AS TO THE ADMISSIBILITY OF

Application No. 21402/93
by Peter SCHNABL
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 30 November 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
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 2 December 1992 by Peter SCHNABL against Austria and registered on 19 February 1993 under file No. 21402/93;

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, born in 1939, is an Austrian national. He is a lawyer practising and residing in Vienna. In the proceedings before the Commission he is represented by Mr. W. Lenneis, a lawyer also practising in Vienna.

A. The particular circumstances of the case

In May 1988 the Vienna Regional Criminal Court (Landesgericht) opened preliminary investigations (Voruntersuchung) against E.S. relating to the bankruptcy of the K. company, i.e. pawnbrokers. The applicant, who had acted as counsel of the K. company, was heard as a witness.

On 14 October 1991 the Vienna Regional Criminal Court asked the Vienna Finance Directorate (Finanzlandesdirektion) to request information and examine the files of a number of limited companies, including the K. company, and other taxable persons, including the applicant, and to inform the Regional Court about the results. The Court stated that preliminary examinations (Vorerhebungen) were conducted against E.S. and others, including the applicant, on the

suspicion of tax evasion or aiding and abetting tax evasion.

On 10 December 1991 the Finance Authority (Finanzamt) submitted a statement of facts (Sachverhaltsdarstellung) to the Regional Court. It said in particular that the applicant had been the majority shareholder of a number of limited companies including the K. company, and had, for a short period, acted as its managing director. He had also held a majority of shares in the M. Property Management Company. Further, the Finance Authority stated that a rough estimate led to the assumption that, for the years 1983/84, 1985 and 1988 the applicant and his wife, according to their declarations of income and expenditure, did not dispose of the necessary means to maintain their family. Therefore, there was a suspicion of tax evasion.

On 28 January 1992 the Investigating Judge at the Vienna Regional Criminal Court referring to S. 139 et seq. of the Code of Criminal Procedure (Strafprozeßordnung) issued a search warrant concerning the applicant's private home, his office and the office of M. Property Management Company. It stated that the search was aimed at finding and seizing documents containing information on the applicant's assets and income as well as documents concerning his involvement with a number of limited companies, including the K. company.

On 17 March 1992 the search was carried out in the applicant's private home and in his office, in absence of the applicant. However, a representative of the Chamber of Lawyers was present, who objected to an immediate examination of the documents seized. They were, therefore, deposited at the Regional Court.

On 30 March 1992 the applicant's counsel was allowed to inspect parts of the file and obtained a copy of the Finance Authority's submissions of 10 December 1991.

On 31 March 1992 the applicant lodged a complaint with the Judges' Chamber (Ratskammer) of the Vienna Regional Criminal Court. He complained in particular that the submissions by the Finance Authority

of 10 December 1991 only contained a rough estimate and were inconsistent. Even assuming that the calculations were correct, there was no suspicion of tax evasion of more than AS 1 million, falling within the competence of the courts. Moreover, the search warrant, contrary to S. 140 para. 1 of the Code of Criminal Procedure, had stated that it was not necessary to hear him prior to the search. The applicant also submitted that most of the documents seized were files concerning his clients and contained no information about his income. In these and the following proceedings, the applicant was represented by counsel.

On 29 April 1992 the Judges' Chamber dismissed the applicant's complaint. It found that there had been reasonable grounds for suspecting him of having committed tax offences. While the statement of facts of 10 December 1991 submitted by the Finance Authority appeared somewhat summary, the Authority, upon the Regional Court's request, had meanwhile submitted more detailed calculations, supporting the suspicion of tax evasion against the applicant, falling within the competence of the courts, which had also been the reason for the search warrant. As regards the applicant's complaint that he had not been heard prior to the search, the Judges' Chamber, referring to an earlier decision of the Constitutional Court, found that non-compliance with S. 140 para. 1 of the Code of Criminal Procedure did not constitute an interference with his right to respect for his home.

The decision of the Judges' Chamber was served on the applicant's counsel on 22 May 1992 and received by the applicant on 27 May 1992.

On 9 June 1992 the Constitutional Court (Verfassungsgerichtshof) rejected the applicant's complaint, finding that it was not competent

to deal with it. The Constitutional Court noted that the applicant had raised complaints relating to the institution of criminal proceedings against him, the search of his premises and the conduct of several authorities, including the Public Prosecutor's Office and the Vienna Finance Directorate with regard to the contested proceedings. The Court found that, even assuming that some of these acts constituted an execution of orders or coercive measures by an administrative authority (Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt), the review of their lawfulness would fall within the competence of the Independent Administrative Tribunals (unabhängige Verwaltungssenate). As regards any acts imputable to the courts, it was not competent for their review either. This decision was served on the applicant's counsel on 9 July 1992.

On 26 August 1992 the Judges' Chamber gave its consent under S. 145 para. 2 of the Code of Criminal Procedure for a review of the documents which had been seized during the search. It noted in particular that the representative of the Chamber of Lawyers, being present during the search, had objected to an immediate review on the ground that they contained information subject to professional secrecy. The Judges' Chamber found that a review would serve the purpose of separating files containing such information, which would be returned without being examined, from other material.

The proceedings against the applicant are still pending.

B. Relevant domestic law and practice

SS. 139 to 145 of the Code of Criminal Procedure (Strafprozeß-ordnung) concern the search of premises, the seizure of objects and the examination of documents.

S. 139 para. 1 provides that the home and other premises of a person may be searched if there are reasonable grounds to believe that a person suspected of a criminal offence was hiding there, or that objects relevant for the investigation were to be found.

S. 140 states that usually the person whose premises are to be searched has to be heard prior to the search (para. 1). As a rule, the search has to be ordered by the investigating judge (para. 3).

If objects, which might be relevant for the investigations, are found, they have to be deposited at the court or be seized (S. 143 para. 1).

In case the owner objects to the examination of documents, they have to be sealed and deposited with the court. The Judges' Chamber has to decide immediately whether they may be examined or have to be returned (S. 145 para. 2).

According to S. 113 of the Code of Criminal Procedure, anyone who considers that his rights have been infringed by a decision (Verfügung) of the investigating judge can bring a complaint before the Judges' Chamber.

According to S. 53 para. 1 (b) of the Tax Offences Act (Finanzstrafgesetz) the prosecution of tax offences falls within the competence of the courts if the offence was committed intentionally and the sum relevant for the penalty is more than AS 1 million.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention that the search of his premises impinged on matters of professional secrecy. Further, the applicant considers that the Courts were not competent under S. 53 of the Tax Offences Act, to investigate this matter, as in

his view, there was no suspicion of tax evasion of more than AS 1 million. Moreover, he submits that the proceedings were unfair as he was not informed about the suspicion against him and was not granted access to the file. Further the search warrant lacked a proper reasoning and he was not heard before the search was carried out.

2. The applicant complains under Article 8 of the Convention that the search of his private home and his office violated his right to respect for his home. He submits in particular that the search warrant was unlawful, as there were no reasonable grounds to suspect him of having committed an offence. Moreover, he complains that the search warrant did not sufficiently specify the documents to be seized.

3. The applicant also complains under Article 14 that the conduct of criminal proceedings against him was arbitrary. He submits in particular that the Courts would not open preliminary investigations or issue a search warrant in comparable cases.

4. Under Article 1 of Protocol No. 1 the applicant complains that the seizure of files violated his right to property.

THE LAW

1. The applicant raises various complaints under Article 6 (Art. 6) of the Convention regarding the criminal proceedings against him. He also complains under Article 14 (Art. 14) that the opening of preliminary investigations against him and the conduct of the proceedings were arbitrary.

As regards the decisions complained of, the Commission recalls that it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except were it considers that such errors might have involved a possible violation of the Convention (No. 10000/82, Dec. 4.7.83, D.R. 33 p. 255).

As regards the complaint about the unfairness of the proceedings, the Commission recalls that the compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole. However, it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (Can v. Austria, Comm. Report 12.7.84, para. 48, Eur. Court H.R. Series A no. 96, p. 15).

In the present case, the proceedings have not attained trial stage. Thus, an examination of the proceedings as a whole is not possible. Moreover, there is no indication that the matters complained of, were so decisive as to allow an assessment of the fairness of the proceedings at the stage of the preliminary examinations. In this context, the Commission notes in particular that the applicant, assisted by counsel, got access to parts of the file after the search of his premises, and was able to lodge a complaint with the Judges' Chamber. Furthermore, the applicant failed to show that the opening of the proceedings against him amounted to discrimination contrary to Article 14 (Art. 14).

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 further complains under Article 8 (Art. 8) of the Convention about the search of his private home and his office. He also invokes Article 14 (Art. 14).

Article 26 (Art. 26) of the Convention provides that the Commission may only deal with a matter "after all domestic remedies

have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken." "The final decision" refers only to domestic remedies which can be considered to be "efficient and sufficient" for the purpose of rectifying the subject-matter of the complaint (No. 11763/85, Dec. 9.3.89, D.R. 60 p. 137).

The applicant submits that the final decision within the meaning of Article 26 (Art. 26) of the Convention was given by the Constitutional Court on 9 June 1992, (served on 9 July 1992), or eventually by the Judges' Chamber on 26 August 1992.

The Commission finds that the complaint brought before the Constitutional Court was not an effective remedy as the Court was not competent to deal with the matters raised by the applicant. Further, his complaint lodged with the Judges' Chamber, which resulted in its decision of 26 August 1992, related to a different issue, namely the question of whether the documents seized were to be examined and, therefore, did not constitute an effective remedy with regard to the search of the applicant's premises as such.

The Commission considers that the final decision on the lawfulness of the search warrant and the actual circumstances of the search of the applicant's premises was already given by the Judges' Chamber on 29 April 1992, and was served on the applicant's counsel on 22 May 1992 and received by the applicant on 27 May 1992, that is more than six months before the introduction of his application on 2 December 1992. The Commission, therefore, finds that the applicant failed to comply with the six-months'-rule laid down in Article 26 (Art. 26) of the Convention.

It follows that this part of the application has to be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant finally complains that the seizure of files during the search of his premises constituted a violation of his right to property as guaranteed by Article 1 of Protocol No. 1 (P1-1).

The Commission, assuming exhaustion of domestic remedies, finds that the seizure of files in the context of criminal proceedings may constitute an interference with the applicant's right to peaceful enjoyment of his possessions, falling within the scope of the second paragraph of this Article.

The Commission finds no indication in the file that the seizure, based on the search warrant, was not in accordance with Austrian law or did not serve a legitimate aim, namely the prevention of crime. In this respect, the Commission notes that the Judges' Chamber in its decision of 29 April 1992 found that the search warrant, on which the seizure was based, was in accordance with the provisions of the Code of Criminal procedure, in particular in that there were reasonable grounds for suspecting the applicant of having committed tax offences. Moreover, the measure was proportionate, as the Austrian law provides special safeguards to separate files which may contain information subject to professional secrecy from other material and return them without examination. Thus, there is no appearance of a violation of the applicant's right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 (P1-1).

It follows that this part of the application is also 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.

Secretary to the First Chamber	President of the First Chamber
(M.F. BUQUICCHIO)	(A. WEITZEL)