AS TO THE ADMISSIBILITY OF

Application No. 24406/94
by Johann ZWETTLER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 31 May 1994 by Johann ZWETTLER against Austria and registered on 15 June 1994 under file No. 24406/94;

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 facts of the case as they have been submitted by the applicant, may be summarised as follows.

The applicant, born in 1925, is an Austrian national and resident in Linz.

In 1989 criminal investigations were started against the applicant and other managers of an aircraft industries company on the suspicion of having committed bankruptcy offences.

In the criminal proceedings against him, the applicant was assisted by defence counsel.

On 2 July 1992 the Linz Regional Criminal Court (Landesgericht für Strafsachen) convicted the applicant of simple bankruptcy (fahrlässige Krida), pursuant to S. 159 para. 1 of the Austrian Penal Code (Strafgesetzbuch), and sentenced him to three months' imprisonment. Three further accused were also convicted of simple bankruptcy and sentenced to three or four months' imprisonment, respectively. The execution of their sentences was suspended on probation. The accused were also ordered to pay compensation to the private parties (Privatbeteiligte). Furthermore, the costs of the

proceedings were awarded against, inter alia, the applicant.

In its judgment, the Regional Criminal Court found that the applicant, as member of the supervisory board (Aufsichtsrat) of the above company, had known about its insufficient capital means and solvency, but failed to urge for an long-term financial strategy and market investigation. He had further agreed to imprudent raising of money and had on the whole insufficiently supervised the management of the company concerned. The Court stated that its factual findings, in particular as regards the applicant's knowledge of the financial situation of the company concerned, were based partly upon the applicant's statements and the statements of members of the managing board and the supervisory board as well as of other witnesses. Having regard to all circumstances and in particular the applicant's position, the Court did not accept his defence that he had not known about the difficulties in raising the financial means for the purposes of an increase of capital. The Court also proceeded from two technical expert opinions, prepared in the context of the preliminary investigations, as well as from the opinion of an auditor. The Court dismissed the requests, by one of the co-accused, to take a private expert opinion into account, and not to consider one of the above expert opinions and to have further expert opinions prepared. In this respect, the Court observed that the Code of Criminal Procedure (Strafprozeßordnung) did not require the trial court to take private expert opinions into account. Furthermore, the expert opinions prepared in the context of the proceedings were on the whole conclusive and covered all relevant matters.

On 9 December 1993 the Linz Court of Appeal (Oberlandesgericht), upon inter alia the applicant's appeal (Berufung), amended the Regional Court judgment as regards its compensation order to the effect that the decision on this issue was referred to the civil courts. The Court of Appeal confirmed the findings of the Regional Criminal Court. It also dismissed the complaints by the applicant and his co-accused about the refusal to take further expert advice, finding that the relevant questions were not particularly difficult and that the expert opinions available did not disclose any shortcomings.

The judgment was served on 27 January 1994.

COMPLAINTS

The applicant complains about his conviction and the alleged unfairness of the criminal proceedings against him. He considers in particular that the Austrian courts wrongly found him guilty, and incorrectly applied the relevant legal provision on bankruptcy in the circumstances of his case. In particular, the Linz Regional Criminal Court should have taken the private expert opinion into account. Furthermore, according to the applicant, the Linz Regional Criminal Court's judgment was not duly reasoned, in particular not sufficiently considered and referred to the legal literature. He also submits that his conviction amounted to discrimination on the ground that other former members of the company's supervisory board were not prosecuted. He finally complains that he had to bear the costs of the criminal proceedings against him as well as his own legal expenses. He invokes Article 6 paras. 1 and 2, and Articles 7 and 14 of the Convention as well as Article 1 of Protocol No. 1.

THE LAW

1. The applicant complains about his conviction and also of the criminal proceedings against him.

a. With regard to the judicial decision of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In

particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (cf. No. 21283/93, Dec. 5.4.94, D.R. 77 p. 81; Eur. Court H.R., Van de Hurk judgment of 19 April 1994, Series A no. 288, p. 20, para. 61; Klaas judgment of 22 September 1993, Series A no. 269, p. 17, para. 29).

b. The applicant complains that his conviction amounted to a violation of Article 7 (Art. 7) of the Convention.

According to Article 7 para. 1 (Art. 7-1), first sentence, "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed".

The Commission considers that the applicant's submissions in this respect are limited to the allegation of factual and legal errors in the Linz Regional Criminal Court's finding, as confirmed by the Linz Court of Appeal, that he had committed the offence of simple bankruptcy, pursuant to the relevant provision of the Austrian Penal Code. They do not disclose any appearance of a violation of Article 7 para. 1 (Art. 7-1) of the Convention.

c. The applicant further raised various complaints about the criminal proceedings against him. The Commission finds appropriate it to examine these submissions from the angle of paragraph 1 taken together with the principles inherent in paragraphs 2 and 3 of Article 6 (Art. 6), as the guarantees in paragraphs 2 and 3 are specific aspects of the general concept of a fair trial set forth in paragraph 1 (cf. mutatis mutandis, Eur. Court H.R., Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29).

With regard to the applicant's complaints about the Regional Criminal Court's taking and assessment of evidence, the Commission recalls that, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. More specifically, Article 6 para. 3 (d) (Art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it does not require the attendance and examination of every witness on the accused's behalf (cf., Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33). However, it is the task of the Convention organs to ascertain whether the taking and assessment of evidence rendered the proceedings as a whole unfair. In this respect, the Commission also recalls that all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, paras. 26-27).

In the present case, the applicant submits in particular that the Regional Criminal Court did not take the private expert opinion into account. In this respect, the Commission notes that the Regional Criminal Court observed that the Code of Criminal Procedure did not require the trial court to accept private expert opinions as evidence. Moreover, the Regional Criminal Court considered that the expert opinions prepared in the context of the proceedings were on the whole conclusive and covered all relevant matters. The Court of Appeal confirmed this approach. Having regard to all material before it, the Commission finds no sufficient grounds to conclude that the failure to take the private expert opinion into account was incompatible with Article 6 (Art. 6).

As regards the applicant's complaint that the Linz Regional

Criminal Court's judgment was not duly reasoned, the Commission recalls that Article 6 para. 1 (Art. 6-1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision (Eur. Court H.R., Ruiz Torija and Hiro Balani judgments of 9 December 1994, Series A no. 303 -A and B, p. 12, para. 29, and pp. 29-30, para. 27). However, the Convention organs are not called upon to examine whether arguments are adequately met (see above and Eur. Court H.R., Van De Hurk judgment of 19 April 1994, Series A no. 288, p. 20, para. 61). The Commission, having considered the Regional Criminal Court's reasoning in its judgment of 2 July 1992, finds no indication that the court failed to fulfil its obligation to state reasons.

In sum, taken individually none of the matters complained of by the applicant discloses any appearance of a violation of the rights of the defence under Article 6 (Art. 6) of the Convention. Furthermore, the Commission finds that, taken cumulatively, the alleged procedural deficiencies did not result in rendering unfair, for the purposes of Article 6 (Art. 6), the criminal proceedings considered as a whole.

d. The applicant also complains that further persons who had been members of the company's supervisory board were not prosecuted and convicted for bankruptcy. The Commission, having examined this issue under Article 14, in conjunction with Article 6 (Art. 14+6), of the Convention, finds that in principle it is not its function to compare different decisions of national authorities, even if taken in apparently similar circumstances proceedings, unless there is a denial of justice or a manifest abuse.

The applicant's submissions do not permit a finding of this sort.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

2. The applicant finally complains under Article 1 of Protocol No. 1 (P1-1) that he had to bear the costs of the criminal proceedings against him as well as his own legal expenses. The Commission considers that the Austrian court decisions on this point are justified under paragraph 2 of this provision which entitles the State "to enforce such laws as it deems necessary ... to secure the payment of taxes or other contributions or penalties". It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)