AS TO THE ADMISSIBILITY OF

Application No. 31062/96
by Leo VON DER THANNEN
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

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 31 January 1996 by Leo VON DER THANNEN against Austria and registered on 19 April 1996 under file No. 31062/96;

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 applicant is an Austrian citizen born in 1952 and residing in Andelsbuch.

The facts of the case, as they have been submitted by the applicant may be summarised as follows.

The applicant is a judge at the Feldkirch Regional Court (Landesgericht) since January 1989. Until August 1993 he was, according to the distribution of cases then in force, in charge of bankruptcy matters. With effect of 1 September 1993 the Staff Senate (Personalsenat) of the Feldkirch Regional Court modified the distribution of cases (Geschäftsverteilung). Henceforth, the applicant was in charge of litigation in social and labour law matters.

The applicant was not satisfied with the modification of his tasks by the Staff Senate, as he considered that his new task amounted to a considerable increase of his work load.

On 18 November 1993 the applicant filed a request for an allowance in the amount of one quarter of his salary as a judge. He submitted that with effect of September 1993 the distribution of cases among the judges of the Feldkirch Regional Court had been amended to

his disadvantage as it burdened him with a work load which was at least 25% higher compared to the work load of average judges. He had no possibility to appeal against this amendment. Since he was compelled to comply with the unfair distribution of cases, he was therefore entitled to an allowance corresponding to this increased work load, be it on the basis of overtime payments or an allowance under the Civil Servants Salary Act (Gehaltsgesetz) or as damage awarded under the provisions of the Civil Code (Allgemeines Bürgerliches Gesetzbuch).

On 16 February 1994 the President of the Innsbruck Court of Appeal (Oberlandesgericht) dismissed the applicant's claim. He found that under the provisions of the Judges Act (Richterdienstgesetz) judges were entitled to a service allowance (Dienstzulage) which was a payment for all possible additional work carried out by them. Once a service allowance had been granted, there was no legal basis for any further claim for payments in addition to the normal salary. Since the provisions of the Judges Act were unambiguous in this respect, there was no room for applying per analogiam other provisions of the law as the applicant had suggested.

On 5 March 1994 the applicant filed an appeal (Berufung) and objections (Vorstellung) against the President's decision. In his appeal he submitted that the service allowance only covered additional work done by a judge which was within the average working load for judges. On him, however, an excessive work load had been imposed and no provisions of the Judges Act provided for such a case. He therefore suggested that per analogiam provisions of the Civil Servants Salary Act or the provisions of Civil Code be applied.

On 14 March 1994 the President of the Innsbruck Court of Appeal rejected as inadmissible the applicant's objections, as no such remedy lay against the President's decision. On 5 April 1994 the applicant appealed also against this decision.

On 11 May 1994 the Federal Minster of Justice (Bundesminister für Justiz) dismissed the applicant's appeals. The Minister found that the provisions of the Civil Servants Salary Act to which the applicant had referred were not applicable to judges. The Minister also observed that no appeal lay against a decision by the Staff Senate on the distribution of cases. This could not be circumvented by instituting service regulation proceedings (Dienstrechtsverfahren).

On 13 July 1994 the applicant lodged a complaint with the Constitutional Court (Verfassungsgerichtshof). He submitted that the provisions of the Judges Act which regulated the granting of a service allowance were unconstitutional as they prevented that in the case of an excessive work load a reasonable salary be given.

On 29 November 1994 the Constitutional Court declined to deal with the applicant's complaint. It noted that according to its previous case-law the legislator was not bound to grant a corresponding allowance for any work performed by a civil servant which was above the average. Moreover the applicant's complaint related to a subject matter which was not excluded from the competence of the Administrative Court.

On 7 February 1995 the Constitutional Court, upon the applicant's request, remitted his case to the Administrative Court (Verwaltungsgerichtshof).

On 14 June 1995 the Administrative Court dismissed the applicant's complaint. It found that it was a principle of the civil service that any claims for payment could only be made on the basis of a legal provision providing for it. In the present case the only provision was the one by which he was entitled to a service allowance. It was not in dispute that the applicant received a service allowance under Section 68 of the Judges Act. If the applicant could at all be

considered a victim of an excessive work load, the reason for this was not any deficiency in the system of the salary of judges but the distribution of cases by the Staff Senate. However this decision, as one taken by an organ of the Judiciary, could not be attacked before the Administrative Court. Since it was apparent that the complaint was unfounded it had to be rejected without further proceedings and without any decision on the procedural costs.

COMPLAINTS

The applicant complains that the distribution of cases as modified in 1993 put a work load on him which was considerable higher than the one of his colleagues at the court. As no increase in pay corresponded to the increase in work, he was a victim of a violation of Article 4 of the Convention.

He complains that because of the unfair distribution of cases he was also discriminated against his colleagues at the court which had a lighter work load and invokes Article 14 of the Convention.

He complains under Article 1 of Protocol No. 1 that his right to peaceful enjoyment of his possessions had been violated because as a consequence of the modified distribution of cases he had lost a part of his spare time which could have been used for other opportunities of making money.

He complains under Article 13 of the Convention that he did not have an effective remedy at his disposal in order to complain about the above violations caused by the unfair modification of the distribution of cases.

Lastly he complains under Article 6 para. 1 of the Convention that in the proceedings on his request for an allowance the Austrian authorities and courts did not sufficiently examine the factual basis of his claims and the legal situation involved. Furthermore, no public hearing in these proceedings was held.

THE LAW

1. The applicant complains that the distribution of cases as modified in 1993 put a work load on him which was considerable higher than the one of his colleagues at the court. In this respect he invokes Article 4, 13 and 14 (Art. 4, 13, 14) of the Convention and Article 1 of Protocol No. 1 (P1-1).

The Commission observes that the applicant has introduced a previous application, No. 24376/94, in which he complained about the modification of the distribution of cases by the Staff Senate of the Feldkirch Regional court and the adverse consequences this modification had for him. On 31 August 1994 the Commission declared this application inadmissible.

According to Article 27 para. 1 (b) (Art. 27-1-b) of the Convention the Commission shall not deal with an application which "is substantially the same as a matter which has already been examined by the Commission ... and if it contains no relevant information"

The Commission finds that the above complaints relate to essentially the same matter as Application No. 24376/94 which had already been examined by the Commission.

It follows that the Commission is prevented from dealing with this part of the present application by virtue of Article 27 para. 1 (b) (Art. 27-1-b) of the Convention.

2. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention that in the proceedings on his request for

an allowance the Austrian authorities and courts did not sufficiently examine the factual basis of his claims and the legal situation involved and that no public hearing in these proceedings was held.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

The Commission recalls that Article 6 (Art. 6) of the Convention only applies to disputes over "rights and obligations" which can be said, at least on auguable grounds, to be recognised under domestic law. Article 6 (Art. 6) does not in itself guarantee any particular content for "rights and obligations" in the substantive law of the Contracting States (see Eur. Court H.R., James and others judgment v. the United Kingdom of 21 February 1986, Series A no. 98, p. 46, para. 81, and Lithgow and others judgment of 8 July 1986, Series A no. 102, p. 70, para. 192). The dispute which gives a right to a determination by a court must be "genuine and of a serious nature" (see Eur. Court H.R., Benthem judgment v. the Netherlands of 23 October 1985, Series A no. 97, p. 14, para. 32). The dispute may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised, and it may concern both questions of fact and questions of law (see Eur. Court H.R., van Marle and Others judgment v. the Netherlands of 26 June 1986, Series A no. 101, p. 11, para. 32; Karni v. Sweden, Comm. Report 15.12.88, D.R. 62 p. 90, para. 86).

The Commission notes that the applicant requested the President of the Innsbruck Court of Appeal for an additional allowance as he considered that his work load was excessive and no direct remedy lay against the decision by which the allegedly excessive work load was imposed on him. He acknowledged that the Judges Act, which is the legal basis for payments of salary to judges, did not provide for the claim he made, but suggested that other provisions of law be applied in his case, which was such an exceptional one. The President of the Court of Appeal dismissed his claim as no legal basis existed for granting the payments he had requested. On the same ground his appeal was dismissed. The Constitutional Court refused to deal with his complaint as there was no prospect of success and the Administrative Court confirmed the Minister's appeal decision. The Minister and the Administrative Court, in their respective decisions, also noted that the applicant essentially complained about the distribution of cases but that this matter could not be considered in the proceedings he had instituted.

The Commission finds that in the present case there was no serious dispute on facts, as the domestic court had to leave open the question whether or not the applicant's work load was excessive as, even if this had been the case, there was no legal basis for the granting of an allowance as the applicant had requested (see No. 10732/84, Dec. 11.3.85, D.R. 41 p. 21). Thus, there was no dispute on the scope or manner of a "right" or "obligation". What the applicant challenged was the law in force as regards the granting of salary to judges and the distribution of cases by the Staff Senate of the Feldkirch Regional Court against which however he could not have brought any proceedings. The Commission finds that the applicant could not on arguable grounds claim a right to an allowance. The dispute thus did not concern a right within the meaning of Article 6 para. 1 (Art. 6-1) and the applicant therefore cannot rely on that provision in this instance.

It follows that this part of the application must accordingly be rejected as incompatible ratione materiae with the provisions of the Convention in accordance with Article 27 para. 2 (Art. 27-2) of the

Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber