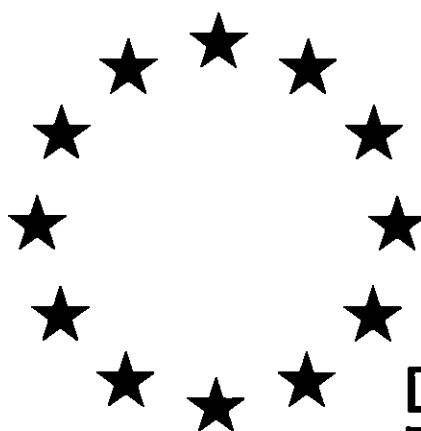


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CONSEIL
DE L'EUROPE

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EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 11662/85

**Gerhard Oberschlick
against
Austria**

Report of the Commission

(Adopted on 14 December 1989)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is an Austrian citizen, born in 1942, and resident in Vienna. He is a journalist working for the periodical "FORUM".

The applicant was represented, in the proceedings on the admissibility of the application, by Mr. R.K. Fiebinger, a lawyer practising in Vienna. In the proceedings on the merits he acted for himself.

3. The application is directed against Austria. The respondent Government were represented by their Agent, Mr. Helmut Türk, Head of the International Law Department of the Federal Ministry of Foreign Affairs.

4. The case concerns the applicant's conviction for defamation of a politician because he had published a criminal information laid against the said politician. The applicant alleges violations of his right to freedom of expression (Article 10 of the Convention) and of his right to a fair hearing by an impartial tribunal (Article 6 para. 1 of the Convention).

B. The proceedings

5. The application was introduced on 16 June 1985 and registered on 29 July 1985. On 9 November 1987 the Commission decided in accordance with Rule 42 para. 2 (b) of its Rules of Procedure to give notice of the application to the respondent Government and to invite them to present before 5 February 1988 their observations in writing on the admissibility and merits of the application. Following an extension of the time-limit, these observations were submitted on 23 February 1988. The applicant's observations in reply were submitted on 21 April 1988.

6. The application was declared admissible on 10 May 1989.

7. The parties submitted further observations on the merits on 3 July 1989.

8. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reactions, the Commission now finds that there is no basis on which such a settlement can be effected.

C. **The present Report**

9. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President
 J. A. FROWEIN
 S. TRECHSEL
 F. ERMACORA
 G. SPERDUTI
 E. BUSUTTI
 G. JÖRUNDSSON
 A. S. GÖZÜBÜYÜK
 A. WEITZEL
 J. C. SOYER
 H. G. SCHERMERS
 H. DANELIUS
 G. BATLINER
 J. CAMPINOS
 H. VANDENBERGHE
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
 C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

10. The text of this Report was adopted on 14 December 1989 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

11. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

12. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

13. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

1. The facts which led to the institution of defamation proceedings against the applicant

14. In a television programme on 23 March 1983 it was reported that Mr. W. G.-M., at that time Secretary-General of the Austrian Liberal Party (FPÖ), had suggested that the family allowances for Austrian women be raised by 50% in order to prevent abortions based on financial reasons. At the same time he had proposed that the family allowances paid to immigrant mothers be cut by 50%.

15. As a reaction the applicant and several other persons laid a criminal information (Strafanzeige) on 20 April 1983 against Mr. G.-M. Eventually, on 1 June 1983, the public prosecutor's office in Vienna decided that there were not sufficient reasons to prosecute Mr. G.-M. (Zurücklegung der Strafanzeige).

16. On the day it was laid, i.e. 20 April 1983, the criminal information was published by the applicant in the periodical "FORUM". On the cover page of the relevant issue of "FORUM" a hint was made to this publication by a line in bold print: "Criminal information against Liberal Party Secretary" ("Strafanzeige gegen FPÖ-Generalsekretär").

17. The text of the publication reads as follows:

strafanzeige

gegen

W. G. M.

Geburtsdatum unbekannt, Beruf: Generalsekretär, o/o FPÖ (Freiheitliche Partei), Bundesgeschäftsstelle, 1010 Wien, Kärntnerstraße 28)

wegen Verdachtes

1. des Vergehens der Verhetzung gem. § 283 StGB,
2. des Vergehens der Aufforderung zu mit Strafen bedrohten Handlungen und Gubeißung mit Strafe bedrohter Handlungen gem. § 282 StGB, sowie
3. des Vergehens der Betätigung im Sinne der §§ 3, 3d des Verfassungsgesetzes vom 8. Mai 1945 StGBI. Nr. 13 über das Verbot der NSDAP (Verbotsgesetz).

Sachverhalt

„FPÖ-Generalsekretär W. G. M. hat heute vorgeschlagen, die Familienbeihilfen für österreichische Frauen um 50 % zu erhöhen. Mit dieser Maßnahme sollte verhindert werden, daß österreichische Frauen aus finanziellen Gründen Kinder abtreiben. Gleichzeitig forderte G. M., die Familienbeihilfen des österreichischen Staates für Gastarbeitermütter auf die Hälfte der jetzigen Höhe zu kürzen. Es gebe auch in anderen europäischen Staaten eine Schlechterstellung der Gastarbeiterfamilien, erklärte G. M.“

ORF FS 1 + FS 2

Schlussnachrichten 29. 3. 1983

Ad. 1):

Die öffentliche Erklärung von W. G. M. erfolgte in einer die Menschenwürde verletzenden Weise und richtet sich gegen eine durch ihre Zugehörigkeit zu einem Volk, einem Volksstamm oder einem Staat bestimmte Gruppe von Menschen; im gegenständlichen Fall bestimmt durch ihre Nichtzugehörigkeit zur Österreichischen Staatsbürgerschaft.

Durch die Gegenüberstellung von österreichischen Frauen, denen Abtreibungen durch finanzielle Besserstellung erspart werden sollen, und Gastarbeitermüttern, für die nicht nur Gleiches nicht gelten soll, für die W. G. M. auch noch eine Halbierung der seiner Meinung nach (für die Vermeidung von Abtreibungen aus finanziellen Gründen) zu niedrigen Familienbeihilfen vorschlägt, entsteht der von W. G. M. wohl beabsichtigte Eindruck, bei Gastarbeitermüttern und ihren ungeborenen Kindern handle es sich um minderwertige, wertlose oder halbwertige Teile der Gesamtbevölkerung, und es liege im Interesse der Österreicher, wenn Gastarbeitermütter Kinder abtreiben.

Dadurch wurden von W. G. M. Gastarbeiter der Achtung der Mitmenschen unwert oder unwürdig hingestellt, was die Anzeiger als tendenziöse Aufreizung zum Haß und zur Verachtung von Gastarbeitern in Österreich auffassen, als Anstoß nehmen und anzeigen.

Ad. 2):

W. G. M. schlägt öffentlich vor und fordert damit insbesondere den Österreichischen Nationalrat und die Bundesregierung auf, Maßnahmen zu setzen, die tatbildmäßig für das Verbrechen der Betätigung im Sinn der §§ 3 und 3d des Verbotsgesetzes sind (siehe unten).

Ad. 3):

Gemäß § 3 Verbotsgesetz ist es jedermann untersagt, sich,

sei es auch außerhalb dieser Organisation, für die NSDAP oder ihre Ziele irgendwie zu betätigen.

§ 3d Verbotsgesetz: Wer öffentlich oder vor mehreren Leuten ... zu einer nach § 1 oder § 3 verbotenen Handlung auffordert, aneifert oder zu verleiten sucht, insbesondere zu diesem Zweck die Ziele der NSDAP, ihre Einrichtungen oder Maßnahmen verherrlicht oder anpreist, wird, sofern sich darin nicht eine schwerer verpönte Handlung darstellt, mit Freiheitsstrafe von 10 bis zu 20 Jahren und mit dem Verfall des gesamten Vermögens bestraft.

Hiezu verweisen die Anzeiger auf die 25 Thesen des Parteiprogramms der NSDAP vom 24. 2. 1920, merken an, daß dieses deren einziges Parteiprogramm bis zum Gesetz über das Verbot der NSDAP am 8. Mai 1945 durch die provisorische Staatsregierung geblieben ist und daß es daher die programmatischen Ziele der NSDAP authentisch und vollständig enthält. Dort heißt es u.a.:

5. Wer nicht Staatsbürger ist, soll nur als Gast in Deutschland leben können und muß unter Fremdengehoßgebung leben.

7. Wir fordern, daß sich der Staat verpflichtet, in erster Linie für die Erwerbs- und Lebensmöglichkeit der Staatsbürger zu sorgen. Wenn es nicht möglich ist, die Gesamtbevölkerung des Staates zu ernähren, so sind die Angehörigen fremder Nationen (Nicht-Staatsbürger) aus dem Reiche auszuweisen.

8. Jede weitere Einwanderung Nicht-Deutscher ist zu verhindern. Wir fordern, daß alle Nicht-Deutschen, die seit 2. August 1914 in Deutschland eingewandert sind, sofort zum Verlassen des Reiches gezwungen werden.

Feindliche Haltung gegenüber Angehörigen fremder Nationen (Nichtstaatsbürgern) zu erzeugen, diese derart schlechter zu stellen, daß ihnen der Aufenthalt im Reiche erschwert wird und sie zum Verlassen des Reiches gezwungen werden, war wesentliches Ziel der NSDAP und der von ihr gemachten Politik.

Der Vorschlag von W. G. M., die Familienbeihilfen für österreichische Frauen um 50 % zu erhöhen, um dadurch zu verhindern, daß österreichische Frauen aus finanziellen Gründen Kinder abtreiben, und gleichzeitig die Familienbeihilfen für Gastarbeitermütter auf die Hälfte der jetzigen Höhe zu kürzen, stellt eine zynische Maßnahme zur Verdrängung Angehöriger fremder Nationen aus der Republik Österreich dar, ja sogar zur Abtreibung solcher in der Republik Österreich ganz in Einklang mit und entsprechend dem Gedankengut und den Zielen der NSDAP, daß „der Staat in erster Linie für die Erwerbs- und Lebensmöglichkeiten der Staatsbürger zu sorgen“ habe, zielen die Vorschläge von W. G. M. unter anderem darauf ab, durch Verschlechterung der Lebensbedingungen für Gastarbeiter diejenigen der Staatsbürger (der österreichischen Mütter) gleichzeitig zu verbessern und unter einem weiteren Einwanderung von Nicht-Österreichern zu verhindern (siehe oben die Thesen 7 und 8/NSDAP).

Daraus erhellt, daß sich W. G. M. im Sinne der Ziele der NSDAP betätigt hat, zumindest aber ihre Maßnahmen gegen Angehörige fremder Nationen anpreist, indem er sie für Österreich vorschlägt.

Für die Richtigkeit der Behauptungen berufen sich die Anzeiger auf Zeugenschaft ihrer Person, die Sprechermanuskripte des ORF für die Schlussnachrichten in FS 1 und FS 2 vom 29. 3. 1983 und das Parteiprogramm der NSDAP vom 24. 2. 1920.

Es wird somit gegen W. G. M. erstattet die Strafanzeige etc.

e.h.:

Gerhard Oberschlick

(Translation)

"CRIMINAL INFORMATION

against

W. G.-M.

Date of birth unknown, Profession: Secretary General, c/o
FPÖ (Liberal Party), Central Office, Kärntnerstrasse 28,
1010 Vienna

On suspicion

of having committed

1. the crime of incitement to hatred, Section 283 of the Penal Code,
2. the crime of instigation and approval of criminal offences, Section 282 of the Penal Code, and
3. the crime of activities contrary to Sections 3 and 3d of the National Socialism Prohibition Act ("Prohibition Act").

FACTS

"The Secretary General of the Liberal Party W. G.-M. has today proposed raising family allowances for Austrian women by 50%. This measure should deter Austrian women from having abortions for financial reasons. At the same time W. G.-M. demanded that family allowances from the Austrian State for immigrant mothers should be reduced to 50% of their present levels. G.-M. stated that immigrant families are also placed in a disadvantageous position in other European countries."

Austrian Broadcasting Corporation,
Television programmes 1 + 2
Late News 29.3.1983

P.1):

W. G.-M.'s public statement was made in a way which offends human dignity and is directed to a group of persons defined by their belonging to a people, a race or a state; in the present case by the fact that they do not have Austrian citizenship.

By juxtaposing Austrian women, who are to be put in a position where they do not need abortions, with immigrant mothers, who are not merely to be deprived of the benefit of this provision, but whose family allowances (according to G.-M. too low to prevent abortion for financial reasons), should be halved, the impression is given, which must in all likelihood have been intended by G.-M., that immigrant mothers and their unborn children constitute inferior sections of the entire population of little or no value, and that it is in the interest of Austrians for immigrant mothers to abort their children.

In such a manner W. G.-M. presents immigrants as being neither worth nor worthy of others' respect, which the layers of the present information regard as a tendentious incitement to hatred and contempt of immigrants in Austria. We take offence and therefore lay the present information.

P.2):

W. G.-M. is publicly proposing, and thereby calling, in particular, on the Austrian Federal Diet and the Federal Government to introduce measures which form the substance of the offence of activities contrary to Sections 3 and 3d of the Prohibition Act (see below).

P.3):

Section 3 of the Prohibition Act prohibits any activities which further the NSDAP or its aims, even if such activities take place outside the organisation.

Section 3d Prohibition Act: Any person who either in public or in the presence of several persons attempts to instigate, incite or induce behaviour prohibited by Section 1 or Section 3 above, in particular any person who, in order to further such attempt, glorifies or extolls the aims of the NSDAP, its organs or actions, save to the extent that no more serious offence is committed, shall be sentenced to imprisonment for 10 to 20 years and his entire estate shall be forfeited.

The layers of the present information refer to the 25 points of the NSDAP Manifesto of 24.2.1920. They note that, until the passing of the National Socialism Prohibition Act of 8 May 1945 by the Provisional Government, this Manifesto remained the party programme and that it therefore contained in authentic and complete form the aims of the NSDAP's programme. It provides, inter alia, as follows:

- '5. Persons who are not citizens may only live in Germany as immigrants and must be subjected to aliens legislation.
7. We demand that the State be required, first and foremost to supply opportunities for employment and the subsistence of its citizens. If it is not possible to feed the entire population of the State, citizens of foreign nations (non-citizens) must be removed.
8. All future immigration of non-Germans is to be prevented. We demand that all non-Germans who have immigrated to Germany since 2 August 1914 be forced to leave the Reich immediately.'

One of the essential aims of the NSDAP and its politics was to produce a hostile attitude to the citizens of foreign nations (non-citizens), and to make the position of such people so much worse that their residence in the Reich became difficult and they were forced to leave the Reich.

W. G.-M.'s proposal to increase family allowances for Austrian women by 50% in order to stop Austrian women having abortions for financial reasons, and at the same time to reduce family allowances for immigrant mothers to half their present levels, is a cynical means of driving citizens of foreign nations from the Republic of Austria and, indeed, to make them have abortions in the Republic of Austria; in unison with and corresponding to the philosophy and aims of the NSDAP that "the State must first and foremost supply opportunities for employment and the subsistence of its citizens", W. G.-M.'s proposals are aimed, amongst other things, at improving the living conditions of citizens (Austrian mothers) by worsening the conditions for immigrants and, at the same time, preventing all future immigration of non-Austrians (see above NSDAP points 7 and 8).

From this it appears that W. G.-M. has been involved in activities which further the aims of the NSDAP, or at the very least has extolled its measures against citizens of foreign nations in proposing that such measures be applied in Austria.

As to the accuracy of the present statements the layers of the present information rely on their own perception, the ORF newscasters' scripts for the Late News on television programmes 1 and 2 on 29.3.1983 and the NSDAP party Manifesto of 24.2.1920.

Therefore, this criminal information is laid against W. G.-M.

(signed)

[Six names with titles and] Gerhard Oberschlick"

2. The first round of the defamation proceedings

18. On 22 April 1983, Mr. G.-M. brought a private prosecution for defamation (üble Nachrede, Section 111 of the Penal Code) against the applicant and the other signatories of the criminal information.

19. Mr. G.-M. also requested the immediate seizure of the relevant issue of "FORUM" under Sections 33 and 36 of the Media Act (Mediengesetz), and the adjudication of compensation to be paid to him by the owners of "FORUM", according to Section 6 of the Media Act.

20. The case was considered the same day, 22 April 1983, by the Review Chamber (Ratskammer) of the Regional Criminal Court (Landesgericht für Strafsachen) of Vienna. It noted that the private prosecutor had failed to request a penalty (Strafantrag). It further found that the publication did not constitute a criminal offence under Section 111 of the Penal Code. The case did not concern the wrongful attribution of a certain (dishonest) behaviour, but only value judgments (Bewertung) on a behaviour which as such had been correctly described. Accordingly the proceedings were discontinued under Section 485 para. 1 (4) of the Code of Criminal Procedure (Strafprozessordnung).

21. On 31 May 1983 the Vienna Court of Appeal (Oberlandesgericht) quashed the above decision on the appeal (Beschwerde) of Mr. G.-M. It held that for the average reader the publication must have created the impression that a contemptible attitude (verächtliche Gesinnung) was ascribed to Mr. G.-M. The authors had disregarded the standard of fair journalism by going beyond a comparative and critical analysis of Mr. G.-M.'s statement and insinuating motives which Mr. G.-M. had not himself expressed, in particular by alleging that he had been guided by National Socialist attitudes. Accordingly the case was referred back to the Regional Court.

3. The second round of the defamation proceedings - 1st instance

22. At a hearing on 20 July 1983 the Regional Court decided to sever the defamation proceedings against the applicant's co-accused because, although they had signed the criminal information against Mr. G.-M., they had not been associated with its publication in "FORUM". These proceedings were referred to the Vienna District Court for Criminal Affairs (Strafbezirksgericht) which subsequently discontinued them on 9 April 1984.

23. On 25 July 1983 the Regional Court ordered the publication of information in "FORUM" that criminal proceedings for defamation had been brought against the applicant by Mr. G.-M. (Section 37 of the Media Act). This decision was confirmed by the Court of Appeal on 7 September 1983.

24. The trial of the defamation case against the applicant was held by the Regional Court on 11 May 1984. The Court took evidence by consulting various documents, by hearing Mr. G.-M. as a witness and by hearing the applicant.

25. The applicant offered evidence that he had written the truth (Wahrheitsbeweis) and claimed that in this respect it was sufficient that the criminal information had actually been laid against Mr. G.-M. in the terms published in "FORUM". He further claimed that by reporting the criminal suspicion he had acted in the exercise of a legal duty, and that therefore he was exculpated according to Section 114 of the Penal Code. The fact that the legal qualification of Mr. G.-M.'s statement might have been erroneous could not be held against him because he was not a lawyer.

26. However, in its judgment of the same day, the Regional Court convicted him of the offence of defamation under Section 111 paras. 1 and 2 of the Penal Code, imposing a fine of AS 4000.-, to be replaced in case of default by 25 days' imprisonment. Simultaneously, several measures were pronounced against the owners of "FORUM": the seizure of the relevant issue of this periodical (Section 33 of the Media Act), the publication of the judgment (Section 34 of the Media Act), the joint liability of the owners of "FORUM" for the payment of the fine and of the costs of procedure (Section 35 para. 1 of the Media Act), and the adjudication of compensation to Mr. G.-M. in the amount of AS 5000.- (Section 6 of the Media Act).

27. The Regional Court held that it was bound by the decision of the Court of Appeal of 31 May 1983 according to which the objective conditions of the offence of defamation were fulfilled despite the fact that the publication had the form of factual reporting about a criminal information. The applicant's defence did not convince the Court. In the Court's view it was not sufficient that Mr. G.-M. had made the criticised statement and that a criminal information had been laid regarding this statement in the terms published in "FORUM". Mr. G.-M.'s statements showed a hostile attitude to foreigners, but did not amount to a National Socialist attitude nor to a criminal offence. Therefore the applicant had failed to establish the truth of his allegations in this respect.

28. The fact that the publication was only a reprint of the criminal information laid against Mr. G.-M. did not exculpate the applicant. While everyone was free to report facts to the police which he considered to constitute a criminal offence, it went far beyond the mere reporting of a criminal suspicion to publish the criminal information in question in a periodical and thus to make it accessible to the general public. In this respect the applicant could not invoke a legal duty or even a legal right.

4. The applicant's request for the rectification
of the trial record

29. The applicant applied for a rectification of the trial court's record which, according to him, failed to mention certain statements of Mr. G.-M. which were of importance for judging the latter's attitudes and thus for the assessment of the evidence showing the truth of the applicant's allegations. Allegedly, Mr. G.-M. had at the trial inter alia confirmed his attitude that he was opposed to excessive immigration of foreigners ("Überfremdung") and that for tactical reasons he approved the "stop foreigners" campaign ("Ausländer Halt") which, as the applicant observes, was staged by a right wing political party and was subsequently prohibited. Mr. G.-M. had also admitted having considered measures of social policy directed against the children of foreign workers in Austrian schools. These statements, however, did not appear in the trial record.

30. On 4 October 1984 the Regional Court rejected the application for rectification of the record as being inadmissible. It stated that after five months the judge had no recollection of the detailed formulations used, and that nothing in the notes of the transcriber supported the applicant's request.

5. The proceedings before the Court of Appeal

31. On 17 December 1984 the applicant's appeal (Berufung) against his conviction and sentence was rejected by the Vienna Court of Appeal sitting with the same President as at the appeal hearing in the first round of the proceedings (see para. 21 above). In this context the Court also dealt with a complaint concerning the Regional Court's decision of 4 October 1984 (cf. para. 30). It observed that this decision refusing a correction of the trial record was final and that there was no appearance that requests made during the trial had not been determined. Moreover, the allegedly important statements of Mr. G.-M. were irrelevant for the Court's decision.

32. The Regional Court had not been legally bound to follow the Court of Appeal's earlier decision concerning the qualification of the offence. However, the Court of Appeal saw no reason to depart from that decision. The case did not concern the (possibly wrong) legal qualification of Mr. G.-M.'s statements by the applicant, but allegations putting a stain on Mr. G.-M.'s character which objectively could not be based on these statements.

33. The Regional Court had rightly found that the applicant had failed to show that his allegations concerning Mr. G.-M.'s character were true. The fact that a short report on the criminal information against Mr. G.-M. would not have been punishable did not justify the conclusion that a full reprint of the criminal information was not punishable either. The presentation of the publication in the form of a criminal information must have created the impression for the average reader that a particularly serious reproach was made against Mr. G.-M.'s character. Neither the right to report a criminal suspicion (Section 86 para. 1 of the Code of Criminal Procedure) nor the exception stipulated in Section 114 para. 2 of the Penal Code justified the full publication of the criminal information because it was not proportionate ("mangels Anlassadäquanz"): It had been insinuated, without a sufficient basis in the facts, that Mr. G.-M. held National Socialist attitudes.

34. The written judgment was served on the applicant on 7 January 1985. On 25 September 1985 the applicant applied to the Attorney General (Generalprokuratur) to file a plea of nullity for safeguarding the law (Nichtigkeitkeitsbeschwerde zur Wahrung des Gesetzes), but by letter of 9 January 1986 he was informed that the Attorney General saw no reason to act upon this request.

B. Relevant domestic law

1. The offence of defamation under Sections 111 et seq. of the Penal Code

35. Section 111 reads as follows:

"1. Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine.

2. Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to

make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine.

3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."

36. Under Section 112 "evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith ...".

37. According to Section 114 para. 1 "an act as mentioned in Section 111 ... is justified, if thereby a legal duty is carried out or a right exercised". Under paragraph 2 of the same provision "a person, who is for special reasons forced to make an allegation within the meaning of Section 111 ... in the particular form and manner, is not to be punished, unless the allegation made is untrue and the offender, acting with necessary care, ought to have been aware thereof".

2. The relevant provisions of the Media Act

38. Section 6 of the Media Act provides for the (objective) liability of the publisher in cases of defamation. The insulted person can claim compensation from the publisher unless the publication is, inter alia, true or justified by an overriding public interest if the author, having acted with the appropriate care to be expected from a journalist, had sufficient reasons to believe that his statement was true. Under Section 35 the publisher further has a joint liability with the person convicted of a media offence for fines and costs of procedure.

39. Under Section 33 of the Media Act the insulted person may request the forfeiture of the publication by which a media offence (Medieninhaltsdelikt) has been committed. Under Section 36 he may further request the immediate seizure of such a publication if the subsequent application of Section 33 is likely unless the adverse consequences of the seizure are disproportionate to the legal interest to be protected by this measure. No seizure shall be pronounced if this legal interest can also be satisfied by the publication of information that criminal proceedings have been instituted (Section 37). Under Section 34 the insulted person may finally request the publication of the judgment insofar as this appears necessary for the information of the public.

3. The offences allegedly committed by Mr. G.-M. according to the applicant

40. Incitement to hatred, i.e. a public call for the commission of hostile acts against a church or religious community existing in the country or a group of persons characterised by their belonging to such a church or religious community, a race, a people, a tribe or a state, is punishable by a prison sentence of up to one year if

committed in a manner susceptible of endangering the public order. The same applies to public incitement to hatred against such groups as well as to public insults against them or their public exposure to contempt in a manner incompatible with human dignity (Section 283 of the Penal Code).

41. Instigation of a criminal offence in print, broadcast or otherwise in such a manner that it becomes accessible to a broad public is punishable by a prison sentence of up to two years if no heavier a penalty applies by virtue of participation in the said criminal offence. The same applies to approval of a criminal offence committed with intent and punishable by more than one year of imprisonment if it is expressed in a manner susceptible of violating the general sense of justice or of inciting to the commission of such an offence (Section 282 of the Penal Code).

42. Section 3 of the National Socialism Prohibition Act (Verbotsgesetz) outlaws any activity in favour of the National Socialist Party (NSDAP) or its aims. Section 3d of this Act makes it a criminal offence to publicly instigate, incite, or induce behaviour falling within the scope of Section 3, in particular by glorifying or extolling the aims of the NSDAP, its organs or actions. Unless these acts do not constitute an offence punishable by a more serious sanction, they shall be punished by between ten and twenty years of imprisonment and forfeiture of the entire estate.

4. Procedural provisions applicable in the present case

a) Right to lay a criminal information

43. The first sentence of Section 86 para. 1 of the Code of Criminal Procedure reads as follows:

"Anybody who obtains knowledge of a criminal offence liable to public prosecution shall have the right to lay a criminal information concerning that offence".

44. Section 3g para. 2 of the National Socialism Prohibition Act furthermore provides for a duty to denounce offences under this Act in certain circumstances. It reads as follows:

"Any person obtaining credible information at a time when damage can still be prevented of an undertaking of the kind mentioned under Sections 3a, 3b, 3d or 3e or of a person involved in such an undertaking, and purposely failing to lodge an information with the authority despite being in a position to do so without exposing himself or relatives (Section 72 of the Penal Code) or persons under his legal protection to danger will be sentenced to a prison penalty of five to ten years."

45. It is a duty not only of the public prosecutors, but also of investigating judges, District Courts and police authorities to accept any criminal information and transmit it to the public prosecutor (Code of Criminal Procedure, Section 86 para. 1 second sentence). The public prosecutor is obliged to examine any criminal information concerning public prosecution offences which reaches him (Section 87 para. 1) and undertake the necessary investigations. However, if the examination of the information and the subsequent investigations do not reveal sufficient grounds to institute criminal proceedings against a particular person, the public prosecutor shall decline to

proceed with the case (Zurücklegung der Strafanzeige) and send the file to the investigating judge with a short report stating that he sees no reason to pursue the prosecution. In such a case the investigating judge shall discontinue the proceedings (Section 90 para. 1). A judicial remedy against such a decision is only available to persons who would be entitled to raise a civil claim in connection with the criminal proceedings in question (cf. Sections 47 and 48 of the Code of Criminal Procedure).

b) Discontinuation of proceedings by the Court

46. In cases such as defamation cases where a single judge of a Regional Court is competent, that judge may not himself discontinue the proceedings if he is of the opinion that the facts with which the accused is charged do not constitute a criminal offence. In such a case he must seek a decision of the Review Chamber (Ratskammer) of the Regional Court (Section 485 para. 1 (4) of the Code of Criminal Procedure) which shall discontinue the proceedings if it shares the views of the single judge (Section 486 para. 3).

47. The public prosecutor may appeal against such a decision (Section 486 para. 4). If the Court of Appeal upholds the appeal and directs the Regional Court to continue the proceedings special rules apply in the second round of proceedings. The relevant provisions read as follows:

Section 486 para. 5

"The trial court shall not be bound by decisions of the Review Chamber or of the Court of second instance which confirm ... that the facts constitute a criminal offence ..."

Section 489 para. 3

"In the hearing of and decision on an appeal also those members of the Court of second instance shall be disqualified who in the previous proceedings have participated in the decision of the Review Chamber to discontinue the proceedings or in the decision concerning an appeal against the Review Chamber's decision to discontinue the proceedings (Section 486)."

48. As regards the procedure to be followed in cases of disqualification of a judge, Sections 70 et seq. of the Code of Criminal Procedure provide the following:

Section 70 para. 1

"The judge is obliged to bring the circumstances which form the basis of his disqualification immediately to the attention of the President of the Court of which he is a member ..."

Section 71

"From the moment when reasons of disqualification come to his knowledge, every judicial officer shall refrain from any judicial acts; the acts concerned shall otherwise be

struck by nullity. Only if there is danger and if another judge cannot be appointed immediately shall the judicial officer concerned carry out those judicial acts which are urgently necessary ..."

49. Under Section 72 of the Code of Criminal Procedure the parties to the proceedings may challenge a judge if they can show that there are reasons to doubt his full impartiality. Although Section 72 expressly refers to grounds "other than disqualification", it is the practice of the courts to apply Section 72 also in cases where a party raises an issue of disqualification of a judge. In fact, the disqualification of a judge of first instance cannot subsequently be raised in nullity proceedings unless the judge has been challenged before or at the trial or immediately after the ground of disqualification has become known to the party (cf. Section 281 para. 1 (1) of the Code of Criminal Procedure).

50. As to the procedure to be observed, the following is stipulated:

Section 73

"The application by which a party wishes to challenge a judge shall be made at any time to the court to which the challenged judge belongs; if the challenge concerns a member of a trial court the application must be handed in or declared before a court-certified officer not later than 24 hours before the beginning of the trial, and if it concerns the whole court, not later than three days after the serving of the summons to appear before that court. The application must specify and, as far as possible, make credible the reasons of challenge."

Section 74

"(1) As a rule it is for the President of the Court to which the challenged judicial officer belongs to decide on the admissibility of the challenge.

(2) ...

(3) No remedy is admissible against these decisions ..."

c) Trial records

51. Records of hearings before criminal courts in Austria are usually drawn up in summary form unless, for special reasons, the court orders the preparation of a shorthand transcript. The preparation of a shorthand transcript can also be requested by a party prepared to advance the costs thereof (Section 271 para. 4).

52. In other cases the record is limited to documenting all essential formalities of the proceedings. In particular, it shall mention the names of the members of the court, of the parties and their representatives, the witnesses and experts heard and set out which parts of the files were read out, whether the witnesses and experts were sworn by oath and the reasons for doing so, and finally all motions submitted by the parties and the decisions taken by the court thereon. The parties are free to demand the recording of specific points in order to preserve their rights (Section 271 para. 1, applicable to single judge proceedings by virtue of Section 488).

53. Where the establishment of a literal version is important, the judge shall, upon the request of a party, order individual passages to be read out at once (Section 271 para. 2).

54. The answers of the defendant and the depositions of the witnesses and experts shall only be mentioned if they contain deviations from, alterations of or additions to the statements recorded in the files or if the witnesses or experts are heard for the first time at the trial (Section 271 para. 3).

55. The parties are free to inspect the finished record and its enclosures and make copies thereof (Section 271 para. 5). The case-law has established that they are entitled to request additions or corrections to the record at the trial or afterwards, as long as a remedy is pending (EvBl. 1948, 32 and SSt 32/108). The court takes a final decision on such requests, no further remedy being available against such a decision (RZ 1967, 88, EvBl. 1948/243).

56. Only failure to prepare any trial record is a ground of nullity (Section 281 para. 1 (3)). Other deficiencies of the record cannot be taken up in nullity proceedings except failure to decide on motions concerning the record which have been made during the trial (Section 281 para. 1 (4)).

III. OPINION OF THE COMMISSION

A. Points at issue

57. The following points are at issue in the present case:

- a) whether there has been an unjustified interference with the applicant's right to freedom of expression as guaranteed by Article 10 of the Convention;
- b) whether in the proceedings before the Regional Court there has been a violation of the applicant's right to a fair hearing by an impartial tribunal as guaranteed by Article 6 para. 1 of the Convention;
- c) whether in the proceedings before the Court of Appeal there has been a violation of the applicant's right to a fair hearing before an impartial tribunal established by law, as guaranteed by Article 6 para. 1 of the Convention.

B. Article 10 of the Convention

58. The applicant complains that his conviction for defamation of a politician and the related seizure of his publication constituted an unjustified interference with his right to freedom of expression as guaranteed by Article 10 of the Convention.

59. This provision reads as follows:

- "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

60. The applicant's freedom of expression under Article 10 para. 1 of the Convention has been interfered with by his conviction and sentence for the publication in the periodical "FORUM".

61. In determining whether or not this interference can be justified under the second paragraph of Article 10, the Commission must have regard to each of the requirements set out in this provision, i.e. its lawfulness, its conformity with one or more of the purposes enumerated in the Convention, and finally its necessity in a democratic society in the light of the particular duties and responsibilities which the exercise of freedom of expression carries with it in such a society.

62. The interference complained of was "prescribed by law", being based on Section 111 of the Austrian Penal Code. Furthermore, it pursued a legitimate aim recognised by the Convention, namely "the protection of the reputation of others". It remains to be examined whether the interference was "necessary in a democratic society".

63. The Commission notes that the publication in "FORUM" concerned statements of a leading politician, Mr. G.-M., which were said to raise the suspicion that certain criminal offences had been committed by that politician, in particular offences against the National Socialism Prohibition Act. The publication was a full reprint of a criminal information which the applicant and others had laid against the politician in question on account of his above-mentioned statements. It does not appear that the incriminated statements of the politician or the contents of the criminal information laid were incorrectly described in the publication.

64. However, the Austrian courts did not consider this as sufficient. For the purpose of establishing the truth of his publication (Wahrheitsbeweis) they further required the applicant to prove the substantive justification of the criticism of Mr. G.-M.'s statements, as expressed in the criminal information.

65. The applicant claims that in particular this latter requirement was incompatible with Article 10 of the Convention.

66. The Government deny a violation of Article 10, claiming in particular that with appropriate legal advice the applicant should have realised that the suspicion of the criminal offences alleged by him was wholly unfounded. The applicant was entitled, but not obliged, to lay a criminal information, and in this context he was not required to qualify the reported facts from a legal point of view. If he did so and overstepped the limits of what was necessary he was responsible for his action. In any event he was not convicted for having laid a criminal information which was legally untenable, but because he had published it. This was not merely the expression of an opinion in the form of a value judgment which was not susceptible of being proven as true. The arguability of the legal qualification of given facts can be verified by reference to the applicable laws and the relevant case-law. In this context allowance must be made for a certain degree of legal uncertainty, justifying the adoption of different opinions. However, in the present case the legal opinion expressed by the applicant was totally unreasonable ("geradezu denkunmöglich"), since hardly any of the elements of the criminal offences alleged by him were met. In these circumstances it was possible to assess the question of the correctness of the legal opinion expressed by him. The applicant used an objectively and subjectively wrongful legal opinion concerning a politician's behaviour in order to insinuate a despicable attitude to the latter. While politicians were required to sustain a higher degree of criticism than other people, there were nevertheless limits to such criticism. The unproven allegation of National Socialist attitudes constituted a massive attack on a person's reputation also if he was a politician. The applicant's conviction of defamation was therefore justified, in particular as the sanctions imposed were not disproportionate.

67. The Commission has held that the regulations on defamation contained in the Austrian Penal Code may as such be considered as a necessary restriction of the freedom of expression. It went on as follows:

"In view of the fundamental importance which this freedom has in the field of political discussion it is of the utmost importance that these restrictive regulations should only be applied where it is really necessary in the particular case. They should not be used to curb legitimate criticism in the press of the behaviour and statements of a politician since it is the very function of the press in a democratic society to participate in the political process by checking on the development of the debate of public issues carried on by political office-holders. A politician must be prepared to accept even harsh criticism of his public activities and statements, and such criticism may not be understood as defamatory unless it throws a considerable degree of doubt on his personal character and good reputation." (Cf. No. 8803/79, *Lingens and Leitgeb v. Austria*, Dec. 11.12.81, D.R. 26 pp. 171, 181; No. 9815/82, *Lingens v. Austria*, Comm. Report 11.10.84, Eur. Court H.R., *Lingens* judgment of 8 July 1986, Series A no. 103, Annex p. 36, para. 77.)

68. In the *Lingens* judgment of 8 July 1986, the Court confirmed the Commission's opinion in the following terms:

"Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues." (Series A no. 103, p. 26, para. 42)

69. The Court further held that, where as in the above case criticism is being expressed concerning the attitude of a politician,

"a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. The Court notes in this connection that the facts on which Mr. Lingens founded his value-judgment were undisputed, as was also his good faith.

Under paragraph 3 of Article 111 of the Criminal Code, read in conjunction with paragraph 2, journalists in a case such as this cannot escape conviction for the matters specified in paragraph 1 unless they can prove the truth of their statements.

As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention." (ibid. p. 28 para. 46)

70. The Commission accepts that also in the present case the matter discussed in the applicant's publication formed part of a public debate on political questions of general importance. The politician, Mr. G.-M., in fact had made certain public statements reported in a television programme which expressed his attitude concerning the treatment of Austrians and foreigners in the field of family allowances. These attitudes were criticised by the applicant who compared them in particular with National Socialist ideology. It follows from the above Lingens judgment that the applicant must have been free to criticise Mr. G.-M.'s political attitudes and express clear value judgments in this context.

71. The question arises whether or not the applicant was also entitled to do so in the form of publishing a criminal information (Strafanzeige) which had actually been laid with the competent authorities, but which eventually was found to be unsubstantiated.

72. It is not contested that it would have been permissible for the applicant to publish information in summary form on the fact that a criminal information had been laid against Mr. G.-M. Only the publication of the full text of the criminal information in question was found to be inadmissible.

73. Moreover, the Court of Appeal in its final judgment of 17 December 1984 found that the case did not concern the (possibly wrong) legal qualification of Mr. G.-M.'s statements by the applicant, but allegations putting a stain on Mr. G.-M.'s character which objectively could not be based on these statements. The expression of the criticism in the form of a criminal information was only seen as relevant in that it created the impression that a particular serious reproach was made against Mr. G.-M.'s character.

74. In view of this analysis by the competent Austrian court of last instance, the Commission cannot follow the Government's argument according to which the applicant was convicted because he failed to show the substantive justification of the criminal suspicion expressed by him. He was not convicted because his legal qualification of Mr. G.-M.'s statements was totally unreasonable, but because in the court's view he had, without a sufficient basis in the facts, insinuated that Mr. G.-M. held National Socialist attitudes.

75. In the Commission's opinion the case therefore does not concern the qualification of Mr. G.-M.'s statements from the point of view of the Austrian criminal law, but the expression of a value judgment of a nature different from a legal appreciation. In particular the applicant had expressed the view that Mr. G.-M.'s statements revealed an attitude similar to National Socialist ideology. This view was supported by pertinent quotations from the National Socialist party programme of 1920.

76. The Commission accepts that the applicant's criticism of Mr. G.-M.'s statements may have been exaggerated in that his claim that these statements constituted criminal acts under the National Socialism Prohibition Act or under certain provisions of the Penal Code was not substantiated. However, this was not regarded as decisive by the Court of Appeal.

77. Its decision concentrated on the question whether or not it was "objectively" justified, on the basis of Mr. G.-M.'s statements, to insinuate that he held National Socialist attitudes. This concerned a value judgment on which it was, in principle, possible to hold different views not susceptible to a strict proof of truth. For the Commission it is decisive that the applicant made his statement in response to a proposal in a political context which was in itself of a nature to shock many people. The reaction by the applicant drew attention in a provocative manner to this nature. In the same way as Mr. G.-M. was free to make his statement, the applicant in a political discussion must have had the freedom in a democratic system to react strongly to it.

78. By preventing the applicant from publishing his views, the Austrian courts thus restricted his freedom of expression to an extent which cannot be regarded as "necessary in a democratic society".

Conclusion

79. The Commission concludes, by nineteen votes to two, that there has been a violation of the applicant's right to freedom of expression as guaranteed by Article 10 of the Convention.

C. Article 6 para. 1 of the Convention

80. Article 6 para. 1 of the Convention reads as follows:

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

81. The applicant alleges violations of this provision both in the proceedings before the Regional Court and in those before the Court of Appeal.

1. The proceedings of the Regional Court

82. The applicant complains that the whole proceedings were unlawful and thus unfair because the private prosecutor had omitted to request a penalty (Strafantrag) as required by Austrian law. However, this complaint has first been raised by the applicant in his observations on the merits of 3 July 1989. It thus is not part of the case, as admitted by the Commission's decision of 10 May 1989, and accordingly cannot be examined.

83. The applicant further complains that it was unfair that the Regional Court refused to rectify the record of the trial as requested by him. The applicant claims that the record did not correctly reflect the position stated by the private prosecutor, who had been heard as a witness, and that this was of particular relevance for the proof of the truth of the applicant's allegations.

84. The Government submit that at the trial the applicant failed to ask for a literal recording of the private prosecutor's statements or for the reading out of specific passages. When requesting the rectification of the record, he did not support his request by a presentation of his own complete shorthand notes, but simply stated that he and his defence counsel had recorded significant statements word for word. These notes were not presented as evidence either. When the Court rejected the request for rectification, it pointed out that the statements referred to by the applicant did not appear in the transcriber's shorthand record, but that corresponding and similar statements had been put down. It must therefore be assumed that the official record was legally correct and that it included all relevant items of the trial. Upon the request for rectification the transcriber was consulted and gave detailed explanations. In the subsequent nullity proceedings before the Court of Appeal, the applicant's objections to the record were not considered in respect of their merits. The Court of Appeal pointed out that it was for the presiding judge of the trial to decide finally on the motion for rectification, and that Section 281 para. 1 (4) of the Code of Criminal Procedure could not be applied because it presupposed a motion entered at the trial. The Government finally observe that the applicant has not shown how the corrections requested could have influenced the Court's assessment that the offence did in fact constitute defamation.

85. The Commission notes that both the Regional Court and the Court of Appeal in fact examined the applicant's submissions concerning the alleged incompleteness of the trial record, but considered his arguments in this respect unsubstantiated and in any event irrelevant to the legal assessment of the case. The decisions in question do not appear to be arbitrary or unreasonable. In these circumstances it cannot be said that the applicant's arguments were not taken into account in a fair manner.

Conclusion

86. The Commission concludes unanimously that in the proceedings before the Regional Court there has been no violation of the applicant's right to a fair hearing as guaranteed by Article 6 para. 1 of the Convention.

2. The proceedings of the Court of Appeal

87. The applicant alleges that it was unfair that in the first round of proceedings the Court of Appeal expressed a view on the merits of the case, by which the Regional Court considered itself bound, and that he was thereby deprived of an effective remedy in the second round of proceedings in which the Court of Appeal confirmed its earlier decision. The applicant further complains that in the second round the Court of Appeal was unlawfully presided over by the same judge as in the first round, and that therefore this Court was not an "independent and impartial tribunal established by law".

88. The Commission first observes that at the relevant time Protocol No. 7 to the Convention had not entered into force for Austria. The right to criminal appeal proceedings, as laid down in Article 2 of this Protocol, therefore did not apply.

89. However, it follows from the established case-law of the Convention organs that Article 6 of the Convention is applicable to appeal proceedings where they are provided for by the domestic law (cf. *inter alia* Eur. Court H.R., *Ekbatani* judgment of 26 May 1988, Series A no. 134, p. 12 para. 24), although a right to appeal cannot as such be derived from this provision (cf. for example Nos. 8603, 8722, 8723 and 8729/79, *Crociani a. Others v. Italy*, Dec. 18.12.80, D.R.22 p. 147; No. 9315/81, *X. v. Austria*, Dec. 15.7.83, D.R. 34 p. 96).

90. The applicant claims that the Court of Appeal which dealt with the case in the second round of the proceedings was not established by law, because it included judges who had participated in the first round of the proceedings, and who would have been disqualified by virtue of Section 489 para. 3 of the Austrian Code of Criminal Procedure. In fact, the Court of Appeal had the same president in both rounds of proceedings. Under Austrian law he should not have participated in the second round, as the Government admit.

91. However, the Government also refer to the principle of Austrian law according to which a party must claim reasons for disqualification of a judge immediately. In the case of judges of an appellate court this must be done together with the appeal, or, if the reasons of disqualification become known to the party only at a later date, without delay. The first decision of the Court of Appeal, signed by the president, was known to the applicant already when he filed his appeal. The summons to the appeal hearing was signed by the same president, and therefore the applicant should have objected to his participation upon receipt of the summons. As he did not do so, the legal presumption applied that the applicant had implicitly renounced a claim to the disqualification of this judge. In the Government's view the Court was therefore "established by law".

92. The applicant objects that at the time of receiving the summons he could not assume that the Court of Appeal would not be composed according to law, even if this summons was signed by the disqualified judge. He further submits that neither he nor his defence counsel knew the judge in question and therefore they were unable to realise his disqualification at the appeal hearing. It was only from the Court of Appeal's written decision that they learnt that the Court had been presided over by the disqualified judge, and at this time it was too late to lodge any remedy in this respect. The attempt to solicit a plea of nullity for safeguarding the law by the Attorney General failed.

93. In essence the Government claim that the Court of Appeal was "established by law" notwithstanding the participation of a disqualified judge, the applicant having implicitly waived his right to object to the unlawful composition of the court by failing to challenge the judge in question.

94. The Commission notes that the presiding judge was disqualified from participating in the second hearing before the Court of Appeal on 17 December 1984, by virtue of Section 489 para. 3 of the Austrian Code of Criminal Procedure. This has been admitted by the Government.

95. The Commission further notes that the presiding judge should primarily have recognised his disqualification of his own motion in the procedure under Section 70 of the Code of Criminal Procedure.

96. The procedure for challenging a judge under Section 73 of the same Code is by its terms provided for a different case, namely the subjective bias of a judge. Nevertheless, it appears that in the practice of the Austrian courts it is also applied to cases of disqualification of a judge. In any event it only provides a subsidiary means to raise the issue of disqualification if the procedure under Section 70 has not been complied with.

97. The Government's argument that the situation has to be regarded as remedied if the disqualified judge has not been challenged in time seems to be based on the case-law under Section 281 para. 1(1) of the Code of Criminal Procedure where the same principle is applied concerning the allegedly unlawful composition of courts of first instance raised in nullity proceedings. Section 281, however, was not applicable in the present case as regards the composition of the Court of Appeal. Here, the only possibility of raising the disqualification of the presiding judge would have existed under Section 73.

98. The Commission, in its decision on the admissibility (cf. Appendix II at page 29), accepted the applicant's argument that he could not be expected to challenge the presiding judge of the Court of Appeal at the hearing on 17 December 1984. No further remedy was available to the applicant after the close of the hearing.

99. In these circumstances the Commission finds no basis for the assumption that the applicant has waived his right to a "tribunal established by law" as guaranteed by Article 6 para. 1 of the Convention. As the Court of Appeal was composed unlawfully the applicant's right to a hearing of his case by a "tribunal established by law" has been violated.

100. The applicant further claims that because of the participation of the disqualified judge the Court of Appeal was not "impartial". The Government submit that the Court's impartiality was not impaired by the fact that a judge who had participated in an earlier decision of the Court also participated in the new decision. No more than disqualification the applicant had raised an issue of bias. The participation of the judge concerned in the Court of Appeal's second decision could not have given the applicant the impression that he had "a pre-formed opinion which [was] liable to weigh heavily in the balance at the moment of the decision" (Eur. Court H.R., *De Cubber* judgment of 26 October 1984, Series A no. 86, p. 16 para. 29).

101. The Commission recalls that in the *De Cubber* judgment the Court pointed out that the "fundamental guarantees [of Article 6 para. 1 of the Convention], including impartiality, must also be provided by any courts of appeal ... which a Contracting State may have chosen to set up" (ibid. p. 18, para. 32) and that in determining impartiality "a distinction should be drawn 'between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect'" (ibid. p. 13, para. 24, with a reference to the *Piersack* judgment of 1 October 1982, Series A no. 53, p. 14 para. 30).

While the personal impartiality of a judge was to be presumed until there was proof to the contrary (ibid. p. 14, para. 25), the objective approach could be reflected, *inter alia*, in the applicable provisions of the national law disqualifying a judge from exercising certain functions: they manifested the law-makers' "concern to make ... appeal courts free of any legitimate suspicion of partiality" (ibid. p. 16 para. 29).

102. The Commission considers that this is precisely the aim pursued by Section 489 para. 3 of the Austrian Code of Criminal Procedure. The Austrian legislature thereby intended to ensure, on the basis of an objective approach related to the particular functions of a Court of Appeal in the second round of proceedings following the quashing, by the same Court, of a decision to discontinue the proceedings, that no legitimate doubts could arise concerning its impartiality.

103. As a lack of impartiality was here presumed by national law, the Court of Appeal must be considered as having lacked impartiality also for the purposes of the Convention. It is irrelevant in this context whether, subjectively, the presiding judge actually had pre-formed opinions concerning the case as the applicant claims.

104. In view of the above findings, the Commission does not consider it necessary to examine further whether before the Court of Appeal the applicant has had a "fair hearing" within the meaning of Article 6 para. 1 of the Convention.

Conclusion

105. The Commission concludes, by twenty votes to one, that in the proceedings before the Court of Appeal there has been a violation of the applicant's right to an impartial tribunal established by law, as guaranteed by Article 6 para. 1 of the Convention, and that it is not necessary to examine separately whether the applicant's right to a "fair hearing" has been respected in those proceedings.

D. Recapitulation

106. The Commission concludes, by nineteen votes to two, that there has been a violation of the applicant's right to freedom of expression as guaranteed by Article 10 of the Convention (cf. para 79 above);

107. The Commission concludes unanimously that in the proceedings before the Regional Court there has been no violation of the applicant's right to a fair hearing as guaranteed by Article 6 para. 1 of the Convention (cf. para. 86 above);

108. The Commission concludes, by twenty votes to one, that in the proceedings before the Court of Appeal there has been a violation of the applicant's right to an impartial tribunal established by law, as guaranteed by Article 6 para. 1 of the Convention, and that it is not necessary to examine separately whether the applicant's right to a "fair hearing" has been respected in those proceedings (cf. para. 105 above).

Secretary to the Commission


(H.C. KRÜGER)

President of the Commission


(C.A. NØRGAARD)

Dissenting Opinion of Mr. Henry G. Schermers

I. I do not agree with the Commission's opinion concerning Article 10 of the Convention for the following reasons:

1. The borderline between freedom of information and libel depends largely on the traditions of the community concerned. In some communities it is quite customary to use harsh language, in others one is more polite. In the political field many established democracies consider it an achievement that one can say almost anything about politicians, in other countries libellous attacks against those who perform democratic functions are seen as attacks against democracy itself. To decide what expressions are defamatory and what are not we have to take into account that it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or a "penalty" intended to meet them (Court Eur. H.R., Müller and Others judgment of 24 May 1988, Series A no. 133, p. 22 para. 35. See also Handyside judgment of 7 December 1976, Series A no. 24, p. 22 para. 48 and Sunday Times judgment of 26 April 1979, Series A no. 30, p. 36 para. 59). In my submission it is not our task to decide whether the Austrian courts solved the present case in the best possible way, but only whether, in deciding the case as they did, they infringed the freedom of information in a way contrary to Article 10. In my opinion that is not the case. The applicant could have published harsh criticism of Mr. G.-M. in a form other than the publication of a criminal information (Strafanzeige).

2. The Austrian legal system with respect to the publication of a criminal information is basically correct. In broad lines it operates as follows:

a) Under Austrian law individuals can lay a criminal information (Strafanzeige) against other individuals whom they suspect of having committed a criminal offence.

b) Like in any legal system defamation of other persons is a criminal offence in Austria, unless it can be demonstrated that the defamatory statement is factually true.

c) Putting a) and b) together it becomes possible to lay totally unfounded criminal information against person X accusing him of the vilest crimes and then publish a newspaper article stating that Mr. X has been accused of the vilest crimes. Subsequently, the criminal information will be declared inadmissible or unfounded, but no action for defamation can be brought as the statement in the press is factually true.

d) To prevent this kind of abuse the Austrian courts held that publication of a criminal information can be prosecuted as a defamatory act if the criminal information is totally unfounded.

This must be right. No legislation can admit that any slanderous press publication can be made once the same publication has been brought as a criminal information.

3. The main question in the present case therefore is whether the Austrian judiciary acted in breach of the Convention when it considered that Mr. Oberschlick's criminal information against Mr. G.-M. was so little founded that it was not justified to publish it in the periodical "Forum" under a bold heading "Criminal information against W. G.-M.". Mr. G.-M. had suggested that the family allowances paid to immigrant mothers be cut by 50%. This is clearly a statement that offends, shocks and disturbs. In the Lingens case (judgment of 8 July 1986, Series A no. 103, p. 26 para. 41) the European Court of Human Rights held that the offending, shocking or disturbing character of an opinion is not enough for its prohibition. It seems therefore justified - in any case not contrary to the Convention - that Mr. Oberschlick's criminal information did not lead to prosecution of Mr. G.-M. Neither were Mr. Oberschlick and his partners censured for bringing the criminal information. The question at issue was only the press publication by Mr. Oberschlick about Mr. G.-M. In his criminal information against Mr. G.-M., and therefore also in his press publication, Mr. Oberschlick went further than just stating that Mr. G.-M. had made a shocking statement which should be criticised. He accused Mr. G.-M. of activities contrary to the National Socialism Prohibition Act. The Austrian courts held that this accusation was totally unfounded and therefore of a defamatory character.

This may seem a bit formalistic. Mr. G.-M. had made an unacceptable statement. This could justify criminal information against him and it could justify a press publication that criminal information had been brought against Mr. G.-M. As a matter of law, however, I would rather hold that the Austrian courts were right in holding that the fact that Mr. G.-M. had made unacceptable statements which were investigated by the courts did not justify publication in the press suggesting to the readers that Mr. G.-M. had committed a different crime. The Austrian courts found no foundation whatsoever in the statements made for the accusation that Mr. G.-M. had violated the National Socialism Prohibition Act. The press publication suggesting that Mr. G.-M. could be criminally prosecuted for that violation was therefore of defamatory character and Mr. Oberschlick's conviction could be justified. It is not the task of the Commission to decide whether the conviction was the best possible judgment, or whether the fine imposed was the best one. The conviction and the fine have a sufficiently sound legal basis for being permitted under the Convention (see also the Government's submissions in para. 66 of the Commission's Report).

4. It is true that the Vienna Court of Appeal based its final decision not expressly on the above reasoning. It considered that not the acts of Mr. G.-M., but his character had been blamed. The result, however, is the same. By suggesting that Mr. G.-M. had violated the National Socialism Prohibition Act the applicant had given a wrong factual information rather than a value judgment. By writing that Mr. G.-M. had presumably intended (wohl beabsichtigt) to give the impression that immigrant mothers and their unborn children were inferior people the accusation was made that Mr. G.-M. had a bad character, rather as a factual information than as a value judgment.

Taking all arguments together my conclusion is that the decision of the Vienna Court of Appeal, though regrettable, is not of such a character that Austria has violated Article 10 of the European Convention of Human Rights.

II. One can also raise doubts about the question whether Article 6 of the Convention has been violated.

1. The decision in first instance (22 April 1983) was in favour of the applicant. In second instance this decision was quashed by the Vienna Court of Appeal (on 31 May 1983). The Court of Appeal did not, however, decide the case itself but referred it back to the first instance court. Then the first instance court decided against the applicant and the applicant again appealed to the Vienna Court of Appeal. When this Court decided the case for the second time on 17 December 1984 it was presided by the same judge who had presided on 31 May 1983. This was contrary to Section 489 para. 3 of the Austrian Code of Criminal Procedure.

2. There are two reasons, however, for which it could be defended that this may not be contrary to Article 6 of the Convention:

a) It may be possible to interpret Austrian law in such a way that the participation of the disqualified judge did not void the decision of 17 December 1984. Under Austrian law (Sections 73, 74, 281 para.1 and 345 para. 2 of the Austrian Code of Criminal Procedure) the application for exclusion of a judge must be filed immediately when the reasons of disqualification come to the knowledge of the party concerned. As the applicant was in possession of the first decision of the Court of Appeal he knew that that the same judge had been president before. With any reasonable care he could also know the composition of the Court of Appeal when it met again in his case. The applicant should therefore have raised his objections before the proceedings started. There is a good reason for this provision as it should be prevented that applicants raise objections against judges only in case they lose their action. In the present case it may be doubted whether the applicant ever would have challenged the judge if he had won the case. Therefore, under Austrian law, the prohibition for the same judge to sit again could be seen as finally covered by the absence of timely objections. In that conception, there was no longer a violation of Austrian law.

b) One may also submit that the irregularity in Austrian law does not violate the principle of a fair trial which is the basic provision of Article 6. The factual situation comes down to a co-operation between two courts. The court in first instance decided; the court in second instance did not agree and referred the case back; the court in first instance decided again and the court in second instance reviewed the case again. This co-operation between the two courts may lead to the question whether there was a fully independent appeal procedure. Article 6, however, does not grant a right to appeal. The fact that the composition of the Court of Appeal (or of the first instance court) remains partly the same in this up and down reference procedure does not affect the independence or the impartiality of either court. Even if the judges remain the same (which in the present case was only true for the president of the Court of Appeal) the requirement of a fair trial may well be fulfilled.

3. However, the vast majority of the Commission held the view that Austrian law clearly prohibits any judge to sit again in a second appeal procedure and does not have any clear exception to that rule. The vast majority of the Commission therefore also considered that the requirement that the court must be "established by law" was not fulfilled and that therefore the Court of Appeal, under presidency of the same judge, was automatically to be regarded as partial. One

could, therefore, not require anybody to verify whether there might be the same judge again. Taking that into account I finally found it unreasonable to require such a verification from the applicant. If the Austrian legal system requires that any challenge of judges be made at the beginning of a session (which in my opinion it would be entitled to require), then this requirement should be stated in a clear and unequivocal manner. As this was not the case, I have, despite certain hesitations, voted with the majority of the Commission on this point.

Dissenting Opinion of Mrs. Jane Liddy

With respect to the majority I find myself unable to share the view that the case concerns the expression of a value judgment of a nature different from a legal appreciation, rather than the qualification of Mr. G.-M.'s statements from the point of view of Austrian criminal law (cf. para. 75 of the Report).

In its judgment of 17 December 1984 the Vienna Court of Appeal indicated that a short report on the criminal information laid would not have been punishable, but the full reprint was, because there was not a sufficient basis in the facts for the insinuation.

What is decisive for me is that the publication in question did not purport to be an "open discussion of political issues" (cf. Eur. Court H.R., Lingens judgment of 8 July 1986, Series A no. 103, p. 26 para. 42) but rather a complaint to the proper authorities of specified criminal acts on the part of a named individual, with a commentary which fell to be assessed within the context of criminal law rather than within the context of political debate.

I have therefore approached the question posed at paragraph 71 of the Report on the basis that neither the content of Mr. G.-M.'s views nor the right of the applicant to react with strong comment on those views is directly an issue in this case.

Accordingly, I think that this case is to be distinguished from the Lingens case and in the light of the fact that it would have been permissible for the applicant to publish information in summary form on the fact that a criminal information had been laid against a named individual (cf. para. 72 of the Report), I conclude that the sanctions imposed on him for publishing the full text of the information actually laid against Mr. G.-M. did not amount to an unjustified interference with his right to freedom of expression.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
16 June 1985	Introduction of the application
29 July 1985	Registration of the application
<u>Examination of Admissibility</u>	
9 November 1987	Commission's decision to invite the Government to submit observations on the admissibility and merits of the application
23 February 1988	Extension of time-limit
23 February 1988	Government's observations
21 April 1988	Applicant's observations in reply
10 May 1989	Commission's decision to declare the application admissible
<u>Examination of the merits</u>	
10 May 1989	Commission's deliberations on the merits
3 July 1989	Government's and applicant's further observations on the merits
4 October 1989	Commission's consideration of the state of proceedings
8 December 1989	Commission's deliberations on the merits and final votes
14 December 1989	Adoption of the Report