AS TO THE ADMISSIBILITY OF

Application No. 19466/92
by Herbert WAIS
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 2 September 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

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 20 December 1991 by Herbert WAIS against Austria and registered on 31 January 1992 under file No. 19466/92;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 20 September 1993 and the observations in reply submitted by the applicant on 4 November 1993;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, born in 1930 or 1931, is an Austrian national. When lodging his application, he was detained at a prison in Garsten. Before the Commission he is represented by Mr. K. Bernhauser, a lawyer practising in Vienna.

On 23 October 1985 the Vienna Regional Court (Landesgericht) convicted the applicant of fraud and sentenced him to four years' imprisonment. Taking a previous sentence of three years' imprisonment into account, it fixed a cumulative sentence of seven years imprisonment.

In April 1986 information was laid against the applicant and others on the suspicion of having committed fraud in 1984.

On 3 September 1986 the applicant was questioned as suspect on the charges against him. He was again questioned on 16 February, on 28 and 31 August 1987 and 8 September 1988. Meanwhile, in May 1987 the criminal proceedings against the applicant had been separated from the

proceedings against the other suspect.

On 7 March 1989 the Vienna Public Prosecutor's Office (Staatsanwaltschaft) preferred the bill of indictment (Anklageschrift) charging the applicant with fraud on three counts committed in 1984 in the context of real property transactions, and false testimony given in the course of civil proceedings in April 1985. The indictment was served upon the applicant on 6 April 1989. The applicant objected to the indictment and requested for assistance by an official defence counsel. The official defence counsel, appointed in May 1989, withdrew the objection on 2 June 1989.

On 1 February 1990 the Vienna Regional Court (Landesgericht), sitting with two judges, one of them acting as presiding judge, and two lay assessors, opened the trial against the applicant. Having noted that the applicant was detained in a psychiatric hospital for mentally deranged criminals where he underwent a particular psychiatric treatment, the Court granted the request of the defence counsel for a psychiatric expert opinion as to the applicant's criminal responsibility in 1984/1985 as well as his capacity to participate in the proceedings.

On 12 February 1990 the Regional Court appointed Dr. G. as psychiatric expert to prepare the above opinion. In his opinion dated 2 March 1990 and received at the Court on 9 April 1990, Dr. G. concluded that the applicant had not been suffering from a mental disease and that there were no other reasons to exclude his criminal responsibility, and that he was capable of participating in the proceedings.

The date for the next trial was fixed for 5 October 1990. It was, however, postponed due to the illness of the defence counsel and in particular in order to have a second expert opinion by Dr. G. taking into account new indications as to the applicant's mental health. Dr. G. submitted his second opinion on 2 November 1990, stating that the applicant's mental health had deteriorated and that he could not therefore present his interests properly before a court.

Further expert advice was taken, upon the request of the Public Prosecutor's office, as to the applicant's general state of health. The specialist for internal medecine appointed on 15 November 1990 informed the Court on 17 December 1990 that the applicant ought to be examined by a specialist for pulmonary diseases. The latter expert, appointed on 19 December 1990, confirmed the applicant's capability to participate in the proceedings (opinion received at the Court on 9 February 1991).

On 16 February 1991, upon the end of his prison term after his conviction in 1985, the applicant was taken into detention on remand. His appeals remained unsuccessful.

Since 19 March 1991 the applicant has been represented by Mr. Bernhauser in the domestic proceedings. Mr. Bernhauser submits that he contacted the Presiding Judge at the Regional Court in order to inquire into the possibilities of an early trial. The Presiding Judge L. had stated that he could arrange for a trial on 3 July 1991, if the applicant pleaded guilty and dispensed with the hearing of witnesses. He added that, should the applicant not plead guilty, the trial could only be continued in autumn 1991. Moreover, the Presiding Judge allegedly promised that the applicant would be conditionally released on the day of his trial.

On 1 July 1991 Mr. Bernhauser drafted a file note in order to prepare a colleague to replace him at the trial fixed for 3 July 1991. The file note referred to an agreement with the competent Judge L. that the applicant should plead guilty in respect of all charges and accept a conviction not exceeding three years' imprisonment on the

understanding that a request for conditional release would immediately be filed ("Hinsichtlich der HV 3.7.1991 ist auszuführen, daß mit dem Richter Dr. [L.] vereinbart wurde, daß der Mandant ein volles Geständnis ablegen wird, auch hinsichtlich der Ausdehnungsfakten, und ist das Urteil (bis zu 3 Jahren Freiheitsstrafe) anzunehmen, wobei sofort mit Rechtskraft der Antrag auf bedingte Entlassung ... zu stellen ist."). Having regard to the period of his prior detention the applicant met the conditions for conditional release. Furthermore, the applicant was at that time receiving an old age pension and, there were thus no particular reasons of a financial nature precluding his conditional release. The note continued that Judge L. had also stated that the Public Prosecutor concerned had been informed accordingly.

On 3 July 1991 the trial was resumed before the Vienna Regional Court. The applicant pleaded guilty. The Regional Court, referring to the previous taking of evidence, heard two witnesses who confirmed their statements as given earlier in the course of the trial. No further taking of evidence was requested.

Following deliberations after the trial, the Regional Court pronounced its judgment against the applicant, including the essential reasoning. The applicant was convicted of fraud on three counts and of having given false evidence in the course of civil proceedings. Taking into account the sentence imposed upon him in 1985, the Court fixed a supplementary sentence of four years' imprisonment. The period of his detention on remand was counted towards his sentence.

Thereupon, the applicant and the Public Prosecutor waived their right to appeal.

The applicant's counsel then requested that the applicant be conditionally released from detention. The Public Prosecutor objected to this request. The Regional Court dismissed the request. Mr. Bernhauser submits that the Regional Court found that the conditions for granting the request were not met.

On 8 July 1991 the applicant lodged an appeal (Berufung) and an appeal on points of law (Revision) against the judgment of 3 July 1991.

On 10 July 1991 the Vienna Regional Court rejected his appeal on points of law on the ground that, in presence of his defence counsel, he had waived his right to appeal.

On 11 September 1991 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's appeal (Beschwerde) against the Regional Court's decision of 10 July 1991. The Supreme Court considered that the applicant, in presence of his defence counsel, had validly waived his right to appeal. In these circumstances, his appeal on points of law was to be rejected without awaiting the written version of the Regional Court's judgment.

On 29 October 1991 the Vienna Court of Appeal declared the applicant's appeal inadmissible as he had waived his right to appeal.

The written version of the judgment of 3 July 1991 was finalised on 7 February 1992. According to a file note of the Presiding Judge of the same date, this delay was due to the fact that the files had been meanwhile twice with the Vienna Court of Appeal and twice with the Supreme Court, furthermore once with the Federal Ministry of Justice (Bundesministerium der Justiz) and also with another Regional Court.

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention about the length of the criminal proceedings against him. He submits in particular that the preliminary investigations and the trial before the Vienna Regional Court were unduly delayed.

2. The applicant also complains under Article 6 para. 1 of the Convention that the proceedings against him were unfair. He submits that the Presiding Judge did not keep his promise to release him on the day of the trial, should he plead guilty and dispense with witnesses.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 December 1991 and registered on 31 January 1992.

On 30 June 1993 the Commission decided to communicate the application to the respondent Government and to invite them to submit written observations on the admissibility and merits of the applicant's complaint about the length of the criminal proceedings against him.

On 20 September 1993 the Government submitted their observations. The observations in reply by the applicant were submitted on 4 November 1993.

THE LAW

1. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the criminal proceedings against him.

The Government contend that the length of the proceedings was due to the complexity of the case and to the applicant's state of health. They consider that there were no unreasonably long delays on the part of the authorities or any inactivity of the judicial authorities.

The applicant submits in particular that the facts of the case were not as complex as to justify a period of three years to complete the preliminary investigations against him and to prefer the indictment against him. He also points at a delay of one year between the service of the indictment and the first trial before the Regional Court. He further maintains that from the beginning of the trial he admitted his guilt, and considers that the length of the proceedings was, therefore, even less justified.

Article 6 para. 1 (Art. 6-1), so far as relevant, provides that "in the determination ... of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time".

The Commission considers, in the light of the criteria established by the case-law of the Convention institutions on the question of "reasonable time" (the complexity of the case, the applicant's conduct and that of the competent authorities), and having regard to all the information in its possession, that a thorough examination of this complaint is required, both as to the law and as to the facts.

2. The applicant also complains under Article 6 para. 1 (Art. 6-1) of the Convention that the proceedings against him were unfair, alleging that the Presiding Judge did not keep his promise to release him on the day of the trial, should he plead guilty and dispense with witnesses.

The Commission finds that it is impossible to establish with certainty that the alleged statement was indeed made by the Presiding Judge. In particular, the file note drafted by Mr. Bernhauser on his conversation with the Presiding Judge does not mention a promise given by the Presiding Judge as to the applicant's conditional release, should he plead guilty. It merely referred to an understanding that a request for conditional release would be put. Furthermore, some other items mentioned in the file note did not reflect what happened in reality: there were witnesses at the trial and the applicant was sentenced to four years' imprisonment instead of three. In any way,

defence counsel could not assume that any promise made by the Presiding Judge could bind the other members of the Court sitting in the case. Mr. Bernhauser must have known that the Regional Court would render its judgment after its deliberations on the issues raised at the trial before it (see Eur. Court H.R., Colak judgment of 6 December 1988, Series A no. 147, pp. 12-13, paras. 30-31).

Consequently, there is no appearance of a violation of Article 6 para. 1 (Art. 6-1) as to the fairness of the criminal proceedings against the applicant.

It follows that this part of 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 ADMISSIBLE THE APPLICANT'S COMPLAINT ABOUT THE LENGTH OF THE CRIMINAL PROCEEDINGS,
without prejudging the merits of the case,

DECLARES INADMISSIBLE THE REMAINDER OF THE APPLICATION.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)