AS TO THE ADMISSIBILITY OF

Application No. 21528/93
by Jan BOHUSLAV and Jirí LAUSMAN
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 12 October 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 12 August 1992 by Jan BOHUSLAV and Jirí LAUSMAN against Austria and registered on 15 March 1993 under file No. 21528/93;

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 applicants are Czech citizen born in 1975 and 1972, respectively. The first applicant is living in Prague and the second applicant is living in Horice.

The facts, as they have been submitted by the applicants, may be summarised as follows.

A. Particular circumstances of the case

On 13 August 1990 a member of the private security staff of a banking institute arrested the applicants in Vienna on the suspicion of conspiracy to a robbery and handed them over to the police. In the course of this incident, the second applicant was wounded by a bullet.

On 13, 14, 16 and 20 August 1990 the applicants were questioned by the Investigating Judge of the Vienna Juvenile Court (Jugendgerichtshof) and the Vienna police authorities. During these interrogations concerning the charge of attempted robbery, no counsel was present. Furthermore, the interpreter who assisted the police authorities was neither court-appointed, nor had he been previously sworn in.

On 27 August 1990 the Vienna Public Prosecutor's Office (Staatsanwaltschaft) dropped the charge for bodily harm brought by the

second applicant against the member of the security staff who had wounded him.

On 20 September 1990 the Vienna Juvenile Court convicted the applicants of conspiracy to commit a robbery and sentenced both to eight months' imprisonment, suspended on probation. The applicants were subsequently released on parole.

On 21 February 1991 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicants' appeal for nullity (Berufung wegen Nichtigkeit) and their appeal against the assessment of guilt (Berufung wegen Schuld). Upon the first applicant's appeal against sentence (Berufung wegen Strafe), it reduced his prison term to six months. The decision was served upon the applicants' counsel on 29 March 1991.

On 28 January 1992 the Attorney General (Generalprokurator), upon the suggestion of the Office of the President of the Czechoslovak Republic, lodged a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) with the Supreme Court (Oberster Gerichtshof).

On 17 March 1992 the Supreme Court held that the law had been infringed in the preliminary investigations against the applicants, in that the Investigating Judge had omitted to appoint immediately a defence counsel when he instituted preliminary investigations against two minors. Moreover, the interpreter who assisted in the questioning of the applicants had not been sworn in.

B. Relevant domestic law

According to S. 33 para. 2 of the Code of Criminal Procedure (Strafprozeßordnung), the Attorney General, on his own motion or upon the request of the Ministry for Justice, may lodge a plea of nullity for the preservation of the law against any judgment, claiming that it infringes the law or is based on an incorrect application of the law.

COMPLAINTS

1. The applicants complain under Article 5 para. 2 and Article 6 para. 3 (a) of the Convention that the criminal proceedings against them were unfair, in particular that they had no proper interpretation at the questionings by the Investigating Judge and before the police authorities.

2. The applicants further complain under Article 3 of the Convention about the circumstances of their arrest by the security staff. The second applicant also complains under Article 2 para. 1 and Article 5 of the Convention about his having been wounded by the member of the security staff, and about the discontinuation of the criminal proceedings against the latter.

THE LAW

1. The applicants complain under Article 5 para. 2 and Article 6 para. 3 (a) (Art. 5-2, 6-3-a) of the Convention that the criminal proceedings against them were unfair.

Under Article 26 (Art. 26) of the Convention, the Commission may only deal with an application within a period of six months from the date on which the final decision was taken. According to the Commission's constant jurisprudence, the "final decision" within the meaning of that provision refers solely to the final decision involved in the exhaustion of all domestic remedies according to the generally recognised rules of international law. In particular, only a remedy which is "effective and sufficient" can be considered for this purpose (No. 8850/80, Dec. 7.10.1980, D.R. 22 p. 232; No. 10308/83, Dec. 3.5.1983, D.R. 36, p. 209).

In the present case, the Vienna Court of Appeal's decision of 21 February 1991, dismissing the applicants' appeals against their conviction, was served upon their counsel on 29 March 1991, whereas they lodged their application on 12 August 1992, i.e. more than six months later.

The Supreme Court's decision of 17 March 1992 on a plea of nullity for the preservation of the law, brought by the Attorney General, cannot be taken into account when calculating the six-months' period. In this respect, the Commission notes that solely the Attorney General disposes of the right to lodge an appeal for the preservation of the law, within the meaning of S. 33 para. 2 of the Austrian Code of Criminal Procedure. This remedy cannot, therefore, be regarded as an effective remedy for the purposes of Article 26 (Art. 26), which the applicants could and would have to exhaust according to the generally recognised rules of international law.

The Commission observes further that the plea of nullity for the preservation of the law was filed by the Attorney General on 28 January 1992, that is ten months after the Vienna Court of Appeal's decision of 21 February 1991 had been served on the applicant's lawyer. Therefore, the Commission finds that no special circumstances existed which could justify that the applicants had waited for introducing their application to the Commission.

It follows that this part of the application is to be rejected for non-compliance with the six-months' rule laid down in Article 26 (Art. 26) of the Convention.

2. The applicants further complain under Article 3 (Art. 3) of the Convention about the circumstances of their arrest by the security staff and the second applicant complains under Article 2 para. 1 and Article 5 (Art. 2-1, 5) of the Convention about his having been wounded by the member of the security staff, and about the discontinuation of the criminal proceedings against the latter.

The Commission recalls that the Convention does not give a right to institute criminal proceedings against a third person (Appl. No. 7116/75, Dec. 4.10.76, D.R. 7 p. 91).

Furthermore, the Commission notes that the applicants' complaints about the specific circumstances of their arrest, in particular about the second applicant having been wounded, are directed against private persons, namely the members of the security staff of the banking institute, whose actions do not fall under the responsibility of the State.

It follows that the remainder of the application is incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)