AS TO THE ADMISSIBILITY OF

Application No. 15882/89
by Theodor BOTKA and Farhad PAYA
against Austria

The European Commission of Human Rights sitting in private on 29 March 1993, the following members being present:

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

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 25 August 1989 by Theodor BOTKA and Farhad PAYA against Austria and registered on 11 December 1989 under file No. 15882/89;

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 facts of the case, as they have been submitted by the parties, may be summarised as follows.

The first applicant, born in 1905, is an Austrian national and resident in Klagenfurt. He is a painter and composer by profession. Before the Commission he is represented by the second applicant, a lawyer practising in Klagenfurt. The second applicant, born in 1954, is also an Austrian national.

A. The particular circumstances of the case

On 29 August 1988 Mr. G. informed the Klagenfurt Federal Police Department (Bundespolizeidirektion) that he suspected Mr. R. of committing criminal offences to the financial disadvantage of the first applicant, who was taken care of by Mr. R., and the first applicant's brother. This information was forwarded to the Klagenfurt Public Prosecutor's Office (Staatsanwaltschaft) which instructed the Police

Department to investigate into the circumstances of the first applicant and his brother and their relationship with Mr. R., and in particular any financial transactions.

In the course of the investigations, a social worker of the Klagenfurt Municipal Office, a physician employed by the Klagenfurt Health Office and a police officer visited the first applicant at his home on 16 September 1988. The social worker, in his subsequent report, referred to some difficulties with Mrs. R., the wife of the suspect Mr. R., who did not wish that they entered and disturbed the first applicant; he then described the first applicant's living conditions and in detail the disorder in the apartment and general state of neglect, and the information gathered in the course of the conversation with the first applicant, inter alia as to his vague knowledge about his financial situation and the fact that he had made Mrs. R. his sole heir.

Furthermore, on the same occasion, the first applicant was examined by a physician employed by the Klagenfurt Health Office. In his report dated 27 September 1988, the doctor stated in detail the first applicant's state of physical health and his impressions as to his mental health. Having also consulted the first applicant's general practitioner, he concluded that the first applicant, although he did not suffer from any important phases of disorientation, might be in need of support, in particular in financial matters.

Moreover, on 21 September 1988 a police officer of the Klagenfurt Federal Police Department, upon appointment with the second applicant, inspected the first applicant's apartment and questioned the first applicant in the apartment of Mr. and Mrs. R. According to his report of the same date, he had put questions as to the first applicant's will, the circumstances of him living in the house of Mr. R., and his financial situation, in particular his various savings booklets. The second applicant had confirmed that he had the savings booklets in safe-keeping; however, referring to his professional secrecy, he refused any indications as to the number of savings booklets as well as the amount of savings concerned. The officer also expressed doubts whether the second applicant, having regard to his acquaintance with Mr. R., could impartially act on the first applicant's behalf.

On 29 September 1988 the Police Department submitted its report to the Public Prosecutor's Office.

On 28 October 1988 the Prosecutor's Office requested the Investigating Judge at the Klagenfurt Regional Court (Landesgericht) to open preliminary investigations, especially to hear Mr. R. on the charges against him, to order an expert opinion as regards the first applicant's and his brother's physical and mental state of health at present and in 1980, and to hear the first applicant and his brother as witnesses.

On 28 October 1988 the Investigating Judge instructed Dr. S. to prepare his expert opinion. In November 1988 the first applicant refused an examination by Dr. S. The expert did not, therefore, examine him; no expert opinion was prepared at that time.

Subsequently, the Klagenfurt District Court (Bezirksgericht), ex officio, opened guardianship proceedings regarding the first applicant. On 5 December 1988 a judge of the District Court heard the first applicant. According to a file note, the judge concerned had gathered the impression that the first applicant might no longer be in a position to handle all his financial matters. The District Court ordered continuation of the guardianship proceedings. The first applicant's appeals in this respect remained unsuccessful.

On 30 January 1989 an Investigating Judge at the Klagenfurt Regional Court ordered the search of the second applicant's law office

in order to find the first applicant's and his brother's savings booklets, all other documents relating to their assets as well as all other evidence concerning their assets and financial transactions. Such evidence should be seized. The search would not take place if all documents were handed over voluntarily. Furthermore the search should be effected without previously hearing the second applicant; he should be heard in the course of or after the search. A representative of the Carinthian Lawyers' Association (Rechtsanwaltskammer) should be present at the search. The Investigating Judge referred to S. 139 of the Code of Criminal Procedure (Strafprozeßordnung).

In its reasoning, the Investigating Judge stated in particular that it was known to the Court that the second applicant represented both the first applicant and his brother as well as the suspect Mr. R. and his wife. Thus conflicts of interests were unavoidable. Having regard to charges laid by the Klagenfurt Federal Police Department, there was a reasonable suspicion that Mr. R. had committed fraudulent conversion and fraud to the disadvantage of the first applicant and his brother who were both considerably helpless due to their age and their physical state. The Judge noted that the brothers concerned had owned two houses which had been sold more than ten years ago and the proceeds had been paid into several savings accounts at three different Austrian banking institutes. Some of the savings booklets as well as securities owned by the brothers were kept by Mr. R. According to statements of the first applicant and his brother, part of the savings booklets and documents and instructions relating to their assets were kept by the second applicant. The Judge considered that the search was necessary on the ground that the suspect Mr. R. refused to disclose the extent to which he administered the first applicant's and his brother's assets or the extent to which such assets were given to him.

The search warrant was amended as regards the second applicant's address in the morning of 1 February 1989.

On 1 February 1989 the second applicant's law office was searched by two police officers of the Klagenfurt Federal Police Department in the presence of two court witnesses and a lawyer as representative of the Lawyers' Association. At the same time, the first applicant was questioned by the Investigating Judge at the Klagenfurt Regional Court in the presence of Dr. S., the psychiatric expert.

According to a report of one police officer about the search of the second applicant's law office, which was dated 1 February 1989, the persons participating in the search arrived at the second applicant's law office at noon. The second applicant was not present. Following some inquiries he was contacted at the suspect's premises, where a search was carried out at the same time, and he arrived at 12h35 at his office. He received a copy of the search warrant. The second applicant stated he would not voluntarily hand over the savings booklets and other documents without permission by the first applicant and his brother, or his brother's curator. Both the second applicant and the representative of the Lawyers' Association declared that they considered the search warrant to be illegal. The representative of the Lawyers' Association further requested that the Investigating Judge as well as the Public Prosecutor concerned should be called to the second applicant's law office.

The report continued that the second applicant then accompanied one of the police officers to the apartment of the suspect Mr. R. The first applicant was heard in the presence of the Investigating Judge and the psychiatric expert S. Upon the second applicant's question, the first applicant refused permission to consult his personal documents and savings booklets and to file them with the Court. The Investigating Judge thereupon ordered that the savings booklets should not be seized and that a file in the second applicant's law office concerning the matters of the two brothers should be put under seal and in safe-keeping. Upon return to his law office, the second applicant

and the representative of the Lawyers' Association stated that they considered the seizure of the file concerned unlawful. Nevertheless, the file, handed over by the second applicant, was sealed in accordance with the instructions given by the Investigating Judge and later deposited at the Klagenfurt Regional Court. At the end of the search, the second applicant also declared that he did not represent the suspect Mr. R., but only the first applicant, and that he had represented the first applicant's brother until a curator had been appointed.

The report of the representative of the Lawyers' Association dated 1 February 1989 essentially corresponded with the above report.

According to the record of the first applicant's questioning as witness in the early afternoon of 1 February 1989, the first applicant answered a series of questions put both by the Investigating Judge and by Dr. S. The first applicant stated in particular that he and his brother had in the past sold two houses, one of them to Mr. R. in exchange for the right to occupy one apartment in a house owned by the latter. He and his brother perceived a monthly rent from the Regional Government and owned securities and savings booklets representing considerable values, Mrs. R. being authorised to dispose of these accounts. The first applicant also stated that the relevant documents were at the bank or with the second applicant, and he permitted the Court to verify the accuracy of his financial matters and to inspect the documents concerned.

On 2 February 1989 the Investigating Judge, in the presence of the second applicant, inspected the contents of the safe No. 50 at a Ferlach banking institute.

On 3 February 1989 the file seized in the second applicant's law office was opened at the Klagenfurt Regional Court. The lawyer representing the Lawyers' Association in this case consulted the file in the presence of the Investigating Judge and the second applicant, and stated that it contained, apart from court documents, only documents which could not be examined without the permission of the first applicant and his brother. Upon the second applicant's request, the file was handed back without having been inspected by the Regional Court.

On 14 February 1989 the first applicant, represented by the second applicant, informed the Klagenfurt Regional Court that he had been questioned in the presence of the psychiatric expert S. apparently in order to enable the expert to prepare an opinion on the question of his capacity to enter into legal transactions. He complained about this procedure and objected to any examination by the expert S. whom he challenged for lack of professional competence and for his Nazi past. He also submitted a private expert opinion confirming his capacity to enter into legal transactions.

On 16 February 1989 the Investigating Judge at the Klagenfurt Regional Court ordered that the employees of a Ferlach banking institute had to hand over for court safe-keeping all savings booklets, securities, deposit receipts etc. contained in the safe No. 50.

The Investigating Judge, referring to the criminal proceedings against Mr. R., found in particular that the second applicant had deposited various savings booklets and securities belonging to the first applicant and his brother in the above safe. Having examined the contents of that safe on 2 February 1989, he found that a particular savings booklet with a deposit of about AS 550,000 had, contrary to the statements of the first applicant, not been in the safe. It was unclear whether this amount had been used to buy securities or had been improperly used, and therefore all financial transactions had to be examined. Thus all savings booklets had to be seized.

The Investigating Judge noted that the first applicant, apparently the owner of the savings booklets and other documents, had expressly agreed to the examination of all his savings booklets when heard as witness on 1 February 1989; any revocation or reservation notified to the Court by third persons were therefore irrelevant. In any event, the seizure had to be effected under S. 143 of the Code of Criminal Procedure.

The Investigating Judge subsequently carried out the order of 16 February 1989 in that he consulted in detail the contents of the safe No. 50 at the Ferlach banking institute, prepared a list and copies of the documents found. The contents of the safe were afterwards put back.

On 21 February 1989 the applicants lodged a complaint about the decisions of 30 January, 1 and 16 February 1989 with the Klagenfurt Regional Court. They submitted in particular that the search warrant had not been precise. The search had in part been carried out at a Rosental banking institute. Furthermore, the first applicant had not agreed that files concerning his matters be handed over. It was true that the first applicant, in the presence of the Investigating Judge and the psychiatric expert, had agreed to an examination of his savings booklets and securities, however, only to an informal examination of his safe without any notes or copies to be taken. Moreover the search warrant of 16 February 1989 incorrectly referred to a banking institute at Ferlach whereas the safe at a Rosental banking institute was examined and the complete contents were copied. S. 145 of the Code of Criminal Procedure would only have provided for sealing and safe-keeping.

On 6 March 1989 the Klagenfurt Regional Court appointed the psychiatric expert S. to prepare an opinion on the question whether the first applicant was capable to enter into legal transactions, at the present time as well as in 1980 when he had transferred real estate to the suspect R. and his wife in exchange for a free right to occupy an apartment. An opinion should also be prepared as regards the first applicant's brother.

On 14 March 1989 the first applicant challenged the expert S. for lack of professional qualifications and in view of his professional activities under the Nazi regime. He also filed a complaint with the Klagenfurt Regional Court about the decision of 6 March 1989.

On 23 March 1989 the Judges' Chamber (Ratskammer) at the Klagenfurt Regional Court dismissed the applicants' complaint against the decisions of 30 January, 1 and 16 February 1989, which concerned the search warrants in respect of the second applicant's law office and the safe at a banking institute, respectively.

With regard to the search complained of, the Judges' Chamber, referring to S. 139 et seq. of the Code of Criminal Procedure, found in particular that there had been a reasonable suspicion of fraudulent conversion to the disadvantage of the first applicant and his brother. The brothers owned various savings booklets and other assets. The suspect R. had refused to disclose in how far he administered the first applicant's and his brother's assets and had received gifts, and he had not voluntarily handed over the relevant evidence. The second applicant had been orally given legal power by the suspect's wife in the presence of police officers on the occasion of the search. Furthermore the second applicant could not rely on his duty of secrecy as counsel as on 1 February 1989, when he was heard by the Investigating Judge, the first applicant had agreed to the inspection of his savings booklets.

As regards the seizure of the savings booklets at the Ferbach or the Rosental banking institute, respectively, the Regional Court referred to the consent given by the first applicant and considered

that one savings booklet had been missing in the bank safe and, therefore, the deposits on all other savings booklets had to be examined in order to verify the money transfers.

On 23 March 1989 the Klagenfurt Regional Court also dismissed the first applicant's complaint about the decision of 6 March 1989 appointing the medical expert S. The Regional Court considered that the expert was highly qualified. Any doubts as regards the expert's impartiality would have to be verified by the Investigating Judge. The private expert opinion submitted by the first applicant could not replace the evidence given by a court-appointed expert. Having regard to the charges, namely fraudulent conversion to the disadvantage of the first applicant and his brother, who due to their age and their physical and mental situation were no longer capable to enter into legal transactions, the examination of their capacity to enter into legal transactions had to be established by psychiatric expert evidence. The decision of 6 March 1989 was thus in conformity with S. 132 of the Code of Criminal Procedure. The Regional Court continued that the Code of Criminal Procedure did not provide for a legal basis to enforce a psychiatric examination of a witness. Should the first applicant refuse an examination, the expert could only base himself upon the file, his observation of the first applicant on the occasion of his examination by the Investigating Judge and, possibly, his attendance at a later trial.

On 4 April 1989 the expert S. submitted his opinion as to the first applicant's and his brother's capacity to enter into legal transactions. He concluded that there were no indications that the first applicant had not been capable to enter into legal transactions in 1980, the time of a contract with Mr. R. concerning real estate. Furthermore, there was no sufficient basis to establish the first applicant's actual capacity to deal with all personal matters.

On 27 September 1989 the Klagenfurt District Court authorised the adoption concluded between the first applicant as chosen father and R. as adopted child. The District Court found in particular that the first applicant had been living since March 1981 with R. and his wife, and that R. had granted him a right to occupy an apartment for lifetime. Since conclusion of the adoption contract in November 1988 the first applicant was fully taken care of by R.

On 16 February 1990 the criminal investigation proceedings against the suspect R. were discontinued in accordance with S. 109 para. 1 of the Code of Criminal Procedure.

On 14 May 1990 the Klagenfurt District Court discontinued the proceedings concerning the appointment of a guardian for the first applicant. The District Court noted that at a hearing in December 1988 it had gained the impression that the first applicant suffered from disturbances in his short-term memory and was not fully capable to judge his actions, in particular signatures. However, following the adoption, the applicant's matters could be handled by his adopted son, Mr. R., and there was no further need for a guardian.

B. Relevant domestic law

According to S. 109 para. 1 of the Austrian Code of Criminal Procedure (Strafprozeßordnung) preliminary investigations are discontinued by the Investigating Judge, if the prosecutor withdraws the charges or declares that there is no reason for further judicial prosecution.

S. 113 of the Code of Criminal Procedure provides in particular that, in the course of preliminary investigations or of the proceedings after indictment, any person affected by a decision or delay caused by the Investigating Judge may lodge a complaint with the Judges' Chamber at the Regional Court. The Judges' Chamber decides upon the complaint

after having heard the Investigating Judge and the Public Prosecutor.

S. 132 of the Code of Criminal Procedure provides for an examination of the injured person in cases of bodily injuries.

SS. 139 to 149 of the Code of Criminal Procedure concern the search of premises and persons and the seizure of objects.

S. 139 para. 1 provides in particular that a search may only be carried out if there is a reasonable suspicion, that in the premises concerned a person suspected of having committed a crime or other criminal offence is hiding, or that there are objects, the possession or examination of which is relevant for a particular criminal investigation. According to S. 140 paras. 1 and 2, a search should in general only be carried out after a hearing of the person concerned, and only if the person or objects searched are not voluntarily rendered and if the reasons resulting in the search have not been eliminated. It is not required to hear persons of bad reputation, or to have such a hearing where there is danger in delay.

S. 143 para. 1 of the Code of Criminal Procedure provides that, if objects relevant for the investigations or subject to forfeiture or confiscation are found, they have to be listed and taken into safekeeping at the court or to be kept by the court or to be seized. It refers, in this respect, to S. 98 according to which objects in safe-keeping have to be put into an envelope to be sealed by the court, or a label avoiding any substitution or confusion has to be attached.

S. 145 of the Code of Criminal Procedure concerns the search and seizure of documents. S. 145 para. 2 provides that, if the owner of documents does not permit the search, the documents have to be sealed and deposited at the court; furthermore, the Judes' Chamber at the Regional Court has to be immediately requested to decide whether the documents are to be searched or handed back.

COMPLAINTS

1. The applicants complain that the search warrant of 30 January 1989 and its implementation violated their rights under Article 8 of the Convention. They consider in particular that the measures, in particular the seizure of one of the second applicant's files, were unlawful and disregarded the second applicant's duty of professional secrecy.

2. The applicants also complain under Article 8 of the Convention about the decision of the Klagenfurt Regional Court of 16 February 1989 concerning the seizure of documents in a bank safe. They submit that the search of the bank safe, the seizure of its contents and the making of copies thereof was also unlawful and circumvented in particular S. 145 para. 2 of the Code of Criminal Procedure.

3. Furthermore the first applicant complains under Article 8 para. 1 of the Convention about the decision of the Klagenfurt Regional Court of 6 March 1989 to appoint a psychiatric expert in order to examine his capacity to enter into legal transactions.

4. Moreover, the applicants complain under Article 13 in conjunction with Article 8 of the Convention that the appeal proceedings before the Regional Court pursuant to S. 113 of the Code of Criminal Procedure did not afford a fair and public hearing and could not, therefore, be regarded as an effective remedy to complain about the alleged violation of their Convention rights.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 25 August 1989 and registered on 11 December 1989.

On 1 July 1991 the Commission decided to communicate the application to the respondent Government.

The Government's observations were submitted on 29 November 1991. The applicant's observations in reply were submitted on 18 February 1992.

THE LAW

1. The applicants complain that the search warrant of 30 January 1989, its implementation and the seizure of a file violated their rights under Article 8 (Art. 8) of the Convention.

Article 8 (Art. 8) of the Convention, so far as relevant, provides as follows:

> "1. Everyone has the right to respect for his private ... life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others."

The Government maintain that the right to respect for his home under Article 8 para. 1 (Art. 8-1) of the Convention did not extend to the second applicant's law office.

The Commission recalls that the search of a law office may interfere with the lawyer's rights to respect for his private life, his home and correspondence (Eur. Court H.R., Niemietz judgment of 16 December 1992, paras. 27-33, to be published in Series A no. 251-B).

The Commission finds that the search warrant of 30 January 1989 in respect of the applicant's law office, its execution on 1 February 1989 and the seizure of one of the second applicant's files amounted to an interference with the second applicant's rights under Article 8 para. 1 (8-1), and, regarding the documents contained in the file, also of the first applicant's rights under Article 8 para. 1 (Art. 8-1). Such interference violates Article 8 (Art. 8), if it is not justified under paragraph 2 of Article 8 (Art. 8-2) as being in accordance with the law and necessary in a democratic society to achieve one of the aims mentioned therein.

The Government contend that the search warrant of 30 January 1989, its implementation and the seizure of one file were based on S. 139 para. 1, S. 143 of the Code of Criminal Procedure. The suspicion against Mr. R. at the time in question justified the search warrant. They further submit that the second applicant's law office was in fact not searched, as, though under protest, he had handed over the file concerned. The file in question had not been inspected by the authorities, but only been looked through by a representative of the Lawyers' Association and then returned to the second applicant.

The applicants consider that the search concerned as well as the seizure of a lawyer's file were unlawful, were based on unfounded suspicions, and disregarded the second applicant's duty of professional secrecy.

The Commission notes that the search warrant issued by an Investigating Judge at the Klagenfurt Regional Court on 30 January 1989

was based upon S. 139 of the Code of Criminal Procedure. In its decision of 23 March 1989 the Judges' Chamber at the Klagenfurt Regional Court confirmed the lawfulness of the search warrant under S. 139 et seq. of the Code on Criminal Procedure. The Commission, considering the arguments put forward by the applicants as well as the objections lodged by the representative of the Carinthian Lawyers' Association on the occasion of the search, finds no indication of non-observance of the relevant provisions of the Code of Criminal Procedure. Consequently, the measures complained of were in accordance with Austrian law.

The Commission is of the opinion that the interference aimed at the prevention of crime and the protection of the rights of others, namely those of the first applicant and his brother.

It remains to be examined whether the interference was necessary in a democratic society to accomplish the said aims.

The Commission recalls that, in Article 8 para. 2 (Art. 8-2) as in several other provisions of the Convention, the phrase "necessary in a democratic society" implies the existence of a "pressing social need". The Contracting States enjoy a certain margin of appreciation in assessing whether such a need exists, but this goes hand in hand with a European supervision which covers the basic legislation and the decisions applying it, even those given by an independent court (Eur. Court H.R., Barfod judgment of 22 February 1989, Series A No. 149, p. 12, para. 28; Silver and Others judgment of 25 March 1983, Series A No. 61, pp. 37 - 38, para. 97).

The Commission must thus determine whether there were relevant reasons for the search warrant of 30 January 1989, its implementation and the seizure of one of the second applicant's files, and whether these measures were, in the particular circumstances of the case, proportionate to the legitimate aims pursued.

The search was ordered in the context of criminal proceedings against Mr. R., who was suspected of fraud and fraudulent conversion to the disadvantage of two elderly brothers, one of whom, the first applicant, was living in an apartment in Mr. R.'s house. The search had the purpose of discovering the first applicant's and his brother's savings booklets and other documents possibly revealing financial transactions to their disadvantage. In the search warrant, the Investigating Judge in detail summed up the result of the criminal investigations at that stage supporting the suspicion against Mr. R.

The search complained of was not directed against the suspect Mr. R., but against the second applicant as a third person on the ground that he was the first applicant's counsel and had indicated on an earlier occasion that he had the savings booklets concerned in safe-keeping.

As regards the circumstances of the search, the Commission puts particular emphasis on the fact that already the search warrant of 30 January 1989 took special procedural safeguards with regard to the search which could affect the second applicant in his position as a lawyer, i.e. his professional secrecy. The search was in fact attended by a representative of the Carinthian Lawyers' Association. Moreover, the second applicant's law office was not inspected since, though under protest, he handed over the file concerning the first applicant. In this respect the Commission also notes that this file was sealed and taken into safe-keeping at the Regional Court where only the representative of the Lawyers' Association consulted it. The file was then returned to the second applicant.

The Commission, taking these different aspects of the present case into account, finds that there were relevant reasons to justify the measures complained of. On balance, the interference does not

appear disproportionate to the legitimate aims pursued, namely the prevention of crime and the protection of the rights of others. Accordingly, the measures complained of were justified under paragraph 2 of Article 8 (Art. 8-2).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants also complain under Article 8 (Art. 8) of the Convention about the decision of the Klagenfurt Regional Court of 16 February 1989 concerning the seizure of documents in a bank safe. They submit that the search of the bank safe, the seizure of its contents and the making of copies thereof were also unlawful and circumvented in particular S. 145 para. 2 of the Code of Criminal Procedure.

The Government submit that the order in question had been taken on the basis of the first applicant's explicit permission of 1 February 1989 to have his financial situation verified. The measure thus served the first applicant's interests. The second applicant had presented the alleged revocation of this permission dated 16 February 1989 only on the occasion of the actual examination of the safe when it was correctly regarded as being irrelevant.

The Commission, considering that the order of 16 February 1989 and the subsequent inspection of the first applicant's savings booklets and other documents in the safe amounted to an interference with his right under Article 8 para. 1 (Art. 8-1), finds it was justified under paragraph 2 of Article 8 (Art. 8-2).

The Commission notes that the order concerned did not only refer to the first applicant's permission of 1 February 1989, but also, in view of the pending criminal investigations, to S. 143 of the Code of Criminal Procedure. Moreover, the Klagenfurt Regional Court, in its decision of 23 March 1989, confirmed the lawfulness of the inspection of the safe and its contents. Despite the applicants' argument that the first applicant had later revoked his permission for an overall examination of his financial matters, the Commission is therefore satisfied that the measures complained of were in accordance with Austrian law.

The interference aimed at the prevention of crime and the protection of the first applicant's and his brother's interests.

The Commission finds that the reasons set forth in the decision of 16 February 1989 to seize the contents of the safe concerned were relevant in the light of the suspicion that fraud and fraudulent conversion had been committed by Mr. R. to the disadvantage of the first applicant. The Commission notes that the Investigating Judge had first consulted the contents of the safe in the presence of the second applicant. Only because of remaining doubts, he decided to consult in detail the contents of the safe and to make copies thereof. Having further regard to the first applicant's permission of 1 February 1989, the Commission is of the opinion that the order concerning the first applicant's safe, as well as consultation and copying of its contents in the course of the criminal investigations against Mr. R. were not disproportionate.

For these reasons, the Commission is satisfied that the interference complained of was necessary in a democratic society for the prevention of crime and for the protection of the first applicant's rights. It was thus justified under Article 8 para. 2 (Art. 8-2).

Consequently, this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Furthermore the first applicant complains under Article 8 para. 1 (Art. 8-1) of the Convention about the decision of the Klagenfurt Regional Court of 6 March 1989 to appoint the psychiatric expert Dr. S. in order to prepare an expert opinion on his capacity to enter into legal transactions.

According to the Government, the preparation of the expert opinion by Dr. S. did not involve an examination of the first applicant against his will or other coercive measures. It did not, therefore, amount to an interference with his right under Article 8 para. 1 (Art. 8-1). They further submit that, in any event, this measure was in accordance with the Code of Criminal Procedure, and necessary for the prevention of crime and for the protection of the first applicant's rights.

The Commission observes that the expert S. prepared the opinion on the first applicant's mental health in the course of criminal proceedings against Mr. R., suspected of having defrauded the first applicant as well as his brother. The charges against Mr. R. raised, inter alia, the question of the first applicant's mental health.

The Commission notes that the preparation of the opinion in question did not necessitate any particular examination of the first applicant by Dr. S. In particular, when, following the appointment of Dr. S. as expert in October 1988, the first applicant refused an examination, no further steps, such as coercive measures, were taken. The first applicant has not submitted that, at that time, he challenged Dr. S. for bias. Furthermore, Dr. S. accompanied the Investigating Judge on the occasion of the first applicant's questioning as witness on 1 February 1989, when the first applicant did not object, but voluntarily answered also the questions put by the expert. Moreover, the expert, in his opinion of April 1989, did not establish any negative findings on the first applicant's capacity to enter into legal transactions.

In these particular circumstances, the Commission finds that the appointment of the expert S. to prepare an expert opinion on questions of the first applicant's mental health does not show any lack of respect for the first applicant's right to respect for his private life under Article 8 para. 1 (Art. 8-1) of the Convention.

Consequently, this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. Moreover, the applicants complain under Article 13 in conjunction with Article 8 (Art. 13+8) of the Convention that the appeal proceedings before the Judges' Chamber at the Regional Court pursuant to S. 113 of the Code of Criminal Procedure did not afford a fair and public hearing and could not, therefore, be regarded as an effective remedy to complain about the alleged violation of their Convention rights.

Article 13 (Art. 13) of the Convention provides that everyone whose rights and freedoms as set forth in the Convention are violated should have an effective remedy before a national authority.

Article 13 (Art. 13) of the Convention requires a remedy in domestic law where an individual has an arguable claim to be the victim of a violation of his rights under the Convention. An arguable claim falls to be considered on the particular facts of each case and the nature of the legal issue raised (cf. Eur. Court H.R., Plattform "Ärzte für das Leben" judgment of 21 June 1988, Series A no. 139, p. 11, paras. 25, 27).

The Commission recalls that the applicants' complaints under

Article 8 (Art. 8) of the Convention are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention on the ground that the measures complained of were justified under paragraph 2 of Article 8 (Art. 8-2). Taking the specific circumstances of the present case into account, the Commission does not find any prima facie issues under Article 8 (Art. 8) which could be considered as arguable claims within the meaning of Article 13 (Art. 13). Consequently, Article 13 (Art. 13) does not apply in respect of the applicants' complaints under Article 8 (Art. 8) of the Convention.

It follows that this complaint is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission — President of the Commission

(M. de Salvia) — (C.A. Nørgaard)