AS TO THE ADMISSIBILITY OF

Application No. 29808/96
by Erich WITT
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 4 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 7 November 1995 by Erich WITT against Austria and registered on 15 January 1996 under file No. 29808/96;

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 national, born in 1918 and residing in Vienna. Before the Commission he is represented by MM. Toth, Themmer and Prunbauer, lawyers practising in Vienna.

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

The applicant was one of three managing directors of the Sch. private company (Gesellschaft mit beschränkter Haftung). This company was founded by the applicant and his wife - the latter representing another company of the Sch. Group - in the beginning of April 1988 with a share capital of ATS 1 million. Subsequently the applicant held 95% of the shares as a trustee for a holding company.

On 29 April 1988 the Sch. company - as a leaseholder - concluded a lease contract with the Sch.K. private company - as a lessor - owned by the applicant and his family, concerning the lease of production and distribution facilities. This contract obliged the Sch. company to pay yearly a fixed rent of ATS 5 million as well as a turnover related rent and to make yearly investments of ATS 3 million. Furthermore the Sch.

company acquired the existing stocks for which it had to pay ATS 19,4 millions.

At the starting up of its operation the Sch. company was granted a credit of ATS 8 million by an Austrian bank. When it became evident that the Sch. company would suffer a loss in the first year, the managing director B.W. initiated a new credit arrangement with the same bank. In the beginning of November 1988 the Sch. company and three of its sister companies guaranteed mutually a maximum credit of ATS 30 million and declared themselves jointly and severally liable.

Soon thereafter the Sch. company faced again financial difficulties and suffered continuous losses. On 28 November 1989 the bank cancelled the credit contract of November 1988 in accordance with its general conditions on credits (Allgemeine Kreditbedingungen).

On 14 December 1989 bankruptcy proceedings were commenced against the Sch. company. The total claims of the creditors amounted to ATS 130 million, of which ATS 40 million were recognised by the trustee in bankruptcy (Konkursverwalter).

On 22 March 1990 a creditor reported the applicant to the Vienna Public Prosecutor's Office. Subsequently the Public Prosecutor's Office conducted preliminary investigations against the applicant on the suspicion of having committed the offence of ordinary bankruptcy (fahrlässige Krida). The applicant was questioned by the police which filed its report on 26 July 1990.

On 9 November 1990, in the course of judicial preliminary investigations (Voruntersuchung), the applicant was questioned by an investigating judge at the Vienna Regional Criminal Court (Landesgericht für Strafsachen).

On 29 September 1991 the court expert A.S., a tax consultant and accountant, submitted his report.

On 18 December 1992 the Public Prosecutor's Office filed a bill of indictment (Strafantrag) against all three managing directors of the Sch. company, charging them with ordinary bankruptcy.

On 3 March 1993, 12 May 1993, 1 December 1993 and 15 December 1993 hearings in the trial against the applicant and his co-accused took place before the Vienna Regional Criminal Court. The court heard the three accused, a number of witnesses, including the applicant's wife and former employees of the Sch. company, as well as the court expert A.S. In these and the subsequent proceedings the applicant was assisted by counsel.

At the hearing of 1 December 1993 the witness M.K. was heard, who had been the tax consultant of the companies leasing the production and distribution facilities prior to and subsequent to the Sch. company. The applicant and the court expert questioned the witness extensively on the average operating results of the predecessor companies. When the applicant's counsel asked the witness whether the years 1984/1985 quoted in the expert opinion represented an atypical operating result, the judge excluded this question on the ground that it referred to the conclusions of the court expert and that M.K. was heard as a witness, but not as an expert. For the same reason the judge did not admit documentary evidence submitted by the applicant, which contained a list of the operating results of the predecessor companies. This list had been drawn up by M.K. and formed part of a private expert opinion, which the judge had already earlier refused to admit. A further set of questions put to the witness concerned the financial obligations resulting from the lease contract of the predecessor companies as well as the investments made by these companies. The court refused, however, to admit any questions concerning the successor company as being irrelevant to the proceedings.

According to the minutes, the applicant's counsel thereupon challenged the judge for bias on the ground that he had stated that he was "not interested in these questions" and had, thus, displayed an unobjective attitude against the applicant. The applicant further alleges that the judge announced that he would withdraw from him the right to put questions, when his counsel tried to explain the importance of the questions at issue.

The next witness heard was W.W., who had prepared a private expert opinion for the applicant. The applicant asked what conclusions he drew from the facts as established by the court expert and whether the rent paid by the Sch. company was adequate. The judge refused to admit these questions on the ground that W.W. was heard as a witness and not as an expert.

Subsequently, the court expert A.S. was heard. He summarized his written expert opinion and supplemented it on the basis of the questions asked during the hearing. He came to the conclusion that the Sch. company had from the beginning of its operations had no positive prospects of existence, as it lacked sufficient resources of its own, had entered into a lease contract the conditions of which were too strict and had had unrealistic and unfounded expectations as regards turnover. The judge as well as counsel for the defence questioned the court expert extensively on the factual basis of his opinion as well as on the conclusions drawn. Further, the applicant's counsel confronted him with the applicant's defence, according to which the Sch. company had never been insolvent. He argued that, as its sister companies belonging to the same group had guaranteed the credit granted by the bank, this credit or rather the claims of the sister companies had to be considered as "shareholder credit replacing own resources" (eigenkapitalersetzendes Gesellschafterdarlehen), i.e. as claims which are excluded as claims in bankruptcy. However, the judge refused to admit any questions concerning the notion of "shareholder credit replacing own resources" on the ground that these referred to the legal assessment of the facts to be made by the court. Since the judge did not admit any questions in this respect and interrupted the applicant's counsel several times when formulating the questions, the latter again challenged the judge for bias.

The judge did not decide during the hearing on the motions challenging him for bias. After terminating the taking of evidence he decided to adjourn the hearing in order to await the decision by the President of the Vienna Regional Criminal Court. He fixed 15 December 1993 as date for the pronunciation of the judgment, dismissing the applicant's request for postponement.

On 9 December 1993 the Acting President of the Regional Court dismissed the motion challenging the judge for bias. He noted the applicant's allegations that the judge had stated that he was not interested in the questions asked by the applicant's counsel and that the judge disregarded the case-law of the Supreme Court regarding the principles on "shareholder credit replacing own resources". He also noted the applicant's further complaints about the refusal of his request to postpone the hearing, the refusal to admit certain questions and to take documentary evidence and the judge's reasoning in a decision dismissing the applicant's request for a rectification of the record, namely that "the defence had obviously got hold of a version of the record which did not correspond to the official version as authorised by the judge". He further noted that the judge did not consider himself to be biased. In particular the judge had stated that the reasons for refusing questions were given in the minutes and that the applicant's counsel had tried to explain his motives for several questions "off the record", whereupon he had told him that explanations which were not meant to be recorded could not interest the court. Further, he had refused to postpone the hearing of 15 December 1993 as the proceedings had already lasted for a considerable time.

The Acting President of the Regional Court found that there was no appearance of bias in the present case. The wording in the decision of 13 October 1993 relating to the request for rectification of the record may not have been polite, but was not directed against the applicant and did not bear out a challenge of bias. Further, it was in the judge's discretion to refuse questions or evidence which he considered irrelevant. In case he held a wrong legal view, this point could be raised in the appeal proceedings. Finally, given the work load of the courts and the need to conduct proceedings speedily, the fact that the judge had refused to postpone a hearing was not such as to cast doubt on his impartiality.

On 15 December 1993 the Regional Court convicted the applicant of ordinary bankruptcy, finding that he had negligently caused the insolvency of the Sch. company by starting the business without sufficient equity capital and by disproportionately raising credit and that he had negligently failed to file a bankruptcy petition in time. Further it convicted him of fraudulent preference of creditors (Gläubigerbegünstigung). The Court sentenced the applicant to nine months' imprisonment suspended on probation for three years. The written judgment was served on 16 December 1993.

On 30 December 1993 the applicant filed an appeal on questions of law and fact and against sentence (Berufung wegen Nichtigkeit, Schuld und Strafe) with the Vienna Court of Appeal (Oberlandesgericht).

In his appeal on questions of law the applicant complained, in particular, that the judge at the Vienna Regional Court had been biased against him. In addition to the reasons already relied on, he claimed that the judge had already proved to be biased before the hearing of 1 December 1993. For instance, the expert opinion of A.S. had been published in an Austrian magazine, in February 1992, before the applicant knew of it. Nevertheless the appointment of a second expert was refused. The judge had refused to admit the private expert opinion of W.W. although it had already been taken to the file and the court expert had referred to it when supplementing his opinion. He had equally refused to admit a legal expert opinion on the question of "shareholder credit replacing own resources". Besides this the judge dismissed a request to postpone a hearing in March 1993. When the applicant's counsel had, in May 1993, wanted to make notes of a telephone conversation with the judge, the judge had rudely stated that this was not necessary and that he was not obliged to have telephone conversations with the applicant's counsel. At the hearing of 12 May 1993 the judge had refused a number of questions and finally he had refused his subsequent request for rectification of the record. The applicant further submitted that the President of the Regional Court, who had dismissed his motion challenging the judge for bias was not competent to decide on this motion. Besides this he claimed that the judge's refusal to admit several questions and some documentary evidence, including a private expert opinion, had violated his right to a fair trial.

In his appeal on questions of fact the applicant contested, in detailed submissions, the Regional Court's finding of fact.

On 9 May 1995 the Court of Appeal confirmed the judgment of the Regional Court as to the conviction for ordinary bankruptcy, but quashed the judgment as to fraudulent preference of creditors and sentenced the applicant to seven months' imprisonment suspended on probation for three years.

As regards the alleged lack of impartiality of the judge, the Court of Appeal found that this did not constitute a ground of nullity under the Code of Criminal Procedure (Strafprozeßordnung). In any case, the complaint was unjustified on the merits as the applicant had not substantiated in which way the alleged conduct of the judge would have

been capable of casting doubt on his impartiality and objectivity. The Court admitted that not the President of the Regional Court but the challenged judge himself would have been competent to decide on a motion for bias made in the course of the hearing. The Court nevertheless found that the infringement of this procedural requirement had no impact on the final outcome of the decision dismissing the motion, as the judge had stated that he did not consider himself to be biased.

As regards the court's refusal to admit several questions and documentary evidence the Court of Appeal stated that the refusal had not impaired the applicant's defence rights, since the questions and document at issue did not concern any relevant facts. In particular, as regards the questions in relation to the predecessor and successor companies asked to the witness M.K., the Court of Appeal noted that the Regional Court had admitted all questions as far as they concerned the relevant facts and had rightly excluded questions concerning conclusions to be made by the court expert or hypothetical questions. The court expert A.S. had been in the possession of all relevant documents to make the necessary conclusions and had supplemented his opinion on the basis of the questions asked during the hearing. Also the refusal to accept as evidence an opinion established by the private expert W.W. and to admit the corresponding questions did not impair the applicant's rights of defence. In particular, A.S. had conclusively explained differences between his approach and the approach of W.W. at the trial. As to the refusal to admit questions and an expert opinion concerning the so-called "shareholder credit replacing own resources", the Court of Appeal found that the Regional Court had rightly considered them to be legally irrelevant.

As regards the appeal on questions of fact, the Court of Appeal, examining in detail the applicant's submissions, found that the Regional Court had correctly assessed all the evidence before it.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention about the criminal proceedings against him. Firstly, he submits that his defence rights were unduly restricted. In particular, at the hearing of 1 December 1993 the court excluded several questions to be put to the witnesses M.K. and W.W. and to the court expert A.S. Further, it did not admit as evidence a legal expert opinion, an opinion established by a private expert and documentary evidence established by the witness M.K. Secondly, the applicant complains that the judge at the Regional Court was biased against him. He refers again to the refusal to admit questions and evidence at the hearing of 1 December 1993, claiming that the judge stated that he was not interested in the applicant's questions, interrupted the defence when formulating questions and announced several times that he would withdraw from the applicant the right to put questions. He also recalls his further complaints relating to events prior to the hearing of 1 December 1993 as submitted in his appeal. Further, he complains that the judge refused to postpone the hearing of 15 December 1993. Moreover, he complains that the decision dismissing his motions challenging the judge for bias had not been taken by the competent body, that is by the challenged judge himself, but by the President of the Regional Court.

2. The applicant also complains under Article 6 of the Convention that the criminal proceedings against him lasted unreasonably long.

THE LAW

1. The applicant complains under Article 6 (Art. 6) of the Convention that the criminal proceedings against him concerning charges

of ordinary bankruptcy were unfair and that the judge at the Regional Court lacked impartiality.

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

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal established by law.

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

d. 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."

a. The applicant submits that the court restricted his right to put questions to several witnesses and to the court expert and refused to admit certain pieces of documentary evidence proposed by him.

The Commission recalls in this respect that the admissibility of evidence is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to assess the evidence before them. The Convention organs' task is to ascertain whether the proceedings, considered as a whole, were fair. The Commission further recalls that the requirements of paragraph 3 of Article 6 (Art. 6-3) represent particular aspects of the right to a fair trial guaranteed in paragraph 1. It will therefore examine the complaint from the point of view of these two provisions taken together (Eur. Court HR, Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, para. 43).

The Commission notes that the Regional Court took as evidence the opinion of a court expert and heard a number of witnesses. The applicant, assisted by defence counsel, had adequate opportunity to examine the witnesses and the court expert, who dealt with the questions raised during the trial and supplemented his opinion accordingly. The court found the expert opinion conclusive. It refused to appoint a further expert and to admit a private expert opinion. As far as questions were excluded or documentary evidence not taken the court gave reasons as to why it considered them irrelevant from a factual or legal point of view. The Court of Appeal, dealing with the applicant's arguments in detail, found that the Regional Court's taking of evidence had been correct and also confirmed its assessment of evidence.

Having regard to all the circumstances of the case, the Commission finds no reasons to conclude that the trial court's taking of evidence was incompatible with Article 6 (Art. 6) of the Convention.

b. The applicant complains further that the judge at the Regional Court was biased against him and that the decision dismissing his motions challenging the judge for bias was not taken by the competent organ.

The Commission recalls that the existence of impartiality for the purpose 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 HR, Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28).

The applicant submits again that the judge, at the hearing of 1 December 1993 refused several questions to be put to the witnesses and the court expert and did not admit certain pieces of documentary evidence. Having regard to its above findings, the Commission considers that these submissions do not suffice to put the impartiality of the judge into doubt. The applicant's further allegations, namely that the judge stated that he was not interested in the applicant's questions, interrupted his counsel when formulating questions and announced that he would withdraw the right to put questions from him have to be seen in this context. The fact that the judge prevented the defence from putting or repeating questions he refused to admit cannot, in the Commissions view, bear out a challenge of bias. Nor are the applicant's further submissions relating to events prior to the hearing of 1 December 1993 and to the judge's refusal to postpone the hearing of 15 December 1993 such as to cast doubt on the judge's impartiality.

Finally, the applicant complains that the decision concerning his motions challenging the judge for bias was taken by the President of the Regional Court and not by the challenged judge himself. The Commission notes the decision by the Court of Appeal, finding that the infringement of this procedural requirement had no impact on the result of the decision. As the applicant did not show in what respect this decision entailed any negative consequences, the Commission finds that also this part of the complaint does not raise any concerns as to the impartiality of the judge or the fairness of the proceedings as a whole.

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.

2. The applicant complains under Article 6 (Art. 6) of the Convention that the criminal proceedings against him lasted unreasonably long.

The Commission considers it cannot, on the basis of the present state of the file, determine the admissibility of this complaint and that it is necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of the complaint concerning the length of these proceedings to the respondent Government.

For these reasons, the Commission

DECIDES TO ADJOURN the examination of the applicant's complaint concerning the length of the criminal proceedings against him and,

unanimously,

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber