicant and his counsel could not properly prepare their defence and present their arguments in court.

Finally, the applicant's submissions do not disclose any appearance of unfairness of the proceedings before the Austrian Supreme Court. His assertion that the Supreme Court, when considering his complaints regarding the taking of evidence, had regard inter alia to the contents of other court files, does not show any undue limitation of his defence rights. In this respect, the Commission considers in particular that the Supreme Court reviewed the Regional Court's decision to refuse the hearing of further witnesses on the basis of the applicant's appeal submissions as to the relevance of their statements.

d. As to the applicant's complaints about the alleged lack of impartiality of the judges at the Wels Regional Court, the Commission has had regard to the relevant criteria established in the relevant case-law of the Convention organs (Eur. Court H.R., Hauschildt judgment of 24 May 1989, Series A no. 154, p. 21, para. 46; Fey judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28). The Commission finds that the applicant's submissions do not disclose any reason to doubt the impartiality of the judges at the Wels Regional Court who had been conducting the proceedings against him. In this respect, the Commission has taken into account the Supreme Court's judgment of 27 May 1993, according to which the applicant's submission that two of the judges of the Wels Regional Court should not have been sitting in the case at issue, as they had acted in previous criminal proceedings against him, did not afford any reason for disqualification in the context of the present proceedings. Moreover, there are no reasonable grounds to conclude that judges, accepting doubts as to their impartiality to decide upon criminal charges brought by the applicant against inter alia one of their colleagues, lacked impartiality in the earlier criminal proceedings against the applicant.

Considering the circumstances of the case as a whole, the Commission finds no appearance of a violation of the applicant's rights under Article 6 paras. 1 and 3 (Art. 6-1, 6-3) 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).

2. As regards the applicant's complaint under Article 7 (Art. 7) of the Convention concerning his conviction of defamation, the Commission considers that the submissions are limited to the allegation of factual and legal errors in the Wels Regional Court's finding, as confirmed by the Supreme Court, that he had committed the offence of defamation, pursuant to the relevant provisions of the Austrian Penal Code. This part of the application is, therefore, also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

3. Finally, the Commission, in accordance with Article 26 (Art. 26) of the Convention, is not called to examine whether or not the limitations on the applicant's correspondence during his detention on remand, imposed in 1985, amounted to a violation of his right to respect for his correspondence under Article 8 (Art. 8) of the Convention. The Commission notes that the applicant lodged this complaint only in May 1993, that is more than six months after the

event complained about. It follows that this complaint is inadmissible under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)