CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37323/97
by Heinz TALIRZ
against Austria

The European Court of Human Rights, sitting on 11 September 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 10 February 1997 and registered on 8 August 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the Commission's partial decision of 30 May 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is an Austrian national, born in 1939 and living in Innsbruck. He is represented before the Court by Mr P. Wallnöfer, a lawyer practising in Innsbruck.

A. The circumstances of the case

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

On 25 April 1991 the Innsbruck Regional Court instituted preliminary investigations against the applicant on suspicion of having committed aggravated fraud (*schwerer Betrug*) and fraudulent conversion (*Untreue*). In particular, he was suspected of having manipulated a call for tenders (*Ausschreibung*) for the construction of a tunnel in favour of a specific company.

On 6 May 1991 the applicant was questioned by the Investigating Judge about these charges for the first time.

Subsequently, the charges against the applicant were extended to more than 15 counts of aggravated fraud and fraudulent conversion.

In 1992 the Investigating Judge appointed experts on geology and explosives.

On 13 July 1992 the Investigating Judge ordered the tapping of the applicant's telephone. On 19 August 1992 the telephone tapping was terminated. Subsequently, the applicant introduced an application with the European Commission of Human Rights against this measure (Application no. 21837/93), which was declared inadmissible by the Commission on 2 March 1994.

In June and July 1993 two reports by the court appointed experts on geology and explosives submitted their reports to the Investigating Judge. A third one on geology was submitted in September 1994.

In February 1994 the Public Prosecutor's Office at the Innsbruck Regional Court lodged the first bill of indictment. In June 1994 the second bill of indictment was lodged. The Innsbruck Court of Appeal dismissed the applicant's objections (*Einspuch*) against these indictments.

On 6 November 1995 the trial before the Innsbruck Regional Court commenced. On 26 January 1996, after 40 court hearings, the applicant was convicted of two counts of aggravated fraud and fraudulent conversion and acquitted of the other charges. He was sentenced to 4 years' imprisonment.

On 13 December 1996 the Supreme Court dismissed the applicant's plea of nullity, but granted the plea of nullity lodged by the Public Prosecutor and quashed the applicant's acquittal on five charges. Although the applicant's conviction in respect of two counts had become final, the Supreme Court remitted the case to the Regional Court in respect of five

counts of fraud and fraudulent conversion. Thereupon, the Regional Court resumed the preliminary investigations concerning these charges.

On 13 August 1997 the Innsbruck Regional Court partially granted the applicant's request for the re-opening of the proceedings (*Wiederaufnahme*). On 30 April 1998 the Innsbruck Court of Appeal, on the applicant's appeal, ordered a complete retrial, including all charges against the applicant.

On 12 October 1998 the Innsbruck Regional Court acquitted the applicant of all the charges against him.

B. Relevant domestic law

Section 91 of the Courts Act (*Gerichtsorganisationsgesetz*), which has been in force since 1 January 1990, provides as follows.

> "(1) If a court is dilatory in taking any procedural step, such as announcing or holding a hearing, obtaining an expert's report, or preparing a decision, any party may submit a request to this court for the superior court to impose an appropriate time-limit for the taking of the particular procedural step; unless sub-section (2) of this section applies, the court is required to submit the request to the superior court, together with its comments, forthwith.
>
> (2) If the court takes all the procedural steps specified in the request within four weeks after receipt, and so informs the party concerned, the request is deemed withdrawn unless the party declares within two weeks after service of the notification that it wishes to maintain its request.
>
> (3) The request referred to in sub-section (1) shall be determined with special expedition by a chamber of the superior court consisting of three professional judges, one of whom shall preside; if the court has not been dilatory, the request shall be dismissed. This decision is not subject to appeal."

COMPLAINT

The applicant's remaining complaint under Article 6 § 1 of the Convention relates to the length of the criminal proceedings against him.

THE LAW

The applicant's remaining complaint relates to the length of the criminal proceedings against him. He relies on Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

However, the Court recalls that under Article 35 § 1 of the Convention it 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 Government, referring to the judgment of the Court in the Holzinger v. Austria case (no. 23459/94, 30.1.2001) submit that the applicant has failed to exhaust domestic remedies as he has not filed a request under Section 91 of the Austrian Courts Act.

The applicant submits that in view of the numerous and complex charges raised against him he could not be expected to have accelerated the proceedings against him. Although a Section 91 request might have led to shorter proceedings at first instance the consequences thereof would have been longer and more complicated appeal proceedings.

The Court recalls that in the case of Holzinger v. Austria it found that an application under Section 91 of the Courts Act - which was an interlocutory application to a court whereby a higher court was requested to fix an adequate time-limit for taking a procedural measure which the court below had failed to take - must be considered an effective and sufficient remedy which has to be used in respect of complaints about the length of court proceedings (*Holzinger v. Austria*, no. 23459/94, 30.01.01, §§ 24-25).

The Court observes that the applicant has not made use of this remedy in the court proceedings about which he is complaining. Accordingly, the applicant has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. It follows that the remainder of the application must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President