AS TO THE ADMISSIBILITY OF

Application No. 19488/92
by F.W.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 1 July 1992, the following members being present:

MM. E. BUSUTTIL, Acting President of the First Chamber
F. ERMACORA
A. S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C. L. ROZAKIS
Mrs. J. LIDDY
MM. M. P. PELLONPÄÄ
B. MARXER

Mr. M. de SALVIA, Secretary to the First 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 1992 by F.W. against Austria and registered on 5 February 1992 under file No. 19488/92;

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 1943 and living in Perchtoldsdorf. He is represented by R. Kornfeld, a lawyer practising in Vienna.

It follows from the applicant's statements and the documents submitted that on 8 February 1991 the applicant was convicted by the District Court (Bezirksgericht) of Vienna of having as the responsible production manager of a food-producing company violated Section 64 in connection with Section 63 para. 1 No. 2 of the Austrian Food Act (Lebensmittelgesetz). He was fined 20 day rates in the amount of 250 AS each. According to the findings of the court the applicant was responsible for the production of sausages which, according to a report of a food control authority (Lebensmitteluntersuchungsanstalt), had to be considered as adulterated in view of their water-protein proportion. The District Court heard the author of the denouncing report as an expert.

The applicant's appeal and plea of nullity was rejected by the Vienna Regional Court on 9 August 1991.

Insofar as the applicant invoked Section 281 para. 1 No. 4 of the Austrian Code on Criminal Procedure (Strafprozeßordnung) which provides for nullity of a judgment in case a motion of the defence has been

arbitrarily disregarded by the trial court, the appellate court stated that the applicant had only requested to hear another expert on his allegation that the sausages produced by him had contained more meat and protein than comparable food products and could therefore not be considered adulterated. This motion had been of no relevance as it was established that the sausages in question contained an eight percent excess of water, and an additional expert opinion would therefore have been of no relevance. The appellate court furthermore noted that it would have been a matter for the defence to challenge the expert who had been heard in first instance as being biased (in accordance with Section 120 of the Code on Criminal Procedure). No such motion had however been made, and the applicant's request to hear another expert could not now be interpreted as such a motion of challenge.

COMPLAINTS

The applicant submits that he was convicted on the basis of an expert opinion prepared by an expert who had caused the criminal proceedings against him, following a food control report established by the same expert. Consequently the expert was not impartial, and the trial therefore violated Article 6 of the Convention.

THE LAW

The applicant complains that he was not given a fair hearing in the criminal proceedings against him as required by Article 6 para. 1 (Art. 6-1) of the Convention because his conviction is based on an expert opinion submitted by an expert who had previously established a food control report which gave rise to the institution of the criminal proceedings in question.

The Commission first notes that the applicant failed to challenge the expert in first instance and therefore his plea of nullity raised in relation to that expert was considered by the appellate court to be unfounded. In these circumstances the applicant cannot be considered to have exhausted the remedies available to him under Austrian law. It follows that the application must be rejected in accordance with Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

In any event, the Commission notes that the present case is distinguishable from the Bönisch case decided by the European Court of Human Rights on 6 May 1985 (Series A no. 92). In that case the Court found a violation of Article 6 para. 1 (Art. 6-1) of the Convention on account of the lack of equal treatment at a criminal trial between an expert appointed by the court on the one hand and witnesses for the defence on the other. In the present case, however, the question of equality of arms does not arise as the facts are uncontested and the applicant only based his defence on the argument that, despite the high percentage of water, the sausages produced by him were of the quality required and he had therefore not acted unlawfully. The appellate court considered, however, that this view was unfounded and that no expert opinion was necessary in this respect. It can in these particular circumstances not be found that the applicant had been denied a fair trial. His application would therefore have to be rejected as being 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.

Secretary to the First Chamber Acting President of the First Chamber

(M. de SALVIA) (E. BUSUTTIL)