AS TO THE ADMISSIBILITY OF

Application No. 16566/90
by W.M.
against Austria.

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
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 18 January 1990 by W.M. against Austria and registered on 8 May 1990 under file No. 16566/90;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 9 July 1992, the observations in reply submitted by the applicant on 24 August 1992 and the Government's letter of 13 October 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1953. He runs a taxi firm. The facts of the case, as submitted by the parties, may be summarised as follows.

On 20 May 1988 the Vienna Federal Police Authority imposed a fine of AS 500 on the applicant by way of a provisional penal order (Strafverfügung) for having failed to comply with his obligation to disclose the identity of the driver of his car at a given time, contrary to Section 103 (2) of the Motor Vehicles Act (Kraftfahrgesetz) 1967. The applicant wanted to submit his written appeal at a police station and/or to declare his objections orally, but the officers at the police station refused to accept his appeal. When the authority proceeded to the enforcement of the provisional order, the applicant referred to this refusal and the authority thereupon instituted ordinary penal administrative proceedings which - after a hearing of the applicant - led to the imposition of a fine of AS 2,000 by a penal order (Straferkenntnis) of 21 April 1989. On appeal, the Vienna Provincial Governor (Landeshauptmann) on 12 June 1989 quashed this

penal order as being null and void on the ground that the applicant had not effectively raised objections against the initial provisional penal order, which accordingly remained valid. The applicant complained of this decision to the Administrative Court (Verwaltungsgerichtshof) which on 18 October 1989 confirmed the Provincial Governor's decision, observing that after the refusal of the police to accept his written appeal and his oral declaration, the applicant could still have filed his objection in writing.

COMPLAINTS

The applicant complains under Article 6 of the Convention that he did not have a fair and public hearing. In particular he alleges a violation of his right of access to court and of his right to defend himself in person.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 18 January 1990 and registered on 8 May 1990.

On 13 February 1992 the Commission (Second Chamber) decided to request the parties to submit their written observations on the admissibility and merits of the application.

The respondent Government submitted their observations on 9 July 1992 and the applicant's observations in reply were received on 24 August 1992. On 13 October 1992 the Government submitted a further comment on admissibility.

THE LAW

The applicant alleges violation of Article 6 (Art. 6) of the Convention in connection with the proceedings which were brought against him for failure to comply with his obligation to disclose the identity of the driver of a car at a particular time.

The Government submit that the Austrian reservation to Article 5 (Art. 5) of the Convention prevents the Commission from entertaining the complaint. In particular, they submit that Section 103 (2) of the Motor Vehicles Act was in force at the time the reservation was made, as Section 86 (2) of the Motor Vehicles Act 1955. As to exhaustion of domestic remedies, the Government accept that an application to the Constitutional Court would have had no prospect of success in connection with an Article 6 (Art. 6) complaint as such, but state that it would have been open to the applicant, in the light of the decisions of the European Court of Human Rights on the question of the precision with which reservations have to be made in the cases of Belilos and Weber (Eur. Court H.R., judgments of 29 April 1988 and 22 May 1990, Series A nos. 132 and 177), to have raised this point with the Constitutional Court. They consider that to the extent that the applicant alleges violation of access to a tribunal, he would have had access to the Administrative Court if he had lodged his appeal against the initial penal order in writing. They further point out that the European Court of Human Rights has accepted that the Administrative Court is an impartial and independent tribunal in, for example, the case of Ettl (Eur. Court H.R., Ettl judgment of 23 April 1987, Series A no. 117, p. 17, paras. 34, 35), and that Article 6 (Art. 6) is complied with if, in administrative "criminal" matters, a last instance decision is taken by an independent and impartial tribunal (Eur. Court H.R., Öztürk judgment of 21 February 1984, Series A no. 73).

The applicant does not accept that the Austrian reservation to Article 5 (Art. 5) can affect the substance of the case, because the Motor Vehicles Act is not referred to in the reservation, and because the provision of Section 103 (2) (which only entered into force in 1968) is not the same as Section 86 (2) of the 1955 Act in that the

earlier provision relate to the identity of the person to whom the vehicle was entrusted (überlassen), whereas Section 103 (2) relates to who was driving the vehicle. The applicant also considers that, by the institution of Independent Administrative Tribunals (Unabhängige Verwaltungssenate), the Government have accepted that the system in force in his case did not comply with the Convention.

The Commission has considered the Government's argument that the applicant could have put to the Constitutional Court a plea concerning the validity of reservations based on the judgments of the European Court of Human Rights in the cases of Belilos and Weber.

The Commission notes that the case of Weber was decided by the European Court of Human Rights on 22 May 1990 (Series A no. 177), post-dating the Vienna Provincial Governor's decision of 12 June 1989 by almost a year. It follows that the applicant could not have referred to the Weber case in the domestic proceedings.

It is true, as the Government submit, that it would have been open to the applicant in the light of the findings of the European Court of Human Rights in the case of Belilos (judgment of 29 April 1988, Series A no. 132), to submit to the Constitutional Court that that Court's traditional reasoning as to the Austrian reservation to Article 5 (Art. 5) of the Convention should be re-considered. However, although the Convention has the status of constitutional law in Austria, the domestic courts are not formally bound by the findings of the Strasbourg organs, and the Government have not indicated how the findings of the European Court of Human Rights in a Swiss case involving an interpretative declaration to Article 6 (Art. 6) of the Convention could have led to the Constitutional Court amending its long-standing case-law on the Austrian reservation to Article 5 (Art. 5) of the Convention (cf. Demicoli v. Malta, 13057/87, Dec. 15.3.89, D.R. 60, p. 243, 248 with further references).

The Commission finds that the applicant was not required by Article 26 (Art. 26) of the Convention to put his case to the Constitutional Court. Accordingly, the application cannot be declared inadmissible for non-exhaustion of domestic remedies.

As to the substance of the application, the Commission finds that the case raises complex issues of law under the Convention, including questions concerning the Austrian reservations to Articles 5 and 6 (Art. 5, 6) of the Convention, the determination of which must be reserved for an examination on the merits. It cannot therefore 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 APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)