



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF NEUMEISTER v. AUSTRIA (ARTICLE 50)

(Application n° 1936/63)

JUDGMENT

STRASBOURG

7 May 1974

In the Neumeister case,

The European Court of Human Rights, sitting in accordance with the provisions of Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and Rules 21 and 22 of the Rules of Court as a Chamber composed of the following judges:

MM. G. BALLADORE PALLIERI, *President*,
Å.E.V. HOLMBÄCK,
A. VERDROSS,
H. MOSLER,
M. ZEKIA,
J. CREMONA,
P.P. O'DONOGHUE

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. J.F. SMYTH, *Deputy Registrar*,

Having deliberated in private,

Decides as follows on the question of the application of Article 50 (art. 50) of the Convention in the present case :

PROCEDURE AND FACTS

1. The Neumeister case was referred to the Court on 7 October 1966 by the European Commission of Human Rights (hereinafter referred to as "the Commission") and on 11 October 1966 by the Government of the Republic of Austria (hereinafter referred to as "the Government"). The case has its origin in an application against the Republic of Austria submitted to the Commission by an Austrian national, Mr. Fritz Neumeister, in 1963. The applicant complained, inter alia, of the length of time he had spent in detention while on remand from 24 February to 12 May 1961, that is, two months and sixteen days, and from 12 July 1962 to 16 September 1964, that is two years, two months and four days.

2. By judgment of 27 June 1968 the Court, while rejecting two other complaints of the applicant, held that there had been a breach of Article 5 (3) (art. 5-3) of the Convention in that the detention of Neumeister had been continued for longer than a reasonable time (first point of the operative part of the judgment and paragraphs 3 to 15 of the reasoning).

3. On 2 July 1968, the Vienna Regional Criminal Court sentenced the applicant to five years' severe imprisonment for aggravated fraud; the two above-mentioned periods of detention on remand were reckoned as part of the sentence. The Supreme Court upheld that decision on 16 June and 4 November 1971.

4. On 23 December 1970, Neumeister presented to the Austrian Federal Ministry of Justice a claim for a provisional overall sum of 3,500,000 schillings compensation in reparation of the damage he had allegedly sustained by reason of the violation so found by the European Court. On 17 March 1971, the Finanzprokuratur (revenue department of the Attorney General's office) informed him that the Republic of Austria could not accept that he was entitled to such compensation since the conditions required therefore under the law in force were not satisfied.

5. Considering this reply as a final decision under the law, the applicant addressed his claim to the Commission on 16 September 1971, referring to the judgment of 27 June 1968 and to Articles 5 (5) and 50 (art. 5-5, art. 50) of the Convention. He stated that, by reason of his second detention on remand (12 July 1962 - 16 September 1964), he had suffered considerable financial loss, not to mention personal injustice and humiliation. He alleged that the sudden cessation of his services had ruined his business; that not only had he lost important business contacts, but contracts in hand had had to be left unfulfilled or carried out incompletely; that this had resulted in a serious decline of the Scherzinger company and an almost total loss of the company's capital. Reserving his right to present further claims, Neumeister for the time being estimated the loss at 3,500,000 schillings at least. He requested the Commission to accept his claim and to initiate the proceedings provided in this connection.

6. On 27 September 1971, Mr. Sørensen, Principal Delegate of the Commission in the earlier proceedings, transmitted the applicant's request to the Registrar.

7. After consultation with the judges, the President of the Court directed that the examination of this aspect of the case should be conducted by the Chamber which had given judgment on 27 June 1968. Mr. O'Donoghue, a substitute judge since an additional drawing of lots on 12 May 1972, has been called upon to sit by reason of the death (April 1973) of Mr. Rolin, President; Mr. Balladore Pallieri has become President of the Chamber. In February 1972 Mr. Schima, appointed by the Government in February 1968 as an ad hoc judge when the elected judge of Austrian nationality, Mr. Verdross, was prevented from attending, found in agreement with the President, Mr. Rolin, that he was no longer able to sit to hear the case; in these circumstances Mr. Verdross has resumed ex officio his place in the Chamber. Mr. Bilge, a member of the Chamber in 1968 and of the Court until 7 November 1972, was not able to exercise his functions (Rule 4): he was appointed as a member of the Government of Turkey and subsequently as ambassador, and he has been replaced by Mr. Cremona, substitute judge.

8. On the instructions of the President of the Chamber, the Registrar requested the Agent of the Government to present his written observations on the question of the application of Article 50 (art. 50) in this case. The Registrar received these observations on 15 February and 23 May 1972.

9. On 17 February 1972, the Delegates of the Commission informed the Registrar that they would not reply to the Government's observations for the time being but would do so later, in writing or at the hearing, as the Court might decide.

10. By Order of 21 March 1972, the President of the Chamber decided that the oral hearings should open on 23 May.

By telex message received on 16 May 1972, the Agent of the Government informed the Court that he had "initiated negotiations with a view to reach a friendly settlement of Mr. Neumeister's claims for compensation"; he explained that "the aim of these negotiations (was) a pardon concerning the remaining part of the sentence Mr. Neumeister would have to serve"; the Agent asked the Court to adjourn the oral hearings "since the proceedings to bring about such settlement take at least six months".

On being consulted by the President of the Chamber through the Registrar, the Delegates of the Commission stated that they had "no objections to make", observing that the applicant had informed them that he agreed to an adjournment. On the same day, the President of the Chamber adjourned the hearings.

11. The Court has since received additional information concerning the events which preceded the dispatch of the telex message. On 12 May 1972, the applicant's lawyer, Mr. Waldhof, had an interview at the Federal Ministry of Justice to negotiate an agreed settlement. Three days later a meeting took place at the Federal Ministry of Foreign Affairs, with Mr. Waldhof and his client on one side and the Agent of the Government and several senior officials on the other. An arrangement was contemplated on that occasion, but its precise terms have been disputed before the Court: according to the Government, Neumeister undertook to waive all claim to monetary compensation if the remainder of his sentence were remitted by an act of grace; the applicant's account is that there was also mention of the Republic of Austria abandoning claims for money it was entitled to bring against him arising out of his conviction.

12. In November 1972, the President of the Chamber directed the Registrar to make enquiries about the progress of the negotiations for an agreed settlement which had begun in May.

By letter received on 26 March 1973, the Agent of the Government informed the Registrar that "the Federal President of the Republic of Austria on 14 February 1973 (had) granted a pardon to Fritz Neumeister in respect of the unserved part of the sentence pronounced by the Regional Court of Criminal Matters in Vienna on 2 July 1968 ... This pardon (had) the effect that Fritz Neumeister (was) to be considered under probation concerning the remainder of his sentence for the time of three years".

13. The observations and documents filed subsequently with the Court make it possible to reconstruct the events which occurred between 16 May 1972 and 14 February 1973:

(a) On 26 May 1972, Neumeister addressed to the Ministry of Justice a request for remission of sentence by an act of grace. Referring to the proceedings pending before the Court and to the negotiations between the Agent of the Government and his lawyer, he stated, *inter alia*, that it was clearly impossible to wipe out (*ungeschehen zu machen*) the detention on remand which he had had to endure from July 1962 to September 1964, but that partial reparation would be possible in his case if the Republic of Austria forbore to insist on his serving the remainder of his sentence. He added that for his part he was prepared to waive all claims for material reparation (*materielle Ersatzansprüche*) against the Republic of Austria. In an addendum of 2 June 1972, he stressed that he had offered in his letter of 26 May to withdraw, in the event of his obtaining the settlement under negotiation, the claim for compensation which he had made to the Commission.

(b) In a report of 11 January 1973 prepared for the Federal President of the Republic after consultation with the Ministry of Foreign Affairs and the Federal Chancellery, the Ministry of Justice stressed that conditional remission, by an act of grace; of the part of the sentence remaining unserved would be a more adequate reparation than monetary compensation. The Ministry of Foreign Affairs, to whom the report was submitted subsequently, made a note on the file to say they shared the opinion of the Ministry of Justice: the procedure contemplated seemed to them the most likely to show the public that Austria was disposed to observe its obligations under the Convention. The Federal Chancellery, for its part, made comments along the same lines and noted that Neumeister would be agreeable (*ware einverstanden*) to this form of reparation and would waive (*würde verzichten*) all claims to monetary compensation.

(c) It was on the basis of this proposal that, on 14 February 1973, the Federal President of the Republic of Austria granted Neumeister remission of the part of his sentence remaining unserved, i.e., two years, seven months and ten days. The decision, which bears the signature of the President and is countersigned by the Minister of Justice, is worded as follows: "I assent to the proposal for pardon, Zl. Gt. 42/73, for Fritz Neumeister".

Remission has the effect of a conditional sentence subject to a probationary period of three years. In order to conserve the benefit of the act of grace, Neumeister must comply with the conditions – and them alone – laid down in Section 3 of the Austrian Act on Conditional Sentences.

14. On the instructions of the President of the Chamber, the Registrar invited the Delegates of the Commission, on 27 March 1973, to present by 9 April any observations they might have to make on the letter received on 26 March from the Agent of the Government (paragraph 12 above).

In a reply of 5 April, the Delegates enquired "what (was), in the Austrian Government's opinion, the significance of the information submitted by the

Government in relation to Mr. Neumeister's claim under Article 50 (art. 50) of the Convention".

15. On the following day the President of the Chamber, through the Registrar, accordingly requested the Government to provide explanations in writing by 26 April as to the significance they attributed to that information for the purposes of the proceedings pending in the case before the Court.

In a letter received on 27 April, the Agent stressed that the judgment delivered by the Court on 27 June 1968 had been "an essential element motivating the Federal President ... to grant the pardon to Mr. Neumeister"; he furthermore expressed the opinion - which, he stated, had been "shared by Mr. Neumeister ... during the conversations which (had) preceded the granting of the pardon - that this pardon (had) to be considered as a form of compensation in the largest sense of the word for any disadvantages Mr. Neumeister might have experienced through the violation" of Article 5 § 3 (art. 5-3).

16. On the instructions of the President of the Chamber, the Registrar invited the Delegates of the Commission, on 27 April 1973, to send him by 7 May their observations on that letter.

The Delegates' reply was received at the Registry on 2 May: the applicant's lawyer, Mr. Gussenbauer, had confirmed to the Secretary of the Commission that his client had been granted a pardon: Mr. Gussenbauer was now expecting "an agreement to be concluded between the Federal Ministry of Finance or the Finanzprokuratur and Mr. Neumeister by which the Republic of Austria (would) waive any claims against Mr. Neumeister resulting from" his conviction and sentence on 2 July 1968.

17. Again at the direction of the President of the Chamber, the Registrar wrote to the Agent of the Government and the Delegates of the Commission on 11 May 1973.

He requested the Delegates to send him by 15 June any observations they wished to make on the two latest communications received from the Agent (paragraphs 12 and 15 above).

In his letter to the Agent of the Government the Registrar asked him to present, also by 15 June, his observations on the above-mentioned letter of 2 May (paragraph 16 above) and informed him that the President of the Chamber especially wished to have explanations concerning the negotiations mentioned in that letter, their progress and the nature of the Republic of Austria's claims against the applicant arising out of the judgment of 2 July 1968.

18. In their reply which was received on 4 June 1973, the Delegates considered that "pending a final clarification of the ... situation" they could do no more than communicate to the Court information which they had received from Mr. Gussenbauer. That information concerned the conversations which had taken place on 12 and 15 May 1972 (paragraph 11 above) and also a further discussion on 16 March 1973 between another of

the applicant's lawyers, Mr. Waldhof, and several senior Austrian officials, including the Agent of the Government.

19. In a letter received at the Registry on 11 July 1973, the Agent of the Government provided the Court with additional information from his side relating to the discussions of 15 May 1972 and 16 March 1973 (paragraphs 11 and 18 above). He stated that the granting of the pardon on 14 February 1973 "was not connected with any request by the competent Austrian authorities that Mr. Neumeister should waive his claim for monetary compensation, since on the one hand such a waiver appeared to be a logical consequence of the whole arrangement and, on the other hand, an act of grace by the Head of State could not be considered to be part of any 'deal'". The Agent concluded by stating that his "Government (was) not in the position to take any further measures in respect of any new requests of Mr. Neumeister aiming at a friendly settlement of the case. If the Court" - unlike the Government - "should not consider the act of grace ... as sufficient and just compensation it (had) to be assumed that the attempt to reach a friendly settlement (had) ultimately failed".

20. It was through the two last-mentioned replies that the Court was apprised of the meeting which had taken place on 16 March 1973; further details concerning it have been furnished since.

At that meeting, Mr. Waldhof stated that his client was now withdrawing all his claims connected with the proceedings before the Court on condition that the Republic of Austria waived all possible claims against Mr. Neumeister which might have arisen out of the facts leading to his conviction.

As to what transpired later in the discussion two divergent versions have been given to the Court. According to the Government, the parties agreed to inform the organs at Strasbourg "of the mere fact of the granting of the pardon to Mr. Neumeister" and the Agent referred Mr. Waldhof "to the competent finance authorities" in so far as the additional requests were concerned. The applicant maintains on his side that on 16 March 1973 it was agreed in principle that the Republic of Austria would drop all claims it had against him arising out of his conviction in return for which he himself would waive his claim for compensation pending before the Court.

However that may have been, it was immediately after the meeting that the Agent of the Government informed the Court of the granting of the pardon to the applicant.

21. On the instructions of the President of the Chamber, the Registrar invited the Delegates of the Commission, on 11 July 1973, to send him in writing by 15 August any observations and submissions they wished to make. In their reply, received at the Registry on 25 July, the Delegates submitted certain observations on the applicant's claim for compensation. They also transmitted to the Court a letter of 8 May 1972 which they had received from Neumeister and which, in view of the adjournment of the

hearings fixed for 23 May 1972 (paragraph 10 above), they had not thought appropriate to forward to the Court at the time.

In that letter, the applicant gave further particulars of, and developed, his initial claim (paragraph 5 above). He estimated the total damage allegedly caused to his firm at 3,564,400 schillings at the very least, and the loss of his salary and allowances as manager as additional damage of not less than 405,000 schillings. He further claimed that he had spent in vain at least 100,000 schillings in lawyers' fees in order to obtain his release. Finally, he considered that he was entitled to at least 3,000,000 schillings damages for the injustice he had suffered. He pointed out, however, that the total amount he claimed, 7,069,400 schillings, should be reduced somewhat as his business losses resulting from his arrest had been calculated on estimated gross profits. Noting that the damages due to him by the Republic of Austria considerably exceeded the total sum originally claimed, he reserved his right to make a corresponding increase in his claim and in addition he asked for payment of interest at an official rate of 5 per cent per annum.

22. In accordance with the directions of the President of the Chamber the Registrar, on 26 July, invited the Agent of the Government to send him by 30 August any observations he wished to make. On 7 August and at the request of the Government, the time was extended to 31 October.

23. The Government's memorial entitled "further additional observations" was received at the Registry on 5 November. When transmitting it the same day to the Delegates of the Commission, the Registrar, in accordance with the instructions of the President of the Chamber, requested them to submit as soon as convenient and if possible by 23 November, any available evidence concerning the applicant's claim which they might think useful to furnish to the Court. The Delegates submitted in reply, on 20 November and with some brief comments, several documents which Neumeister had appended to his above-mentioned letter of 8 May 1972 (paragraph 21 above), including the balance sheets of the Scherzinger company for the years 1961 to 1966.

24. On 12 November 1973 and on the instructions of the President of the Chamber, the Registrar requested the Agent of the Government to send him, if possible by 23 November, a copy of the act of grace of 14 February 1973 (paragraph 12 above) and to indicate on the same occasion the condition or conditions to which the remission of the applicant's sentence was made subject unless the same appeared from the terms of the act of grace itself.

That document and the information requested were received at the Registry on 29 November and 11 December 1973 (paragraph 13 (c) above).

25. By Order of 6 December 1973, the President of the Chamber decided that the oral hearings should open on Tuesday, 22 January 1974.

26. The public hearings took place on 22 and 23 January in the Human Rights Building at Strasbourg.

There appeared before the Court:

- for the Commission:
Mr. J.E.S. FAWCETT, *Principal Delegate, and*
Mr. F. ERMACORA, *Delegate;*
- for the Government:
Mr. E. NETTEL, Ambassador Extraordinary and Plenipotentiary, *Agent;*

Mr. W. PAHR, Head of the
Constitutional Service of the Federal Chancellery,
Mr. R. LINKE, Ministerialrat
at the Federal Ministry of Justice,
and
Mr. G. SAILER, Oberprokuratsrat at the Finanzprokuratur, *Counsel.*

The Court heard the addresses and submissions of these representatives as well as their replies to questions put by several judges.

The Government produced to the Court a copy of the request for pardon made on 26 May 1972 and several other documents relating to the meetings and consultations which had preceded the decision of the President of the Republic taken on 14 February 1973 (paragraphs 10 to 13 above).

The Delegates of the Commission produced copies of correspondence exchanged on 30 October and 22 November 1973 between Mr. Waldhof and the Ministry of Finance. They, furthermore, handed in to the Court a statement of account dated 18 January 1974 in which Neumeister put his costs for lawyers' fees at approximately 250,000 to 260,000 schillings.

27. On 24 January 1974, the Registrar informed the Agent of the Government that the President had fixed at two weeks the time within which the Agent was to file any observations in writing he might wish to make on the above mentioned statement of account of 18 January. Observations were received at the Registry on 11 February and 27 March.

AS TO THE LAW

I. THE QUESTION WHETHER ARTICLE 50 (art. 50) IS APPLICABLE

28. The Court has first to ascertain whether or not Article 50 (art. 50) is applicable in the present case since the Government has advanced several arguments to show that it is not.

29. In its written observations and then at the hearings, the Government expressed the opinion that the Commission had acted in error in transmitting to the Court Neumeister's claim for compensation. In the Government's view, the Commission should have considered and examined the claim as

an application lodged under Article 25 (art. 25) and alleging violation of Article 5 (5) (art. 5-5), which provides that "everyone who has been the victim of arrest or detention in contravention of the provisions of this Article" - in this case those of paragraph 3 - "shall have an enforceable right to compensation". The Government has submitted that Article 5 (5) (art. 5-5) constitutes a *lex specialis* in relation to Article 50 (art. 50); that it states a special rule for compensation so that the general rule in Article 50 (art. 50) does not apply in cases of violation of freedom of the person; that the applicant, moreover, had well understood this to be so on 16 September 1971 when he relied on Article 5 (5) (art. 5-5), requested the Commission "to accept" his submissions, which meant to declare them admissible, and asked the Commission "to initiate the proceedings provided in this connection", which was a reference to Articles 25 (art. 25) and following.

The Government put forward in the beginning several other arguments aimed too at establishing that Article 50 (art. 50) was inapplicable but did not revert to them at the oral hearings in January 1974. These arguments were grounded principally on the text of Article 50 (art. 50) itself, on Article 52 (art. 52) and on the omission from the operative provisions of the judgment of 27 June 1968 of any reservation relating to a possible entitlement of Neumeister to just satisfaction.

30. As to the first point, the Court begins by observing that the manner in which the Government interprets the claim of 16 September 1971 is not beyond discussion. Neumeister did not entitle his letter "application" (Beschwerde) but "claim" (Antrag); he did not complain explicitly of a violation of Article 5 (5) (art. 5-5): while he referred to that provision, he also relied on Article 50 (art. 50), mentioning the Court and the possibility of "just satisfaction" (gerechte Entschädigung).

Furthermore, and above all else, the Court must take an objective and not a subjective view: whatever may have been the applicant's intentions, the Court must determine whether the Convention requires or authorises in such a case the procedure which the Commission has chosen to follow.

The submission that Article 5 (5) (art. 5-5) constitutes a derogation from the *lex generalis* laid down in Article 50 (art. 50) and excludes the application of the provisions contained in the latter Article (art. 50) was made already by the Government in the Ringeisen case (Series B, no. 13, pp. 26-28, 50, 53 and 80). In its judgment of 22 June 1972 the Court implicitly rejected that submission in holding the applicant's claim for compensation to be admissible (Series A, no. 15, pp. 7-8, paragraphs 14 to 19); it considers it necessary to settle explicitly this question in the present case.

Article 5 (5) and Article 50 (art. 5-5, art. 50) are placed on different levels, although both Articles deal with questions of compensation under the Convention.

The first lays down a rule of substance: placed among the "normative" provisions of Section I of the Convention, it guarantees an individual a right, the observance of which is obligatory in the first instance for the authorities of the Contracting States, as the use in the English text of the adjective "enforceable" confirms.

Article 50 (art. 50), for its part, lays down a rule of competence: placed in Section IV of the Convention, it authorises the Court expressly to afford subject to certain conditions, just satisfaction to the "injured party". One of these conditions is the existence of a national decision or measure "in conflict with the obligations arising from the ... Convention", and there is nothing to show that a breach of one of the first four paragraphs of Article 5 (art. 5-1, art. 5-2, art. 5-3, art. 5-4) is not to be taken into account in this regard. While paragraph 5 of Article 5 (art. 5-5) carefully specifies that "everyone who has been the victim" of such a breach "shall have an enforceable right to compensation", it in no way follows therefrom that the Court cannot apply Article 50 (art. 50) when it has found that there has been a breach, for example, of paragraph 3; what does follow, and no more, is that in the exercise of the wide competence conferred upon it by Article 50 (art. 50), the Court must take into consideration, among other factors the rule of substance contained in paragraph 5 of Article 5 (art. 5-5).

In addition, the acceptance of the Government's argument would lead to consequences incompatible with the aim and object of the Convention. In order to obtain just satisfaction over and above mere recognition of his entitlement to his rights, the victim of a violation of liberty of the person might find himself obliged to lodge two successive petitions with the Commission on each of which the Court or the Committee of Ministers would be called upon, if need be, to rule after a lapse of several years. The system of safeguards set up by the Convention would therefore operate only at an extremely slow pace in the case of Article 5 (art. 5), a situation which would scarcely be in keeping with the idea of the effective protection of human rights (see *mutatis mutandis* the De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A, no. 14, p. 9, paragraph 16 in fine).

These various considerations lead the Court to conclude that the proceedings in the present case no longer fall within Section III of the Convention but are the final phase of proceedings brought before the Court under Section IV on the conclusion of those to which the original petition of Neumeister gave rise in 1963 before the Commission (see *mutatis mutandis* the De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A, no. 14, p. 8, paragraph 15). The claim of 16 September 1971 cannot therefore be dealt with as a new petition presented under Article 25 (art. 25) and the Commission was right to transmit it straightaway to the Court.

31. At the oral hearings in January 1974 the Government passed over in silence the other submissions which it had made in its memorials to show that Article 50 (art. 50) was not applicable (paragraph 29 above, second sub-

paragraph). The Government, incidentally, had made those submissions before, in almost identical terms, in the Ringeisen case (Series B, no. 13, paragraphs 24-26) and the Court rejected them in its judgment of 22 June 1972. Setting out in detail its reasons for so doing, it laid particular emphasis on the fact that "it would be a formalistic attitude alien to international law to maintain that the Court may not apply Article 50 (art. 50) save on condition that it either rules on the matter by the same judgment which found a violation or that this judgment has expressly kept the case open". The Court confines itself to referring on this point to its previous decisions (Series A, no. 15, pp. 7 and 9, paragraphs 14-18 and 22; see also the De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A, no. 14, p. 10, paragraph 20).

II. AS TO THE WAIVER ALLEGED BY THE GOVERNMENT

32. At the oral hearings, the Government submitted that in 1972 Neumeister of his own accord had waived all claims for pecuniary compensation for moral or material damage allegedly suffered by him, should he obtain remission of the part of his sentence remaining unserved. In the Government's submission, this waiver became operative (*wirksam*) for the future and entailed legal effects (*rechtlich relevant*): it removed all basis for the proceedings commenced before the Court on 27 September 1971 ("für ein Entschädigungsverfahren kein Substrat mehr vorhanden ist").

The Government submitted in the alternative that the act of grace of 14 February 1973 had constituted in itself and on its own, independently of any agreed settlement, just satisfaction within the meaning of Article 50 (art. 50).

33. Having regard to its responsibilities in pursuance of Article 19 (art. 19) of the Convention, the Court would not be relieved of its duty by the sole fact that an individual had stated to his Government that he waived rights guaranteed by the Convention. Even if the Court were to reach the conclusion in this case that Neumeister had waived his claims, it could not terminate the proceedings and strike the case out of its list without first being satisfied that the aim of Article 50 (art. 50) has been achieved.

On the other hand, the fact that an applicant has declared at a particular time that he would settle for the satisfaction obtained or to be obtained from his Government may be an important or even a decisive factor when the Court comes to assess the just character of that satisfaction within the meaning of Article 50 (art. 50).

It is from this point of view that it has to be ascertained whether Neumeister did in fact declare that he waived in advance any satisfaction which the Court would be called upon to afford him.

34. In the Government's submission, the waiver was made at the meeting on 15 May 1972 (paragraph 11 above); the request for pardon of 26

May and the addendum thereto of 2 June confirmed this unequivocally (paragraph 13 (a) above); the President's decision of 14 February 1973, although admittedly taken in the exercise at his discretion of the prerogative of the Head of State and not as part of a kind of "deal", had led to the condition formulated by the applicant being fulfilled; in putting forward further requirements on 16 March 1973 (paragraph 20 above), the applicant had failed to keep his word; the applicant had thus taken unfair advantage of the good faith of the representatives of the Government who, having obtained at his behest an adjournment of the hearings fixed for 23 May 1972 (paragraph 10 above), had attempted, to the certain knowledge of the Commission and the Court, to reach an agreed settlement.

35. The Delegates of the Commission have replied that there certainly was, in May 1972, an "arrangement" between senior Austrian officials and Neumeister, but Neumeister's "waiver" did not thereby become the reason which decided the President of the Republic to pardon him. They further observed that if the "waiver" had become effective as from 14 February 1973, there was no explanation why the authorities dealing with the matter had not relied upon it, as a ground of rebuttal, when the applicant increased his claims in March 1973. The Delegates explained too that the Commission had never taken any position on the offers which the applicant might have made to the Austrian authorities, since it considered that it had no further competence in the matter once the claim had been referred to the Court. In conclusion they submitted that the arrangement reached in May 1972 raised no preliminary bar in law to the examination of the claim for compensation, but it was a matter for the appreciation of the Court whether account was to be taken of that understanding on the substance, to see, for example, if it had given rise to "a certain moral obligation" on the part of Neumeister.

36. The Court observes that particularly in the specific field covered by the Convention, the waiver of a right, even the mere right to a sum of money, must result from unequivocal statements or documents.

This is not the position in the present proceedings: considering all the circumstances of the case, including the terms of the request for pardon of 26 May 1972 ("for my part I should be prepared to waive ... if ...", "ich wäre meinerseits bereit, ... zu verzichten, ... falls ...") and of the addendum thereto of 2 June 1972 ("... I offered ... to withdraw my claim ...", "ich (habe) angeboten ... meinen Antrag ... zurückzuziehen"), the Court is of opinion that no waiver by the applicant has been established. It in no way follows, however, that Neumeister's attitude is not relevant for the examination of the substance of the claim for compensation.

III. AS TO THE MERITS OF THE APPLICANT'S CLAIM

37. Before ruling on the merits of the claim, the Court clearly has to determine the date on which the length of the applicant's second detention on remand (12 July 1962 - 16 September 1964), the only period with which it need deal (Neumeister judgment of 27 June 1968, Series A, no. 8, p 37, § 6), became unreasonable under Article 5 § 3 (art. 5-3). The Court did not see any need to do so explicitly in its judgment of 27 June 1968 since the applicant had not as yet claimed damages; the position is not the same now.

38. Contrary to the applicant's view, the judgment of 27 June 1968 does not imply that this second detention was in breach of Article 5 § 3 (art. 5-3) *ab initio*. Having noted that the Austrian judicial authorities gave the danger of absconding as the reason for their successive decisions not to release the applicant, the Court stated that it found it understandable that this risk seemed to them to have been much increased in July 1962 by the greater gravity of the criminal and civil penalties which a co-accused's new statement must have caused Neumeister to fear (judgment of 27 June 1968, Series A, no. 8, pp. 38-39, §§ 9-10). It is true that the Court afforded only relative value to their reasons and accepted the force of the applicant's arguments and the investigating judge's evidence (*ibid.* p 39, §§ 10-11) but it did not conclude that there was a complete lack of danger of absconding: the Court found no more than that "the danger ... was, in October 1962 in any event, no longer so great that it was necessary" - the attitude of the Austrian judicial authorities - "to dismiss as quite ineffective the taking of the guarantees which under Article 5 (3) (art. 5-3) may condition a grant of provisional release" (*ibid.* p. 40, § 12).

Nor does the judgment of 1968 mean that the violation arose "when for the first time, on 26 October 1962, Neumeister proposed a bank guarantee of 200,000 or, if necessary, 250,000 schillings": the Court did not consider itself to be "in a position" to estimate "the amount of security which could reasonably be demanded of Neumeister" and it did not reject "the notion that the first offers could have been dismissed as insufficient" (*ibid.* p. 40, § 13).

In any event, the Austrian authorities could not be required to release the applicant on the very day he had made some sort of offer; they clearly needed time to examine the offer and to make a ruling.

The Court nevertheless regrets that the Judges' Chamber of the Vienna Regional Criminal Court and the Court of Appeal did not - instead of describing as "out of the question" ("*indiskutabel*") the offer of 26 October to which the investigating judge had stated on 29 October that he had no objection (Series B, no. 6, p. 241) - indicate to Neumeister in their decisions of 27 December 1962 and 19 February 1963 a different sum for security which they considered appropriate. Such a step, legitimate under Austrian law (Series A, no. 8, p. 15, first paragraph), would probably have rendered it

possible to expedite the release of the applicant and would have been in complete conformity with the spirit of the Convention. In particular, it would have shown a better appreciation of the relevant considerations in evaluating the danger of flight (*ibid.* p 39, § 10).

It is certainly rather difficult to state at what precise point in time the competent authorities would have succeeded in reaching agreement with the applicant on the amount of the guarantee if they had adopted a more flexible attitude. The date of 1 March 1963, that is about four months subsequent to the offer of 26 October 1962, seems to be appropriate for this purpose. It is no doubt of an approximate character, but the Court does not find any further precision necessary, having regard to the conclusions it reaches concerning Neumeister's claims for compensation (see paragraphs 40 and 41 below).

39. The applicant claims several million schillings in compensation for the damage which, he alleges, his second detention on remand (12 July 1962 - 16 September 1964) caused to the Scherzinger company and in two ways to himself, the loss of his salary as manager of the firm and "injustice suffered" (paragraphs 5 and 21 above).

The Government considers that, quite apart from Neumeister's "waiver", the act of grace of 14 February 1973 on its own amounts to full reparation. The Government relies too on the fact that the detention on remand was reckoned as part of the sentence and on the more favourable conditions - disputed by the applicant - compared to penal imprisonment.

40. As regards, first, the alleged material damage, the onus was on Neumeister, as the Government and the Commission are agreed in thinking, to establish not only that in fact it had been sustained but also that there was a causal link between it and the violation so found by the Court in its judgment of 27 June 1968 (see the Ringeisen judgment of 22 June 1972, Series A, no. 15, p. 9, § 24).

The arrest of Neumeister on 12 July 1962, which he complains of as being sudden and unjustified, must have deprived him of some income and upset the running of his business. The breach of Article 5 (3) (art. 5-3), however, did not commence until much later: the second detention on remand was, at the outset, compatible with the Convention and so remained for about seven and a half months; its length did not exceed a "reasonable time" until 1 March 1963 or thereabouts (paragraph 39 above). Until that approximate date the interruption of Neumeister's business activity resulted from decisions which were in conformity with the requirements of the Convention; therefore, that interruption cannot entitle him to reparation. Subsequently, the interruption could not be taken into account under Article 50 (art. 50) unless the overrunning of the "reasonable time" had caused some damage distinct from that which the applicant would necessarily have suffered in the event of his being released one and a half years earlier but imprisoned for the same period after conviction.

Some losses must have followed from the excessive prolongation of the detention in question but it proves very difficult to isolate and unravel them from those which Neumeister and the Scherzinger company would have had to bear in any event. The Court does not find it necessary on this point to embark on additional proceedings. In effect, the time the applicant had spent in detention on remand was reckoned as part of his sentence and, more especially, he was granted remission of the remainder of his sentence, i.e., two years, seven months and ten days. He would doubtless have had prospects, if he had been imprisoned after conviction, of being released on probation for a third of the term of imprisonment, but even on this assumption it is established that he avoided deprivation of liberty for eleven months and ten days at the very least. Moreover, he was saved the adverse consequences which further imprisonment would inevitably have caused him in his business activities. In short, the act of grace of 14 February 1973 was of considerable benefit to him. The few conditions which accompany that act are in no way onerous; they are defined limitatively in the Act which applies to such cases. While remission of sentence, like the reckoning of detention as part of a sentence, does not constitute real *restitutio in integrum* (Ringeisen judgment of 22 June 1972, Series A, no. 15, p. 8, § 21, 2), it comes as close to it as is possible in the nature of things.

The applicant, moreover, shared this view at first. In his request of 26 May 1972 for pardon, he indicated that remission of the remainder of his sentence would be the best possible form of reparation, given that the wrong suffered was by its nature incapable of being wiped out; so sure was he of this that he stated that he would be prepared to waive, if he were accorded a pardon, all his claims for compensation against the Republic of Austria (paragraph 13 (a) above). The opinion he expressed of his own accord at that time retains its value; it confirms the just character of the measure taken in Austria in favour of the applicant.

The Court concludes that it is therefore not necessary to afford satisfaction to the applicant for material damage.

41. Neumeister undeniably suffered moral damage by reason of the fact that his second detention on remand lasted longer than a "reasonable time" by some eighteen and a half months (1 March 1963 - 16 September 1964); under this head he was entitled in principle to "compensation" or "just satisfaction".

The Delegates of the Commission take the view that, in spite of the measures already taken in favour of the applicant in Austria, the damage resulting from the breach of Article 5 (3) (art. 5-3) "in itself" in addition calls for some element of monetary compensation of which it is for the Court to assess the amount in the light of all the circumstances of the case; in this regard they base themselves on paragraphs 20 and 21 of the Ringeisen judgment of 22 June 1972.

Article 50 (art. 50), however, provides for an award by the Court of just satisfaction only "if necessary" (De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A, no. 14, p. 10, § 21).

The applicant was convicted and sentenced to a term of imprisonment considerably longer than his detention on remand and that detention was reckoned in full as part of the sentence. Moreover, unlike Ringeisen he was granted a pardon on 14 February 1973 which he himself had requested as being the best form of reparation, and which was far more advantageous to him than payment of a sum of money (paragraph 40 above). These various circumstances outweigh the moral wrong of which he complains; the Court thus reaches the conclusion that in this regard it is not necessary to afford him any further satisfaction.

42. Finally, the applicant claims from 250,000 to 260,000 schillings for fees said to have been paid to five lawyers namely, Mr. Steger (from 12 July 1962 to the beginning of 1963), Mr. Stern (from January 1963 to September 1964), Mr. Leutgeb (from mid-1963 to the end of 1964), Mr. Waldhof (from May 1972 onwards) and Mr. Gussenbauer (from September 1971 onwards).

As to the services rendered by these lawyers, the Court has before it the information furnished by Neumeister (statement of account of January 1974), by the Government (observations of February and March 1974) and also that provided by the other documents on the file, including the Commission's report of 27 May 1966.

It would appear that Mr. Steger, Mr. Stern, or Mr. Leutgeb, as the case may be, acted for the applicant in Austria during his second detention on remand (12 July 1962 - 16 September 1964). In particular, they made applications on his behalf for his release on 26 October 1962, 12-16 July 1963 and 6 November 1963 and lodged appeals on 15 January 1963, 5 August 1963, 20 August 1963, 13 December 1963, 21 January 1964 and 20 April 1964, and in addition they conducted correspondence, appeared at hearings and took other steps (see, for example, Series A, no. 8, pp. 10-16 and 18; Series B, no. 6, pp. 34, 35, 112-113, 115 and 241). Moreover, Mr. Stern wrote on at least one occasion to the Commission, on 14 April 1964, (Series B, no. 6, pp. 13, 60 and 90), and Mr. Leutgeb appeared for Neumeister at the hearings of 6 July 1964 on the admissibility of the application (*ibid*, p. 86).

Mr. Waldhof and Mr. Gussenbauer were retained - in so far as they are mentioned by the applicant in his statement of account of January 1974 - after the Court's judgment of 27 June 1968: they dealt with their client's claims for compensation, Mr. Waldhof having to do with the Austrian authorities (meetings of 12 May 1972, 15 May 1972 and 16 March 1973, request for pardon of 26 May 1972 with the addendum of 2 June 1972, the letter of 30 October 1973 to the Ministry of Finance, etc., - see, for example, paragraphs 11, 13 (a), 20 and 26 above), Mr. Gussenbauer being concerned with the Delegates of the Commission in the procedure before the Court

(claim of 16 September 1971, observations of 8 May 1972, sundry letters to the Delegates, etc., - see, for example, paragraphs 5, 10, 16 and 21 above).

Neumeister did not have the benefit of free legal aid before the Commission itself or with the Commission's Delegates after the case was referred to the Court. He was granted legal aid in Austria only during the initial stages of the criminal trial (Hauptverfahren – see the Government's observations of February 1974). That trial, which opened on 9 November 1964 (Series A, no. 8, p. 19) and terminated on 4 November 1971 (paragraph 3 above), is not material to the matters presently under consideration; besides, the applicant does not mention it in his statement of January 1974.

43. As the Court has already observed (paragraphs 40 and 41 above), the advantages resulting from the remission of sentence constitute just satisfaction for the damage, material and moral, suffered by the applicant through the excessive length of his detention on remand. This finding does not prevent the Court from ascertaining whether the expenses incurred by Neumeister in vindicating his rights guaranteed by the Convention have been sufficiently compensated too by the advantages above-mentioned.

The Court considers it proper, in this particular case, to distinguish between damage caused by a violation of the Convention and the necessary costs which the applicant has had to incur in order to try to prevent such violation, to have it established by the Commission and later by the Court and to obtain, after judgment in his favour, just satisfaction either from the competent national authorities or, if appropriate, from the Court.

Although the act of grace outweighs in this case the material and moral damage, that act does not likewise amount to just satisfaction in respect of the necessary costs in lawyers' fees which the applicant incurred over the years in order to achieve that result. It is therefore necessary to afford to the applicant fair compensation in this regard.

44. In the circumstances of the case, the Court takes as an appropriate basis for calculation the current rates payable under the scheme for free legal aid operated by the Commission and Delegates of the Commission. The Court furthermore takes into consideration the various acts enumerated above (paragraph 42) covering the time since the request for release of 26 October 1962, being the latest of those which, if granted, would have avoided the breach of Article 5 (3) (art. 5-3) which began on or about 1 March 1963 (paragraph 38 above).

On this basis the Court assesses at thirty thousand schillings (30,000 AS) the sum to be paid by the Republic of Austria to the applicant.

FOR THESE REASONS, THE COURT

1. Finds unanimously that Article 50 (art. 50) of the Convention is applicable in the present case;
2. Holds unanimously that, subject to what follows, the applicant's claim is not well-founded;
3. Holds unanimously that the Republic of Austria is to pay to the applicant Fritz Neumeister, in respect of lawyers' costs, the sum of 30,000 schillings.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this seventh day of May, one thousand nine hundred and seventy-four.

Giorgio BALLADORE PALLIERI
President

Marc-André EISSEN
Registrar