AS TO THE ADMISSIBILITY OF

Application No. 22340/93
by W. N.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 27 November 1996, the following members being present:

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

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 14 July 1993 by W. N. against Austria and registered on 26 July 1993 under file No. 22340/93;

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 10 April 1996 and the observations in reply submitted by the applicant on 3 June 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1957, and living in Axams. He is represented by Mr. A. Heiss, a lawyer practising in Innsbruck.

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

The applicant's older brother, A.N., is the owner of the family's farmhouse which was donated to him by the father in 1970. In 1973 he constructed a two-storey apartment house on the premises. The applicant and other family members assisted in the construction works.

When the house was finished, the mother, a sister of the applicant and his brother, A.N., each occupied an apartment in the new construction.

In 1979 the applicant's brother, A.N., concluded a user-right contract with his mother. According to this contract his mother's

user-right ended at the latest on 31 December 2008 unless she died earlier.

In 1988 the mother died and M.-L.N., another sister of the applicant, moved into the apartment. Thereupon, the applicant's brother, A.N., brought an action for eviction against her.

On 11 January 1991 the Innsbruck District Court (Bezirksgericht) granted this action. The judgment was given by Judge K. while Judge W. who had dealt with the action earlier had been successfully challenged by the plaintiff. Judge K. found, on the basis of evidence obtained from various family members heard as witnesses and also on the basis of documentary evidence, that there was nothing to show that the defendant had any valid user-right. She had claimed to have been authorised to move into the apartment by the applicant. The court considered that the applicant did have a user-right which however had expired once he had reached the age of majority.

It appears that subsequently the applicant took possession of the apartment and his brother, A.N., therefore brought an action for eviction against him too.

In the new proceedings the plaintiff again challenged Judge W. The matter was therefore referred to Judge K. who made a request to be replaced as he also considered himself to be biased in view of the judgment given in the same matter against the applicant's sister, M.-L.N., in particular as the question of the applicant's user-right had played a role in these proceedings.

On 24 September 1991 the President of the District Court (Gerichtsvorsteher) rejected Judge K.'s request to be replaced. It is stated in the order that the mere fact that a judge had dealt with a similar matter on an earlier occasion did not in itself constitute a reason to doubt his impartiality. A judge had the obligation to obtain and assess evidence in each case in an impartial manner and the mere fact that he had decided a parallel matter did not give rise to doubt that he would not respect this obligation in the new proceedings.

On 30 October 1991 the Innsbruck Regional Court (Landesgericht) dismissed the applicant's appeal against this decision. This court pointed out that there were no statutory reasons to replace Judge K. It noted that the applicant, being the defendant, had not yet made any submissions in the proceedings at issue. Thus, it was not yet clear what evidence would be the subject of the new proceedings. Moreover, the fact alone that a judge, in previous proceedings, had to decide on a similar or identical matter and to assess similar or identical evidence did not in itself justify the assumption that in taking his decision the judge would be influenced or guided by subjective criteria (unsachliche Kriterien).

On 23 April 1992 Judge K. of the Innsbruck District Court gave judgment against the applicant. The reasons stated in this judgment refer inter alia to the evidence taken in the earlier proceedings against the defendant's sister. Jugde K. pointed out that his impression of the persons heard as witnesses or of the parties had not substantially changed. Thus, he saw no reason to assess the evidence in a different manner than in the earlier proceedings. It is also pointed out that the user-rights contract concluded between the plaintiff and his mother in 1979 does in no way mention the applicant as a successor to his mother's user-right. Also other documentary evidence in no way indicate that the defendant could invoke his mother's user-right.

On 10 September 1992 the Innsbruck Regional Court, sitting in private, rejected the applicant's appeal on grounds of nullity. It noted the applicant's submissions that the rejection of Judge K.'s request to be replaced violated his right to a fair trial as guaranteed

by Article 6 of the Convention, in particular as the said Judge, when assessing the evidence in the present proceedings, had referred to his findings in the earlier proceedings. However, it found that Judge K. had not been disqualified. The fact that his request to be replaced had been rejected did not constitute a ground of nullity.

By decision of the same day, the court, after having held a public oral hearing, dismissed the applicant's appeal on questions of fact. It considered that the first instance assessment of the evidence was unobjectionable.

The Regional Court's decision was served on the applicant on 20 January 1993.

On 19 March 1993 the Innsbruck District Court rejected the applicant's "appeal on points of law" (Revisionsrekurs). It noted that it should have been called "appeal" (Rekurs) but found that, in any case, there was no remedy against a decision by which the appellate court, sitting in private, rejected an appeal on grounds of nullity.

COMPLAINTS

The applicant points out that Judge K. considered himself to be biased and therefore requested to be replaced. He argues that in these circumstances there was justified reason to doubt the impartiality of Judge K. and consequently the refusal to replace Judge K. violated Article 6 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 July 1993 and registered on 26 July 1993.

On 29 November 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 10 April 1996, after an extension of the time-limit fixed for that purpose. The applicant replied on 3 June 1996.

THE LAW

The applicant complains that the refusal to replace judge K. violated Article 6 (Art. 6) of the Convention, as he had considered himself to be biased and there was, thus, justified reason to doubt his impartiality.

Article 6 para. 1 (Art. 6-1), so far as relevant, reads as follows:

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

a. As to the requirements of Article 26 (Art. 26), the Government argue, that the applicant failed to lodge his application within the six-months time-limit. They argue that the decision by the Innsbruck Regional Court of 30 October 1991, rejecting the applicant's appeal against the refusal to replace Judge K., has to be considered as final decision. In particular, there was no possibility under the Code of Civil Procedure (Zivilprozessordnung) to challenge the rejection of a judge's request for replacement by appeal on grounds of nullity. They refer to S. 477 para. 1 (1), which explicitly states that a ground of nullity is only given if a disqualified judge participated in the decision or in the case of a judge who has been successfully challenged.

The applicant contests the Government's view. He submits in particular that at the time of the Regional Court's decision of 30 October 1991 it was still open whether, in the new proceedings, Judge K. would take the same view as in the previous case. However, he did so in his decision of 23 April 1992, referring explicitly to his assessment of evidence in the earlier proceedings. Further, the applicant argues that the enumeration of grounds of nullity in S. 477 of the Code of Civil Procedure is not exclusive. Thus, violations of basic principles of the fairness of the proceedings may in any case be challenged by an appeal on grounds of nullity.

The Commission recalls that the period of six months runs from the date of the final domestic decision after effective and sufficient remedies have been used (cf. No. 11763/85, Dec. 9.3.89, D.R. 60 p. 128).

The Commission does not share the Government's view that the Regional Court's decision of 31 October 1991 has to be considered as final decision. It notes in particular, that the Regional Court found that it was not yet clear what evidence would be the subject of the new proceedings. In these circumstances, the applicant could not be expected to introduce his application before Judge K. gave his decision, which was the case on 23 April 1992. Next, it has to be ascertained whether the appeal on grounds of nullity, which the applicant brought against this decision was an effective remedy. The Government contests this, arguing that S. 477 para. 1 (1) of the Code of Civil Procedure does not provide a possibility to challenge the decision refusing a judge's request to be replaced. The applicant, however, claims that the enumeration of grounds of nullity is not exclusive. The Commission notes that the applicant, in his appeal on grounds of nullity, mainly argued that Judge K.'s bias had become manifest as he had referred to his previous assessment of evidence. As the applicant could not have raised this argument before the decision of 23 April 1992 was given, the fact that he did so in his appeal on grounds of nullity should not be held against him. It follows that the final decision was given by the Regional Court on 10 September 1992. It was served on the applicant on 20 January 1993. Thus, the application introduced on 14 July 1993 was lodged within the six-months time-limit.

In the alternative, the Government submit that the applicant failed to exhaust domestic remedies. They argue that he could have lodged an appeal on points of law against the Regional Court's decision of 10 September 1992. The applicant contests this view.

The Commission notes that the applicant did appeal against the Regional Court's decision of 10 September 1992. His appeal was rejected on the ground that there was no remedy against a decision by which the appellate court, sitting in private, rejected an appeal on grounds of nullity.

In conclusion, the Commission finds that the applicant complied with the requirements of Article 26 (Art. 26) of the Convention.

b. As regards Article 6 (Art. 6), the Government, referring to the Convention organs' case-law, submit that the impartiality of a judge has to be ascertained by way of a subjective and an objective test. They argue that Judge K., when requesting to be replaced, in no way indicated that he was subjectively biased. As to the objective test, the Government point out that, at the time Judge K. filed his request for being replaced, it was not yet clear what evidence would be the subject of the new proceedings. That the judge had formed an opinion on the basis of the evidence taken in the previous proceedings, did not mean that he would not deviate from this opinion, if the taking of evidence provided new results. Moreover, Judge K. did not take any procedural step or decision, which would give rise to the assumption that he had a preconceived view of the applicant's position. The mere

fact that a judge had to decide on a similar or identical matter and to assess similar or identical evidence in previous proceedings is not sufficient in itself to justify doubts as to his impartiality.

The applicant points out that Judge K. considered himself to be biased in view of the judgment given in the previous case. Thus, from the beginning he, the applicant, could not expect a favourable decision. In fact, Judge K. did not deviate from his opinion in the new proceedings and even referred explicitly to his prior assessment of evidence. Thus, there were doubts as to his subjective as well as to his objective impartiality.

The Commission recalls that the existence of impartiality for the purposes of Article 6 para. 1 (Art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (Eur. Court H.R., Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 46; Thomann v. Switzerland judgment of 10 June 1996, Reports 1996, para. 30).

As to the subjective test, the Commission notes that Judge K. considered himself to be biased. However, the only reason on which he relied in his request to be replaced, was that he had already dealt with the same matter in proceedings concerning the applicant's sister. It was neither alleged nor shown that Judge K. in fact conducted the proceedings in a manner that gave rise to doubts as to his personal impartiality. Thus, his personal impartiality has to be presumed (Hauschildt judgment, loc. cit., para. 47).

It therefore only remains to be determined under the objective test, whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. It is decisive whether the fear that a particular judge lacks impartiality can be held to be objectively justified (Hauschildt judgment, loc. cit., para. 48).

The Commission recalls that it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which set aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority (Eur. Court HR., Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 40, para. 97; Diennet v. France judgment of 26 September 1995, Series A no. 325-A, paras. 37-38). Further, the Commission notes that it is common in the Convention countries that higher courts deal with similar or related cases in turn and that the European Court has found this unobjectionable from the point of view of the right to a fair trial (Eur. Court H.R, Gillow v. United Kingdom judgment of 24 November 1986, Series A no. 109, p. 28, para. 73).

The Commission considers that the above principles apply mutatis mutandis to first instance proceedings in civil matters. The civil courts may from time to time have to deal with similar or related cases. Unlike in criminal proceedings where a judge has to form an opinion on the defendant's guilt, the outcome of civil proceedings depends in general on evidence unrelated to any question of guilt on the part of the parties. The Commission notes that in the instant case the first instance judgment given by Judge K. was not only based on evidence obtained from witnesses and the appreciation of their credibility, but also on objective documentary evidence which supported the plaintiff's allegation that no user-right had been given to his brother, the applicant.

The applicant was in a position to produce evidence and arguments

also in the light of the result of the previous proceedings brought by the plaintiff against their common sister. The applicant has not shown that he did not make use of this possibility and has furthermore not alleged that Judge K. did not examine in an impartial manner the arguments and evidence produced by him in the proceedings in which he was himself the defending party.

In conclusion, the Commission finds that there is no appearance of a violation of Article 6 (Art. 6) of the Convention.

It follows that the application is 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.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber