AS TO THE ADMISSIBILITY OF

Application No. 18962/91
by Fred SINOWATZ
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 30 June 1993, the following members being present:

MM. E. BUSUTTIL, Acting President of the First Chamber
F. ERMACORA
A.S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI

Mrs. M.F. BUQUICCHIO, Secretary to the First 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 10 october 1991 by Fred Sinowatz against Austria and registered on 17 October 1991 under file No. 18962/91;

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 is an Austrian citizen, born in 1929. He resides at Neufeld an der Leitha, Austria. Before the Commission he is represented by Mr. Walter Schuppich, a lawyer practising in Vienna.

On 14 April 1986 an article appeared in a periodical called "Profil" in which the author of the article stated inter alia :

> "Verbleibt eine letzte Meldung zum Komplex WALDHEIM: Schon im Sommer 1985 berichtete - streng vertraulich, versteht sich - der burgenländische SPÖ-Funktionär Fred SINOWATZ seinem Landesparteivorstand, daß man - wörtlich - zur rechten Zeit vor der Präsidentenwahl 'in einer groß angelegten Kampagne die österreichische Bevölkerung über WALDHEIM's braune Vergangenheit informieren werde' ..."

(translation)

> "There remains a last piece of information in the WALDHEIM complex: Already in the summer of 1985 the Burgenland SPÖ-functionary, Fred SINOWATZ, told the regional executive committee of the party - on a strictly confidential basis, of course - that - quote - at the right moment prior to the presidential elections 'the Austrian public would be informed through a large-scale campaign about WALDHEIM's

brown past' ..."

Due to this publication the applicant instituted private criminal proceedings against the author for defamation (übler Nachrede) contrary to section 111 of the Penal Code. Several court sessions were held from 11 March to 12 October 1987 during which more than 50 witnesses, including the applicant, were heard. On the basis of an evaluation of the evidence submitted by these witnesses as well as the documentary evidence submitted the author was acquitted by the Regional Criminal Court (Landesgericht für Strafsachen) of Vienna on 12 October 1987 as the Court found it established that the applicant had in fact expressed himself as stated by the author of the article in question. The applicant appealed against this judgment but subsequently withdrew the appeal for which reason the judgment became final on 25 April 1988.

On 17 May 1989 the public prosecutor instituted proceedings against the applicant charging him with a violation of section 288 of the Penal Code in having given false evidence as a witness in the above case during a hearing on 29 April 1987.

The case was heard in the Regional Criminal Court of Vienna on 25 September 1990. The Court heard one witness, two expert witnesses as well as the applicant. Furthermore, the Court decided to accept the reading out of the statements made by 45 witnesses in the previous private criminal prosecution case and thus rejected the prosecutor's request to hear these witnesses directly. Finally, the Court rejected the applicant's request to hear four further witnesses (hereinafter referred to as A, B, C and D) as they could not, in the Court's view, add anything of relevance to the case.

On the basis of the evaluation of the evidence submitted the Regional Criminal Court, by judgment of 25 September 1990, found the applicant guilty of the charge brought against him and sentenced him to a fine totalling 360,000 ÖS.

The applicant appealed against this judgment to the Vienna Court of Appeal (Oberlandesgericht). He relied inter alia on the fact that the first instance court had refused his requests to hear the witnesses A, B, C and D and that it had not heard the witnesses from the previous case directly but relied on the court transcripts from that case.

The case was heard in the Court of Appeal on 8, 10 and 15 April 1991. In reply to the applicant's above complaints the Court of Appeal confirmed the refusal not to hear the witnesses A, B, C and D as they could not, also in the opinion of the Court of Appeal, add anything of relevance to the case. As regards the witnesses A and B the Court found that their testimony, which was related to the motives behind the applicant's withdrawal of his appeal in the previous case and to whether he was the man behind the campaign against the presidential candidate Waldheim, would be of no relevance in respect of solving the question of guilt in the present case. As regards the witness C, who was supposed to inform the Court of what another witness had told him, the Court found that this testimony was not such that reliable conclusions could be drawn therefrom. Finally, as regards the witness D, the Court found that his testimony concerned matters which already followed from the other evidence submitted.

The Court of Appeal, however, decided to hear, and heard, the one witness already interrogated in the first instance as well as almost all the other witnesses heard in the previous case in order to obtain direct supplementary evidence from them (Beweisergänzung). On the basis of an evaluation of the evidence so obtained the Court of Appeal decided, on 15 April 1991, to reject the appeal and to confirm the judgment of the Regional Criminal Court.

COMPLAINTS

The applicant complains that he did not get a fair trial and refers in particular to the fact that he was not allowed to hear a number of witnesses. He invokes in this respect Articles 6 para. 1 and 3 (d) of the Convention.

Furthermore, he complains that he was not afforded a review of his conviction or sentence by a higher tribunal as guaranteed to him under Article 2 of Protocol No. 7 to the Convention.

THE LAW

1. The applicant complains that he did not get a fair trial and that he was not allowed to hear a number of witnesses. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention which read as far as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial ... tribunal ...
> ...
>
> Everyone charged with a criminal offence has the following minimum rights:
> ...
>
> 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."

The Commission first recalls that with regard to the judicial decisions involved in the present case, its only task is to ensure, in accordance with Article 19 (Art. 19) of the Convention, the observance of the obligations undertaken by the Parties in the Convention. In particular, the Commission 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. It refers, on this point, to its established case-law, (see. e.g. No. 458/59, Dec. 29.3.90, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

It is true that in this case the applicant also complains that he did not get a fair trial and that he was not allowed to have certain witnesses heard by the courts.

As the guarantees in paragraph 3 of Article 6 (Art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1, the Commission will consider the applicant's complaints under the two provisions taken together.

In this connection the Commission refers to its consistently held view that the conformity of a trial with the rules laid down in Article 6 (Art. 6) of the Convention should be examined in the light of the entire trial. It is true that one particular aspect or incident could have been influential or assumed such importance as to constitute a decisive factor in a general appraisal of the trial as a whole. But it is important to note in this regard that, even in such an event, it is on the basis of an appraisal of the whole trial that the question of whether the case was given a fair hearing should be decided (cf. for example No. 9000/80, Dec. 11.3.82, D.R. 28 p. 127).

As regards the hearing of witnesses the Commission recalls that

one of the purposes of Article 6 para. 3 (d) (Art. 6-3-d) is to ensure equality between the defence and the prosecution as regards the summoning and examination of witnesses but it does not grant the accused an unlimited right to secure the appearance of witnesses in court. Furthermore, it is in the trial court's discretion to refuse to take evidence which is considered irrelevant or unobtainable (cf. No. 8417/78, Dec. 4.5.79, D.R. 16 p. 200 and Eur. Court H.R., Engel and Others judgment of 8 June 1976, Series A no. 22, para. 91, pp. 38-39).

In the present case the Commission recalls that the applicant's case was heard in public in the Regional Criminal Court on 25 September 1990 where he was present and had the opportunity to submit what in his opinion was of relevance to the outcome of the case. The Court furthermore heard one witness and two expert witnesses whereas it rejected the prosecutor's request to hear another 45 witnesses. It does not appear that the applicant himself had requested to hear these witnesses or had joined the request made by the prosecutor. It is clear, however, that the applicant's request to hear the witnesses A, B, C and D was rejected since their evidence would not, in the Court's view, be necessary for the evaluation of the substance of the case which the Court that to consider. Furthermore, the Commission recalls that the case was heard again in public in the Court of Appeal which confirmed the refusal to hear A, B, C and D but decided to obtain supplementary evidence from the other witnesses in question.

The Commission has found no elements which would indicate that the courts in these circumstances went beyond their discretion to refuse to take evidence when refusing to hear the witnesses concerned. Furthermore, the Commission has not found other elements which could lead it to conclude that the right to a fair trial within the meaning of Article 6 (Art. 6) of the Convention was not respected. Accordingly, an examination of the case, as submitted, does not disclose to the Commission, on the basis of an appraisal of the entire trial, any appearance of a violation of Article 6 (Art. 6) 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) of the Convention.

2. The applicant also complains that he was not afforded a review of his conviction or sentence as guaranteed by Article 2 of Protocol No. 7 (P7-2) to the Convention which reads :

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the higher tribunal or was convicted following an appeal against acquittal."

The applicant refers to the fact that only the Court of Appeal actually heard the witnesses and that he could not appeal against that Court's judgment.

The Commission recalls that the applicant's case was examined by the Regional Criminal Court and, on appeal, by the Court of Appeal which was called upon, and did in fact, review both the conviction and the sentence. This procedure fulfils, in the Commission's view, the requirement of Article 2 of Protocol No. 7 (P7-2) to the Convention. The fact that the Court of Appeal decided, in compliance with the applicant's request, to hear further witnesses, cannot lead to any other conclusion.

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 — Acting President of the First Chamber

(M.F. BUQUICCHIO) — (E. BUSUTTIL)