AS TO THE ADMISSIBILITY OF

Application No. 21585/93
by Gerhard RESCH
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

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 December 1992 by Gerhard Resch against Austria and registered on 25 March 1993 under file No. 21585/93;

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 1951. He is the manager (Geschäftsführer) of a construction company which carries his name. The applicant lives in Aigen im Mühlkreis, in Upper Austria. He is represented by Mr P. Wagner, a lawyer practising in Linz. The facts of the present case, as submitted by the applicant, may be summarised as follows:

The particular circumstances of the case

On 17 May 1991 five penal notices (Straferkenntnisse) were served on the applicant by the Rohrbach District Authority (Bezirkshauptmannschaft), finding him guilty of contraventions of Regulations 43 (1) and 44 (4) of the Construction Workers (Protection) Order (Bauarbeiterschutzverordnung). He was fined 5,000 shillings in each case, with six days' detention in default in each case. His appeal, addressed to the Independent Administrative Senate for Upper Austria (Unabhängiger Verwaltungssenat), was rejected by the Upper Austrian Regional Government (Landesregierung) on 12 May 1992. The applicant then made an administrative complaint to the Administrative Court (Verwaltungsgerichtshof). The Administrative Court on 29 June 1992 dismissed the complaint. It noted that the applicant accepted that the facts alleged (the individual contraventions of the safety legislation) had taken place. As to the "subjective" element, the applicant would only have been relieved, in accordance with Section

31 (5) of the Workers (Protection) Act, of (administrative) criminal responsibility if he could have shown that, in delegating the oversight of the building site to a third person, he had shown the necessary care. That care included complying with the safety regulations, and the applicant had not shown it. As to Article 6 of the Convention, the Administrative Court considered that it was sufficient to refer to a previous decision of 8 May 1987, in which it had found that the Austrian reservation to Article 5 of the Convention prevented the application of Article 6.

Relevant domestic law

Regulation 43 (1) of the Construction Workers (Protection) Order provides that work on roofs may only be commenced when appropriate safety measures have been put in place. Regulation 44 (4) of the Order provides that workers on roofs with a slope of over 20° must attach themselves securely to the roof with ropes.

Section 31 (5) of the Employees (Protection) Act provides that employers and their representatives are criminally liable where a contravention of regulations is committed with their knowledge or when they have failed to exercise appropriate care in supervising work or representatives.

COMPLAINTS

The applicant alleges a violation of his right to "fair proceedings in accordance with Article 6 of the Convention". He also alleges that he was required to establish his innocence, rather that the authorities being required to prove him guilty, and that this was in violation of Article 6 para. 2 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 December 1992 and registered on 25 March 1993.

On 7 September 1993 the Commission (First Chamber) decided to bring the application to the notice of the respondent Government without requesting observations.

THE LAW

1. The applicant alleges a violation of Article 6 para. 2 (Art. 6-2) of the Convention on the ground that he was required to establish his innocence because he had had to show that he had displayed the necessary care in delegating supervision of the works. Article 6 para. 2 (Art. 6-2) reads as follows.

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

The Commission notes that the applicant was charged with and convicted of offences under Regulations 43 (1) and 44 (4) of the Construction Workers (Protection) Order. Regulation 43 (1) provides that particular types of work may only be commenced when appropriate safety measures have been put in place. Regulation 44 (4) provides that roof workers must be safely attached with ropes. The applicant's administrative criminal liability flowed from Section 31 (5) of the Employees (Protection) Act, which attaches criminal administrative liability to employers who fail adequately to supervise, in this case, construction works.

The Commission recalls that the facts alleged were not at issue in the present case. Moreover, it remains in cases such as the present for the prosecuting authorities to establish the elements of the administrative offence. Thus in the present case, the prosecution had

to establish that the facts in connection with the specific incidents were as alleged (in connection with the Regulations), and that the applicant was the person responsible under Austrian law for the company. Article 6 para. 2 (Art. 6-2) of the Convention does not prohibit presumptions of fact and law in principle, but does require States to remain within certain limits as regards criminal law which take into account the importance of what is at stake and maintain the rights of the defence (Eur. Court H.R., Salabiaku judgment of 7 October 1988, Series A no. 141-A, pp. 14 - 18, paras. 26 - 30).

The applicant accepts that the measures actually taken did not comply with the relevant Regulations, and so it is not easy to see which presumptions are alleged to have been applied. In any event, in the context of regulations designed to protect workers, the Commission finds that the application of those regulations to the employer rather than to the employee does not amount to a presumption which exceeds the limits set by the European Court of Human Rights in the case of Salabiaku: what is at stake is the effective protection of workers, and it remains open to the defence to show that adequate measures were in fact taken, such that the rights of the defence are maintained.

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 also alleges violation of Article 6 para. 1 (Art. 6-1) of the Convention, which guarantees, inter alia, a fair hearing before an independent and impartial tribunal in the determination of a criminal charge.

The Commission has already given notice of the application to the respondent Government but has not requested the parties to submit their observations. The Commission has now adopted its Reports in cases similar to the present one (cf., for example, No. 15523/90, Schmautzer v. Austria, Comm. Rep. 19.5.94, pending before the European Court of Human Rights), and finds it appropriate now to resume the proceedings in the present case in the light of those Reports.

For these reasons, the Commission

by a majority
DECLARES INADMISSIBLE the complaint that the presumption of innocence was violated; and

unanimously
DECIDES TO ADJOURN its examination of the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)