AS TO THE ADMISSIBILITY OF

Application No. 12489/86
by W.
against Austria

The European Commission of Human Rights sitting in private on 14 December 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 2 October 1986 by W. against Austria and registered on 23 October 1986 under file No. 12489/86;

Having regard to:

- the observations submitted by the respondent Government on 10 March 1988 and the observations in reply submitted by the applicant on 11 May 1988;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, apparently not in dispute between the parties, may be summarised as follows:

The applicant is an Austrian national, born in 1933, and a pensioner. He is presently serving a sentence in Stein prison, Krems (Lower Austria). Before the Commission he is represented by Mr. W. Nowak, a Rechtsanwalt practising in Innsbruck.

On 20 November 1985 the Innsbruck Regional Court (Landesgericht) convicted the applicant and a co-accused of burglary (schwerer Diebstahl durch Einbruch) committed at Stams. The applicant was sentenced to three years' imprisonment. In the criminal proceedings the applicant was represented by counsel.

In its judgment the Court referred to the statements made by two anonymous witnesses before the police. The police officers who had interrogated them had been examined by the Court.

On the basis of the testimony of the police officers the Court found that the two witnesses had seen two men in the vicinity of the place of the crime at Stams during the late evening when the burglary was committed and that they later recognised the applicant as one of them without any doubt. The Court, which was not aware of the identity of these witnesses and had not examined them in person, found the two women to be credible persons. The applicant denied having been at the locality at Stams but maintained that he was in Innsbruck throughout the night in question.

The applicant's request to have these witnesses summoned and to be confronted with them was rejected by the Court on the ground that the police officers concerned had promised the two witnesses who feared retaliation not to reveal their identity. The police officers were not allowed by their superiors to give evidence. The Court found that the scope of the witnesses' perceptions sufficiently resulted from the statements of the police officers.

The Court also considered that another witness had told the applicant about the victim and his financial situation. Moreover, the Court, having heard several witnesses on the applicant's behalf, found that he had failed to establish his alibi. Finally, the Court believed him capable of such a crime.

On 20 March 1986 the Supreme Court (Oberster Gerichtshof) rejected the applicant's plea of nullity (Nichtigkeitsbeschwerde). The Supreme Court found that the request to summon and hear the two anonymous witnesses would have been futile. Failing a precise indication of how the identity of these witnesses could be established, this request would have necessitated an intervention of the police authorities. However, as matters stood it was not possible to establish the witnesses' identity by asking the police. The applicant had not, for example, asked the Court to take evidence on the identity of the two anonymous witnesses by hearing X whom the witnesses stated to have met late in the evening in question. X might have known the two witnesses and remembered to have met them.

On 24 April 1986 the Supreme Court dismissed the applicant's appeal against sentence (Berufung).

COMPLAINTS

The applicant complains under Article 6 para. 3 (d) of the Convention that the Regional Court convicted him exclusively on the basis of evidence given by two anonymous witnesses who were not heard by the Court and whom he had no opportunity to examine. These two witnesses were the only witnesses against him. He lists several questions which he would have put to these witnesses. The Regional Court refused to hear the witnesses on the sole ground that the police authorities had refused to disclose their identity.

The applicant submits that the Regional Court's refusal to hear the witnesses was not justified. In particular, there was no basis for possible fear of retaliation by his co-accused. Moreover, it would have been possible to exclude the public during the witnesses' examination or to have them examined by the investigating judge in the presence of the Public Prosecutor and of defence counsel if the Court had wished to protect them.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 October 1986 and registered on 23 October 1986.

On 12 December 1987 the Commission decided to invite the

respondent Government, pursuant to Rule 42 para. 2 (b) of its Rules of Procedure, to submit written observations on the admissibility and merits of the application.

The Government's observations were submitted on 10 March 1988, the applicant's observations in reply on 11 May 1988.

On 15 July 1988 the Commission decided to grant the applicant legal aid.

SUBMISSIONS OF THE PARTIES

A. The Government

1. The Government consider that the applicant did not properly exhaust the remedies available to him under Austrian law (Article 26 of the Convention) to the extent that he did not request the Austrian courts to take evidence on the identity of the two anonymous witnesses by hearing X.

2. The Government argue that Article 6 para. 3 (d) of the Convention does not grant the accused an unlimited right to secure the appearance of witnesses before the court with a view to having them cross-examined. A police informant may well have a legitimate interest in remaining anonymous. In particular, the use of indirect testimony does not render proceedings unfair if it was not the only item of evidence. They refer, in this respect, to the Commission's case-law (cf. No. 4428/70, Dec. 1.6.72, Collection 40 p. 1; No. 8417/78, Dec. 4.5.79, D.R. 16 p. 200).

The Government consider that in the present case there was a legitimate interest not to reveal the identity of the two anonymous witnesses. Their fear of retaliation was not unreasonable.

Furthermore, the Government contend that the applicant's conviction was not solely based on the statements of the two anonymous witnesses. The Innsbruck Regional Court took further evidence and in particular heard several other witnesses. It established that the two accused had met in Innsbruck on the evening in question. The applicant failed to prove his alibi that he had spent the whole evening in Innsbruck. Taking into account the applicant's previous convictions, he might have been capable of committing the burglary in question. The Government also submit that the two anonymous witnesses were no eye-witnesses and their statements could, therefore, not have been the decisive item of evidence in the criminal proceedings against the applicant.

3. The Government request the Commission to declare the application inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

B. The applicant

The applicant maintains that the hearing of the two anonymous witnesses would have served both his interest in a fair trial and the public interest in criminal justice. Witnesses alleging that they fear retaliation should not be easily allowed to refuse evidence before the competent court. He finds that in the present case there was no legitimate interest not to reveal the two witnesses' identity.

Furthermore, the applicant considers that the statements of the two anonymous witnesses were of decisive importance in assessing the evidence. In particular, the Regional Court, assuming that the applicant had been in the vicinity of the place of the crime at Stams, was not inclined to believe the witnesses on his behalf who stated

that he had been in Innsbruck at the time in question.

THE LAW

The applicant complains under Article 6 para. 3 (d) (Art. 6-3-d) of the Convention that he was convicted on the basis of statements made by anonymous witnesses to the police without having had the opportunity to examine them.

Article 6 para. 3 (d) (Art. 6-3-d)of the Convention provides that everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The Commission notes first that the respondent Government raised the issue that the applicant did not expressly request the Innsbruck Regional Court to examine the witness X on the question of the two anonymous witnesses' identity, and did not, in this respect, properly exhaust domestic remedies. However, they did not request the Commission to declare the application inadmissible for non-exhaustion of domestic remedies.

The Commission considers that the applicant has raised his complaints under Article 6 para. 3 (d) (Art. 6-3-d) of the Convention which he now makes before the Commission in the domestic court proceedings and can therefore be considered to have exhausted the domestic remedies under Austrian law within the meaning of Article 26 (Art. 26) of the Convention.

The Government furthermore contend that the applicant's rights under Article 6 para. 3 (d) (Art. 6-3)d) of the Convention were respected. They submit in particular that the police authorities had a legitimate interest not to reveal the identity of the two anonynous witnesses and that the applicant's conviction was not exclusively based upon their statements.

The Commission, however, considers that the applicant's complaints raise complicated issues of fact and law which can only be resolved by an examination of the merits. The application cannot, therefore, be declared manifestly ill-founded and no other grounds for inadmissibility have been established.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE

without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)