

**SECRET**

**COUNCIL OF EUROPE**

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**EUROPEAN COMMISSION  
OF HUMAN RIGHTS**

**APPLICATION No. 1446/62  
LODGED BY  
Oskar PLISCHKE  
AGAINST  
AUSTRIA**

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**R E P O R T  
OF THE COMMISSION  
(Adopted on 28th September 1964)**

**STRASBOURG**

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### GENERAL INTRODUCTION

This Report concerns the Application lodged by Mr. Oskar PLISCHKE (No. 1446/62) against Austria under Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and is now transmitted to the Committee of Ministers and to the Respondent Government in accordance with paragraph (2) of that Article. It has not been transmitted to the Applicant.

The Application was declared admissible by the Commission on 19th June 1963 as regards the alleged violation of Article 6, paragraph (1) and paragraph (3)(c) of the Convention. The Commission rejected all the Applicant's other complaints on 19th September 1963 and 7th March 1964. The Commission drew the Applicant's attention to the fact that its decision of 19th June 1963 gave him until 5th October 1963 to lodge a special appeal as provided for in Section 1 of the Act of 27th March 1963 (Bundesgesetzblatt 1963, No. 66). The Applicant duly lodged an appeal on which the Supreme Court gave judgment on 12th December 1963, reducing by six months the sentence passed on him on 21st December 1961.

The Commission, therefore, considered that there was no longer any need for it to determine whether or not the circumstances of the hearing on 21st December 1961 constituted a violation of the Convention. Without setting up a Sub-Commission in accordance with Articles 28 and 29 of the Convention the Commission simply noted that in the final resort the Applicant had been given a fair hearing within the meaning of Article 6 of the Convention.

On 17th December 1963, when the Commission adopted its report on 14 individual applications against Austria (Doc. A 85.459), this case was not included in the collective report, since the procedure followed in Austria in this instance, while it also raised before the Commission the question of "equality of arms" (Waffengleichheit) under the Code of Criminal Procedure, was not the same as in those cases. Furthermore, as a result of new complaints made by the Applicant, the Commission was not able to give a final decision on the admissibility of the Plischke case until 7th March 1964.

The purpose of the Commission in the present Report, as prescribed in Article 31, paragraph (1), is accordingly:

- (1) to establish the facts, and
- (2) to state an opinion as to whether the facts found disclose a breach by the Respondent Government of its obligations under the Convention.

The Report begins with a brief outline of the case (Part I), followed by an account of the proceedings (Part 2). Part 3 sets out the issues connected with the admissibility of the Application and also the text of the Commission's decision of 19th June 1963. In Part 4, the Commission gives its opinion as prescribed in Article 31, paragraph (1). The Appendices contain the texts of the supplementary decisions of 19th September 1963 and 7th March 1964.

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On 28th September 1964, during its 50th session held in Strasbourg, the Commission drew up the present Report.

At that session the following members were present:

MM. S. PETREN, President  
C. Th. EUSTATHIADES, Vice-President  
L. J. C. BEAUFORT  
Mrs. G. JANSSEN-PEVTSCHIN  
MM. M. SØRENSEN  
F. CASTBERG  
G. SPERDUTI  
S. SIGURJONSSON  
J. E. S. FAWCETT  
C. MAGUIRE  
T. BALTA

Mr. A. B. McNULTY, Secretary to the Commission

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PART I

OUTLINE OF THE CASE

This Report is based on the Applicant's latest communications and represents a slightly different version of the facts as were outlined in the Commission's earlier decisions on admissibility (see paragraph 13 and Appendices).

1. On 5th September 1961 the Regional Court (Kreisgericht) of St. Pölten sentenced Plischke to 18th months' imprisonment for fraud, failure to maintain his family and other offences. Previous sentences had been passed on him for these offences, but the Court, nevertheless, granted him the benefit of mitigating circumstances (ausserordentliches Milderungsrecht).

The Applicant did not contest this judgment. However, the Public Prosecutor's Office of St. Pölten lodged an appeal, on the grounds that the Regional Court had shown an excessive leniency and had not ordered Plischke's detention in a labour establishment after he had served his sentence. The file was therefore transmitted to the Court of Appeal (Oberlandesgericht) of Vienna.

The Attorney-General (Generalprokuratur) entered a plea of nullity in the interests of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) against that part of the judgment of the Court of first instance which related to the failure to maintain his family. The Attorney-General relied upon the fact that from 8th January to 8th March 1959, and from 4th February to May 1961, i.e. during part of the period in question, Plischke had not been at liberty and had thus been deprived of his job and means of livelihood. The Attorney-General concluded that during that period Plischke had not been able to meet his maintenance obligations. Under Austrian law the Attorney-General's plea had the effect of removing the case from the jurisdiction of the Court of Appeal and of transferring the proceedings in both the appeal and the plea to the jurisdiction of the Supreme Court (Oberster Gerichtshof).

The Supreme Court handed down its decision on 21st December 1961 in open session after hearing the Judge Rapporteur and the representative of the Attorney-General's Office; the accused, on the other hand, was neither present nor represented ("nach öffentlicher Verhandlung, nach Anhörung des Vortrages des

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Berichterstatters ... und der Ausführungen des Vertreters der Generalprokuratur"). The Court annulled the judgment of 5th September 1961, in two respects, although it upheld it as to the remainder. In the first place, it allowed the Attorney-General's plea, holding that failure to maintain within the meaning of Section 1 of the Compulsory Maintenance Act (Unterhaltsschutzgesetz) had occurred only between 9th March 1959 and 3rd February 1961. On the other hand, it accepted the appeal of the St. Pölten prosecuting authority to the extent of ruling that the Regional Court had been too lenient in admitting the existence of mitigating circumstances. Finally, the Court, on the one hand, refused to order Plischke's detention in a labour establishment while, on the other hand, it increased his sentence from 18 months to 3 years' rigorous imprisonment.

2. On 2nd December 1963 the Applicant informed the Commission that he had lodged a special appeal as provided for in Section 1 of the Austrian Act of 27th March 1963. On 12th December 1963, following a public hearing in the presence of the parties including Plischke himself, and after hearing the Judge Rapporteur, Counsel for the Defence and the representative of the Attorney-General's Office, the Supreme Court reduced the sentence passed on 21st December 1961 by six months, namely, from 3 years to 2 1/2 years' rigorous imprisonment.

3. In a letter dated 13th January 1964 the Applicant announced his intention of leaving Austria as soon as he came out of prison, particularly as a deportation order had been issued against him and was due to be enforced immediately upon his release. The letter by which the Commission's second supplementary decision was sent to Plischke at the Garsten prison, was returned on 10th August 1964, marked "released, present address unknown". The Commission has since tried to trace him but without success.

PART 2

HISTORY OF PROCEEDINGS

4. Introduction and Registration

An application was submitted to the Commission by this Applicant under cover of a letter dated 3rd May 1962 and was registered on 10th December 1962 under file No. 1446/62 in the general register kept by the Secretary to the Commission.

5. Substance of the Application

The Applicant alleged violation of Article 6, paragraphs (1), (2) and (3)(b), (c) and (d) and Article 7 of the Convention. He alleged various infringements of an accused person's right of defence: that the Supreme Court had not called or had not heard witnesses for the defence, had not allowed the defence to consult the case-file, had not appointed ex officio a lawyer to defend him and had heard the case without both parties being present.

At first, Plischke also seemed to criticise the Court decisions on certain points of fact (e.g. with regard to its finding on paternity); however, he later stated that he intended to abandon this allegation.

Plischke appeared to be asking for a revision of the proceedings.

6. Report of the group of three members

A group of three members (MM. L. J. C. BEAUFORT, A. SUSTERHENN and J. E. S. FAWCETT) examined the Application on 13th July 1962 (Doc. A 72.414) and proposed that the Commission should adjourn its examination of the admissibility of the case and, at the same time, should add it to the list of similar Austrian cases in which the principle of "equality of arms" was in question.

On 17th July 1962 the Commission adjourned its examination of the admissibility of this Application and instructed its Secretary:

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- to inform the Applicant and the Respondent Government accordingly;
- to inform the Respondent Government of the substance of the Application;
- to invite the Applicant to submit a certified copy of the two judicial decisions referred to.

On receipt of the texts of these decisions the Secretary put before the Commission an amplified statement of the facts (Doc. A 77.039).

On 21st February 1963 (Doc. A 77.821) a second group of three members (MM. L. J. C. BEAUFORT, N. ERIM and J. E. S. FAWCETT) considered the case and proposed that the Commission should communicate it to the Austrian Government in accordance with Rule 45, paragraph (3)(b) of its Rules of Procedure.

7. Communication of Application to the Respondent Government

At its meeting on 29th March 1963, the Commission examined this group of three's report and instructed its Secretary:

- to communicate the Application to the Respondent Government and invite it to submit its observations in writing on the admissibility of Plischke's complaints within six weeks (Rule 45, paragraph (3)(b) of Rules of Procedure);
- to ask the Government whether the Applicant could avail himself of Section 1 of the Austrian Act of 18th July 1962 amending Section 41 (2) of the Code of Criminal Procedure.

The Secretary wrote to the Applicant accordingly on 5th April 1963.

8. Partial decision of the Commission as to admissibility

On 20th May 1963 the Respondent Government sent its observations in writing on the admissibility of the Application (Doc. A 80.072/TN 4025) and they were sent to the Applicant on 21st May 1963 with a request that he should reply before 15th June 1963.

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On 19th June 1963 the Commission gave a partial decision as to admissibility (see paragraph 13 of this Report). It declared the Application admissible as regards the alleged violation of Article 6, paragraphs (1) and (3)(c) of the Convention but decided to postpone its decision on the remainder.

The Applicant's reply to the Government's observations of 20th May reached the Secretary on 21st June 1963 and was brought to the attention of the Commission on 19th September 1963.

The Secretary informed the Applicant of the Commission's decision of 19th June by a letter dated 21st June 1963 and informed him that he had thereby the right, until 5th October 1963, to lodge a special appeal with the Supreme Court, as provided for in Section 1 of the Act of 27th March 1963 (Bundesgesetzblatt 1963, No. 66).

9. Supplementary decisions of the Commission as to admissibility

On 19th September 1963 the Commission gave a first supplementary decision (Appendix I) declaring inadmissible the complaints whose examination had been adjourned on 19th June 1963.

On 27th November 1963 the Secretary asked Plischke whether he had lodged an appeal as provided for under the Austrian Act of 27th March 1963.

On 2nd December 1963, the Applicant replied in the affirmative, adding that the Supreme Court was to hear the case on 12th December.

On 23rd December 1963 the Secretary asked the Applicant to send the text of the Supreme Court's judgment as soon as possible.

Plischke has since written to the Secretary on two occasions, on 13th January and 29th February 1964. He has also submitted the text of the Supreme Court's judgment of 12th December 1963.

On 7th March 1964 the Commission gave a second supplementary decision by which it declared inadmissible the new complaints made by the Applicant (Appendix II).

PART 3

AS TO ADMISSIBILITY OF THE APPLICATION

10. Contents of the Application

In his original Application and in his letters, the Applicant alleged violations of the Convention as stated in part 2, paragraph 5 of this Report.

The Commission has therefore to decide upon the admissibility of the Application in regard to the following points:

- a) As regards Article 6, paragraphs (1) and (3)(c), that the parties were not both represented at the proceedings before the Supreme Court and that the Court had not ex officio appointed a lawyer to defend the Applicant;
- b) As regards Article 6, paragraph (3)(b), that the Applicant was not allowed to consult the case-file;
- c) As regards Article 6, paragraph (3)(d), that witnesses for the defence were not called;
- d) As regards Article 7, that the 1960 Compulsory Maintenance Act was wrongfully applied to the Applicant's detriment;
- e) That the Regional Court of Krems had rejected the Applicant's application for conditional release.

11. Point at issue

The complaint mentioned in paragraph 10 (a) above was the only one declared admissible by the Commission (see the partial decision of 19th June 1963, paragraph 13 of this Report). Thus the only point still in dispute was whether or not the public hearing on 21st September 1961, at which the parties were not both represented, was in accordance with Article 6, paragraphs (1) and (3)(c) of the Convention

12. Submissions of the parties

As regards the alleged violation of Article 6, paragraphs (1) and (3)(c)

The Respondent Government stated in its written observations: "The questions of law raised by this Application are so complicated and many-sided that it is not possible to foresee how long it will take to examine them completely. It is therefore to be feared that the Applicant will not be able to observe the time-limit laid down in Section 2(1) of the Act of 27th March 1963 (Bundesgesetzblatt 1963, No. 66), which appears to be applicable in this case. In accordance with the opinion of the Federal Ministry of Justice the Republic of Austria would, exceptionally and without prejudice, not oppose the Application being accepted by the Commission of Human Rights under Article 28 of the Convention, as regards the failure of the Supreme Court to hear both parties".

The Applicant stated in his reply to the above observations that he had been granted free legal aid for his trial but that the lawyer appointed by the Court had not conducted the case or appeared before the Supreme Court.

13. Text of the partial decision of the Commission as to admissibility, dated 19th June 1963

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HAVING REGARD to the Application lodged on 3rd May 1962 by Oskar PLISCHKE against Austria and registered on 10th December 1962 under file No. 1446/62;

HAVING REGARD to the declaration made by the Government of the Republic of Austria on 26th July 1961 renewing for a period of three years from 3rd September 1961 the declaration made on 3rd September 1958 in accordance with Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950;

Having deliberated,

THE FACTS

Whereas the facts of the case may be summarised as follows:

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The Applicant is a stone-cutter born in 1913 and is at present detained in the prison at Stein/Donau; he states that he is a German national.

The Regional Court (Kreisgericht) of St. Pölten, sitting as a Children's Court, sentenced him, on 5th September 1961, to 18 months' "rigorous imprisonment", with the additional penalty of one night's "sleeping hard" and one fast day each month, for aggravated fraud, burglary, false accusation, breach of trust and failure to maintain his family (Articles 171, 174 (1)(d), 183, 197, 200, 321 and 461 of the Penal Code; Sections 1 and 3 of the Compulsory Maintenance Act - Unterhaltsschutzgesetz - 1960).

On this last point the Regional Court found that from 8th January 1959 to May 1961 the Applicant had failed in his maintenance obligations towards Klaus Walser, his natural son. The Applicant contested paternity but the Court rejected his argument on the ground, inter alia, that he had not invoked any decision which had acquired the force of res judicata.

The Court noted that the Applicant had already been convicted more than once of fraud (e.g. on 9th September 1958) and failure to maintain (e.g. on 24th July 1958). It nevertheless granted him the benefit of mitigating circumstances (ausserordentliches Milderungsrecht) on account of his partial admissions, the financial difficulties in which he had lived since his last release from prison and the fact that he had restored to its owner one of the articles obtained by fraud.

The St. Pölten prosecuting authorities lodged an appeal against the sentence, coupled with a plea of nullity. They appear to have submitted that the Regional Court, inter alia, showed excessive leniency and had not ordered the Applicant's detention in a labour establishment after he had served his sentence.

On 21st December 1961, the Supreme Court annulled the judgment of 5th September 1961 in two respects, while confirming it as to the remainder. It found in the first place that from 8th January to 8th March (or May), 1959 and from 4th February 1961 to May 1961, i.e. during part of the period concerned (8th January 1959-May 1961), the Applicant had not been at liberty and had thus been deprived of his trade and sole means of livelihood. It concluded that failure to maintain within the meaning of Section 1 of the Compulsory Maintenance Act had occurred only between 9th March 1959 and 3rd February 1961; it appears to have ruled on this point proprio motu.

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On the other hand the Supreme Court agreed with the Public Prosecutor's Office that the Regional Court had been too lenient in accepting mitigating circumstances; it refused however to order Plischke's detention in a labour establishment.

The Supreme Court increased the principal sentence from 18 months' to 3 years' rigorous imprisonment.

The judgment of 21st December 1961 was given in open court after hearing the Judge Rapporteur and the representative of the Attorney General (Generalprokuratur). The accused, on the other hand, was neither present nor represented ("nach öffentlicher Verhandlung, nach Anhörung des Vortrages des Berichterstatters ... und der Ausführungen des Vertreters der Generalprokuratur").

The Applicant alleges violation of Article 6, paragraphs (1), (2) and (3)(b), (c) and (d) and Article 7 of the Convention, complaining of various alleged infringements of an accused person's right of defence in that the Supreme Court did not call or did not hear witnesses for the defence, did not allow the defence to consult the case-file, did not appoint ex officio a lawyer and did not hear the case in the presence of both parties.

At first the Applicant also seemed to be criticising the decisions concerned on certain points of fact (e.g. with regard to the decision on paternity); however, in his last letter dated 17th September 1962 he states expressly that he does not intend to pursue this matter.

Plischke appears to be asking for a revision of the proceedings.

#### PROCEEDINGS BEFORE THE COMMISSION

Whereas the Commission, at its meeting on 29th March 1963, instructed the Secretariat:

- (a) to communicate the Application to the Austrian Government and to invite it to submit **within a period of six weeks** its observations in writing on the admissibility of Plischke's complaints (Rule 45, paragraph (3)(b) of Rules of Procedure);
- (b) to ask the Government whether the Applicant could, if appropriate, avail himself of Section 1 of the Austrian Act of 18th July 1962, amending Section 41 (2) of the Code of Criminal Procedure.

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Whereas the Secretariat acted on these instructions in a letter dated 5th April 1963;

Having regard to the written observations of the Respondent Government dated 20th May 1963 on the admissibility of the Application, which stated as follows:

"(1) Failure of the Supreme Court to hear both parties or ex officio to appoint a lawyer for the defence

The questions of law raised by this Application are so complicated and many-sided that it is not possible to foresee how long it will take to examine them completely. It is therefore to be feared that the Applicant will not be able to observe the time-limit laid down in Section 2 (1) of the Act of 27th March 1963 (Bundesgesetzblatt 1963 No. 66), which appears to be applicable. In accordance with the opinion of the Federal Ministry of Justice, the Republic of Austria would, exceptionally and without prejudice, not oppose the Application being accepted by the Commission of Human Rights under Article 28 of the Convention as regards the failure of the Supreme Court to hear both parties.

(2) Refusal of permission to consult the file

Without more precise information from the Applicant it has not been possible for the Federal Ministry of Justice to determine whether, when and in what circumstances the Applicant was refused permission to consult the case-file. There is nothing in the file to indicate that he showed any desire to consult it.

(3) Failure to call or hear witnesses for the defence

This alleged violation of the Convention cannot be successfully pleaded unless the Applicant has exhausted all legal remedies. Such is not the case, since he did not lodge a plea of nullity against the judgment of the Regional Court of St. Pölten, in which he could have mentioned the alleged defect as a reason for quashing the judgment, as provided in Section 281 (4) of the Code of Criminal Procedure.

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(4) Alleged violation of Article 7 of the Convention

Section 6 (2) of the Compulsory Maintenance Act, 1960 has not been applied to the prejudice of the Applicant. On the contrary, he has benefited from it; if his punishable conduct, which began on 9th March 1959, had been considered up to 1st April 1960 as a minor offence under the Compulsory Maintenance Act, 1925 (Unterhaltsschutzgesetz) and, after that date, as a major offence, the combination of the two separate offences would have been given weight in fixing the sentence as a further aggravating circumstance. Under the Act in question, however, the element constituting the minor offence is merged, as it were, with the major offence as defined in the Compulsory Maintenance Act; thus, as there was no longer an aggravating circumstance, the Applicant has in fact received more favourable treatment than he claims in the presentation of his cause.

All things considered, therefore, the wording and application of the Act has had the effect of not aggravating the case of the offender, in that he has been charged with a series of acts constituting at once a minor and major offence.

Thus there is no question of a violation of Article 7 of the Convention";

Having regard to the Order of the President of the Commission dated 21st May 1963 instructing the Secretariat to communicate the said observations to the Applicant and to invite him to reply not later than 15th June 1963 (Rule 46, paragraphs (1) and (2) of Rules of Procedure);

Whereas the Secretariat acted on these instructions on 22nd May 1963 but has since not received any communication from the Applicant;

THE LAW

As regards the alleged violation of Article 6, paragraphs (1) and (3)(c) of the Convention

Whereas Article 6, paragraph (1) of the Convention provides that "in the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by a

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As regards the Applicant's other complaints

Whereas the Commission is not at present able, with a full knowledge of the case, to take a decision as to the admissibility of the Applicant's other complaints, since the Secretariat has not yet received his reply to the written observations of the Respondent Government and the Applicant has not yet stated clearly the nature of the alleged violation of Article 7 of the Convention;

Now therefore the Commission

1. DECLARES ADMISSIBLE AND ACCEPTS, WITHOUT PREJUDICE TO AN EXAMINATION OF THE MERITS OF THE CASE, THE APPLICATION INSOFAR AS IT RELATES TO THE ALLEGED VIOLATION OF ARTICLE 6, PARAGRAPHS (1) AND (3)(c) OF THE CONVENTION;
2. ADJOURNS ITS DECISION AS TO THE REMAINDER OF THE CASE.



PART 4

OPINION OF THE COMMISSION

14. The Commission's decision declaring the Application admissible as regards the complaint that the parties had not both been present at the proceedings before the Supreme Court had the effect under Austrian legislation of entitling the Applicant to have the proceedings re-opened before the Supreme Court. The Applicant availed himself of this right, and the Court gave judgment on 12th December 1963 following a hearing in open court at which both parties, including the Applicant himself, were present and counsel for the defence was heard. The Court reduced its sentence of 21st December 1961 by a period of six months (two and a half years' rigorous imprisonment instead of three years').

As a result of this development the Commission is no longer required to decide whether or not the circumstances, in which the hearing of 21st December 1961 ~~was~~ conducted, constituted a violation of the Convention. The Commission, without following its procedure by setting up a Sub-Commission, may limit itself to stating that in the final resort the Applicant's case received a fair hearing in accordance with the requirements of Article 6 of the Convention.

The Commission therefore is of the opinion that there is no violation of the Convention.

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