AS TO THE ADMISSIBILITY OF

Application No. 18820/91
by A.G.
against Austria

The European Commission of Human Rights sitting in private on 13 January 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI

Mr. H.C. KRÜGER, Secretary to the Commission
Mr. M. de SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 24 June 1991 by A.G. against Austria and registered on 18 September 1991 under file No. 18820/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1968 and living in K. He is represented by Mr. Wolfgang Roringer, a lawyer in Tamsweg.

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

The applicant was born out of wedlock. According to a judgment given by the Murau District Court (Bezirksgericht) on 31 March 1969 A.J. is the applicant's father. This judgment, which became final, had been given without the taking of evidence, the defendant A.J. not having contested being the applicant's father.

However, according to a medical test carried out in March 1987 it is proven that A.J. cannot be the applicant's biological father.

Although he knew that the final paternity judgment of 31 March

1969 was irreversible the applicant nevertheless introduced an action in the Murau District Court requesting a finding that contrary to the previous judgment A.J. was not his father. This action was rejected as being inadmissible on 10 January 1991. The Court stated that the case was substantially the same as the matter decided in the previous paternity proceedings and therefore the final judgment given in these proceedings was binding. A retrial (Wiederaufnahmeverfahren) was no longer possible as the time-limit fixed in Section 534 para.3 of the Austrian Code on Civil Procedure (ZPO) was exceeded. Therefore, so the Court concluded, the existing legal order did not provide for any possibility to grant the applicant's justified request for a correction of his legal family status.

The applicant's appeal on points of law (ordentlicher Revisionsrekurs) was rejected by the Leoben Regional Court (Kreisgericht) on 21 February 1991 as being inadmissible. In the appeal proceedings the applicant had requested the Court to submit the matter to the Constitutional Court (Verfassungsgerichtshof). He considered that in its unamended version in force prior to 1970 Section 163 of the Austrian Civil Code (ABGB) was unconstitutional in that it allowed a court in paternity proceedings to find the defendant to be the father of the plaintiff child without the taking of any evidence if the defendant accepted to be the father. The Leoben Regional Court considered however that the provision in question was no longer decisive in the appeal proceedings. The appeal was not inadmissible on account of an application of Section 163 ABGB but on account of procedural provisions resulting in the judgment of 31 March 1969 being final. Therefore there was no reason to submit the case to the Constitutional Court, as requested by the applicant.

THE COMPLAINTS

The applicant complains that under Austrian law he has no possibility to have a paternity judgment given in 1969 set aside although a medical test carried out in 1987 clearly disproves the finding in that judgment according to which A.J. is his father. He alleges a violation of Article 8 of the Convention which secures to everyone the right to protection of his private and family life.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 26 June 1991 and registered on 18 September 1991.

On 2 December 1991 the Commission decided to communicate the application to the Austrian Government, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, and to write them to submit observations in writing on the admissibility and merits of the application.

The Government submitted their observations on 9 March 1992 and the applicants's Counsel replied on 6 May 1992.

THE LAW

The applicant invokes the right to protection of private and family life which he considers violated on account of the impossibility to have a paternity judgment given in 1969 set aside although its findings are disproved by recent medical tests. However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of this provision as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant failed to raise, before the Austrian Supreme Court (Oberster Gerichtshof) by way of an

extraordinary appeal on points of law (ausserordentlicher Revisionsrekurs), the complaint he now makes before the Commission.

According to the uncontested statement of the respondent Government the issue raised by the applicant in his complaint has so far not been dealt with by the Supreme Court. In these circumstances it cannot be found that the appeal in question would have been ineffective (cf. Eur. Court H.R., Van Oosterwijck judgment of 6 November 1980, Series A No. 40, pp. 16-17, paras 33-34). Moreover, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from raising his complaint in the proceedings referred to.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and his application must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)