AS TO THE ADMISSIBILITY OF

Application No. 22606/93
by S. Z.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 6 April 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
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

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 5 May 1993 by S. Z. against Austria and registered on 10 September 1993 under file No. 22606/93;

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

The applicant was a citizen of former Jugoslavia, born in 1966, and is presently detained at the Stein prison.

On 23 September 1992 the Vienna Public Prosecutor's Office (Staatsanwaltschaft) preferred a bill of indictment against the applicant and S.P. as co-accused, charging them with murder.

On 3 and 4 December 1992 the trial took place before the Court of Assizes (Geschwornengericht) at the Vienna Regional Court (Landesgericht) in which the applicant and S.P. were both assisted by official defence counsels. According to the transcript of the court hearing the court heard three witnesses and three experts and neither of the accused requested the taking of further evidence at the trial.

On 4 December 1992 the Court of Assizes convicted the applicant and S.P. of murder and aggravated robbery and sentenced them to life imprisonment. The Court of Assizes found that on 5 June 1992 the accused had murdered a woman, an acquaintance of the applicant, and taken her jewels.

The applicant introduced a plea of nullity (Nichtigkeits-beschwerde) and an appeal (Berufung) against the sentence. In his plea of nullity the applicant submitted in particular that the questionnaire

submitted to the jury was incorrect. In his appeal he submitted that the Court of Assizes had failed to take into account as further mitigating circumstances his confession and that he had acted under the influence of S.P.

On 20 April 1993 the Supreme Court (Oberster Gerichtshof), after a public hearing in which the applicant was represented by his counsel but did not participate himself, dismissed his plea of nullity and appeal. As regards the plea of nullity, the Supreme Court found that the questions put to the jury had been correct. As regards the appeal the Supreme Court found that there were no indications in the file for the alleged incitement by S.P. and that the Court of Assizes had acted correctly in passing the sentence.

COMPLAINTS

The applicant complains about his conviction and the alleged unfairness of the proceedings concerned. He submits in particular that he had been questioned by the police in the absence of an interpreter, that the case-file had not been translated for him into Serbo-Croat and that the Court of Assizes had failed to hear important witnesses. He further submits that his defence counsel did not defend him properly. He also complains that he could not attend the hearing of the Supreme Court. He invokes Article 6 paras. 1, 2, 3 (a) and 3 (d) and Article 7, 8, 13 and 14 of the Convention.

THE LAW

1. With regard to the judicial decisions of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its 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 (see e.g. No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

The applicant further complains that the criminal proceedings did not comply with the requirements of Article 6 (Art. 6) of the Convention in several respects.

2. He submits that he had been questioned by the police in the absence of an interpreter, that the case-file had not been translated for him into Serbo-Croat and that the Court of Assizes failed to hear important witnesses.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 6 (Art. 6) of the Convention as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognized rules of international law. It recalls that domestic remedies within the meaning of Article 26 (Art. 26) of the Convention have only been exhausted if, before the highest domestic body, the applicant has submitted in substance his complaint before the Commission, even without particular reference to the Convention (No. 7299/75 and 7496/76, Dec. 4.12.79, D.R. 18 p. 5; No. 12164/86, Dec. 12.10.88, D.R. 58 p. 63).

The Commission notes that the applicant in his plea of nullity did not raise the issue of the interpreter, the translation of the case file or the Court of Assizes' failure to summon witnesses for the defence.

It follows that the applicant has not complied with the requirement as to the exhaustion of domestic remedies contained in

Article 26 (Art. 26) of the Convention.

This part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. As regards the applicant's further complaints about the alleged unfairness of the proceedings leading to his conviction, the Commission recalls that the guarantees contained in paragraph 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the general concept of fair trial set forth in paragraph 1 of this Article (Art. 6-1). In the circumstances of the present case, it will consider the applicant's complaints from the angle of paragraph 1 taken together with the principles inherent in paragraph 3 (Art. 6-3)(see Eur. Court H.R., Bönisch judgment of 6 May 1985, Series A no. 92, p. 15, para. 29; Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29).

a. As regards the applicant's complaint that his defence counsel did not defend him properly, the Commission recalls that the domestic courts are obliged under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention to ensure the accused's effective defence, but the person concerned must provide them with the wherewithal to notice any deficiency in the defence (No. 9022/80, Dec. 13.7.83, D.R. 33 p. 21 at p. 36).

However, the applicant has not shown that at any stage in the proceedings he had notified the authorities of the alleged shortcomings in his defence. In these circumstances there is no appearance of a violation of the applicant's right to a fair hearing in this respect.

b. Lastly the applicant submits that he could not attend the public hearing before the Supreme Court.

The Commission notes that this hearing concerned first the applicant's plea of nullity. In this respect the Commission recalls that under Austrian law the Supreme Court in dealing with nullity proceedings, is primarily concerned with questions of law that arise in regard to the conduct of the trial and other matters. While the Supreme Court is bound by the findings of fact made by lower courts, it may be required to examine whether a motion to take evidence has been properly refused by the trial court and whether the excluded facts might have influenced the jury's verdict. If the accused is represented by counsel, neither paragraph 1 nor 3 (c) of Article 6 (Art. 6-1, 6-3-c) require his presence at such proceedings (Eur. Court H.R., Kremzow judgment of 21 September 1993, Series A no. 268-B, p. 44, para. 63). In the present case, the applicant had been represented by counsel and had not requested to be present at the hearing. Moreover he had invoked as ground of nullity that the questionnaire submitted to the jury was incorrect which is a question of law.

The hearing before the Supreme Court also concerned the appeal against sentence. In such proceedings it is essential that the appellant be present during the hearing of the appeal and afforded the opportunity to participate in it together with his counsel, if the court is called upon to assess not only the appellant's character and state of mind at the time of the offence but also of his motive (Kremzow judgment, loc. cit., p. 45, para. 67). In the present case, however, the grounds of appeal submitted by the applicant, did not give rise to an assessment of his motive or even of his character or state of mind at the time of the offence.

Therefore, the Commission finds that the applicant's presence at the Supreme Court's hearing was not required by Article 6 para. 1 (Art. 6-1) or para. 3 (c) (Art. 6-3-c) of the Convention. There is, thus, no appearance of a violation of the applicant's right to a fair hearing in this respect.

This part of the application, therefore, 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 THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)