AS TO THE ADMISSIBILITY OF

Application No. 21154/93
by Gerhard HÖFLER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 17 May 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
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN

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 6 November 1992 by Gerhard HÖFLER against Austria and registered on 14 January 1993 under file No. 21154/93;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the Commission's decision of 29 June 1994 to declare the application partly inadmissible and to communicate the remainder to the respondent Government for observations on its admissibility and merits;

Having regard to the observations submitted by the respondent Government on 7 October 1994 and the observations in reply submitted by the applicant on 22 November 1994 as well as the supplementary observations of the Government submitted on 20 December 1994 and the applicant's supplementary observations in reply of 26 January 1995;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is an Austrian national born in 1949 and residing in Linz.

Before the Commission he is represented by Mr. A. Frischenschlager, a lawyer practising in Linz.

On 16 June 1981 the applicant, who was then the managing director of the H. Company doing business as a car retailer, filed in the course

of an inspection of the company by tax inspectors (Betriebsprüfung) a report (Selbstanzeige) with the Linz Tax Office (Finanzamt), in which he incriminated himself. He stated that in 1979 and 1980 he had bought tractors from the P. company, and that in the sales contracts and invoices higher prices than due had been entered. The exceeding amounts had been refunded upon payment of the invoice. He, therefore, had claimed input tax (Vorsteuerabzüge) on value added tax without justification.

On 22 November 1984 the Tax Office instituted administrative criminal proceedings under the Code of Tax Offences (Finanzstrafgesetz) against the applicant on suspicion of evasion of taxes and instructed the applicant to submit a written statement on the charges raised.

On 23 December 1986 the applicant submitted his statement. On 2 January 1986 the Tax Office submitted the case file in the applicant's criminal proceedings to the competent Trial Board (Spruchsenat) at the Linz Tax Office.

On 24 February 1987 the Trial Board convicted the applicant of tax evasion and sentenced him to a fine of 400.000 AS or 90 days' imprisonment in default. It found that the applicant in 1976, 1977 and 1978 had failed to enter numerous car sales into the bookkeeping which lead to tax evasion in the amount of AS 202.933. Moreover, between January 1979 and April 1981 the applicant had claimed without justification input tax of altogether 675.256 AS by making incorrect declarations of input tax.

In September 1987 the applicant lodged an appeal, which only concerned his conviction for claiming input tax without justification. He submitted that his report of 16 June 1981 should have led to the discontinuation of the criminal proceedings regarding this charge.

On 16 September 1987 the Tax Office ordered the applicant to remedy defects of the appeal (Mängelbehebungsauftrag). On 3 November 1987 the applicant complied with this order.

On 18 December 1987 the applicant's appeal was transmitted to the Upper Austria Regional Tax Authority (Finanzlandesdirektion)

On 16 March 1989 an oral hearing took place before the Appeals Board (Berufungssenat) at the Regional Tax Authority on the applicant's appeal. On 30 March 1989 a further hearing took place.

On 11 September 1989 the Appeals Board partially granted the applicant's appeal and reduced his sentence to a fine of 200.000 AS and 60 days' imprisonment in default. The Appeals Board found that on 7 June 1981 a tax inspector of the Linz Tax Office had started, at the premises of the H. Company, an examination of the Company regarding value added tax. At that time bankruptcy proceedings had already been opened against the company. In the course of the concluding discussion concerning the examination (Abschlußbesprechung) the applicant had presented his self-incriminating report. This report, however, could not lead to the discontinuation of the proceedings, as at that time, his offence, at least partially, had already been discovered.

On 6 November 1989 the applicant lodged a complaint with the Constitutional Court (Verfassungsgerichtshof).

On 7 March 1990 the Constitutional Court refused to entertain the applicant's complaint.

On 3 July 1990 the applicant requested that his case be referred to the Administrative Court (Verwaltungsgerichtshof).

On 25 October 1991 the Constitutional Court referred the case to the Administrative Court.

On 7 January 1992 the applicant supplemented his complaint to the Administrative Court.

On 22 April 1992 the Administrative Court dismissed the applicant's complaint.

COMPLAINTS

The applicant complains that the criminal proceedings instituted against him were not concluded within a reasonable time as required by Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 November 1992 and registered on 14 January 1993.

On 29 June 1994 the Commission decided to communicate the applicant's complaint under Article 6 para. 1 of the Convention as regards the length of the proceedings to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure and declared inadmissible the remainder of the application.

The Government's written observations were submitted on 7 October 1994. The applicant replied on 22 November 1994. On 20 December 1994 the Government submitted a supplement to its observations. On 26 January 1995 also the applicant supplemented his observations.

THE LAW

1. The applicant complains that the criminal proceedings instituted against him were not concluded within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention which, as far as relevant, provides as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

2. The Government submit that the applicant failed to exhaust domestic remedies as, in the appeal proceedings, he did not lodge a complaint with the Administrative Court, pursuant to Article 132 of the Federal Constitution, against the Appeal Board's inactivity in deciding on his appeal.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress (No. 11660/85, Dec. 19.1.89, D.R. 59 p. 85).

The Commission recalls further that a complaint with the Administrative Court under Section 132 of the Federal Constitution is a remedy which in certain cases must be instituted in order to exhaust domestic remedies within the meaning of Article 26 (Art. 26) of the Convention (No. 11782/85, Dec.16.7.87, unpublished). However, where an applicant complains that he has not been tried within a reasonable time on a criminal charge, Article 26 (Art. 26) of the Convention does not require as a general rule that he should himself have taken steps to accelerate the proceedings (No. 8261/78, Dec. 8.7.81, D.R. 25 p. 157).

Accordingly the present complaint cannot be declared inadmissible

for non-exhaustion of domestic remedies.

3. As regards the merits of the complaint the Government submit that the proceedings at issue started when the Tax Office on 22 November 1984 instituted criminal proceedings against the applicant. The applicant's self incriminating report of 16 June 1981 could not be taken into account as it was up to the Tax Office to determine whether on the submissions in the applicant's report criminal proceedings had to be instituted. Before 22 November 1984 no criminal charge was raised against him nor was he questioned by the authorities as suspect.

The Government submit further that delays occurred in the proceedings were attributable to the applicant. In the proceedings at first instance he failed for two years to submit his observations on the charge raised against him. When he finally did so the Tax Office referred his case without delay to the Trial Board which took its decision speedily. Also the Constitutional Court and Administrative Court decided speedily on the applicant's complaints. The applicant could even have accelerated these proceedings by requesting the transfer of his case to the Administrative Court already in his complaint to the Constitutional Court.

The applicant submits that the criminal proceedings against him started on 16 June 1981 when he submitted the self incriminating reports to the tax authorities. From that time on a criminal charge had been raised which the authorities had to decide upon.

He submits further that the case was neither complex nor necessitated lengthy investigations. Delays occurred in the proceedings had to be attributed to the authorities, in particular, it took more than 15 months before the Constitutional Court decided on his request to refer his case to the Administrative Court.

The Commission finds that this complaint raises questions of law and fact which require an examination of the merits. The remainder of the application therefore cannot be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission, by a majority,

DECLARES THE REMAINDER OF THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)