AS TO THE ADMISSIBILITY OF

Application No. 13717/88
by H.O.
against Austria

The European Commission of Human Rights sitting in private on 2 May 1989, the following members being present:

MM. J.A. FROWEIN, Acting President
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, 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 29 December 1987 by H.O. against Austria and registered on 17 March 1988 under file No. 13717/88;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1925 and living in Strass. He is represented by Mr. S. Gloss, lawyer in St. Pölten.

It follows from his statements and the documents submitted by him that on 27 June 1986 the applicant was convicted by the Langenlois District Court (Bezirksgericht) of slander (üble Nachrede) for having addressed two letters to federal and regional offices (Gremien) of the professional organisation of Austrian wine and liquor wholesale traders and other persons related to the wine business containing deliberate untrue accusations against the plaintiff (Privatankläger), Mr. U.

According to the findings of the District Court an Austrian newspaper, the "Neue Kronenzeitung", had published an article on 26 February 1983 under the heading "Wines, adulterers and proceedings" (Weine, Fälscher und Verfahren) about irregularities in the Austrian wine economy. On account of this article Mr. U brought a private criminal action against the author of the article. In connection with these proceedings the Neue Kronenzeitung published a communiqué in accordance with Section 37 (1) of the Press Act (Mediengesetz) stating that Mr. U had lodged a private criminal action against W, editor, who had published the afore-mentioned article. The relevant part of the article was then repeated, namely that a wine dealer of St.

Margareten used to submit to his German wholesale clients two bills with different prices. The higher priced bill was paid by the retail customer while the lower priced bill was used for tax declaration purposes.

The applicant, who is himself a wine producer, read the article and sent a copy of it to the federal office (Bundesgremium) of his professional organisation. He stated that according to trustworthy information the newspaper article referred to Mr. U who allegedly was in serious difficulties for having for years practised a system of double invoicing. This constituted, so the applicant argued, unfair competition (grobe Benachteiligung von Kollegenbetrieben). He therefore requested the exclusion of Mr. U from the organisation's activities as he probably had for years violated the law and the interests of the profession (da Herr U mit grosser Wahrscheinlichkeit jahrelang grob gegen unsere Berufsinteressen und das Handelskammer-gesetz zum Schaden unserer Kollegenschaft verstossen hat).This letter was transmitted to U who informed the applicant on 19 May 1983 that he had in fact been accused of double invoicing but it followed from a report of the competent tax authorities of 21 April 1983 that this accusation was unfounded. U added that the investigations of the tax authorities had been carried out by K and that he, U, was prepared to dispense K from his obligation to keep the matter secret. Furthermore U's lawyer also wrote to the applicant informing him about the private criminal action against the editor of the newspaper article and about the result of an audit carried out in U's enterprise. He stated that the audit report attested his client's business practices to be correct. Therefore, so he warned the applicant, he should refrain from making further incriminating statements as he was now informed about the true facts.

On 13 February 1985 the editor W asked the applicant whether it was a common practice in the wine export business to grant discounts and to what amount. He sent the applicant copies of letters and order confirmations. One letter sent by the firm R to U, dated

10 December 1976, referred to an order confirmation No. 263/76 and stressed that the vendor would have to repay 0.50 DM per litre to the firm 0 once the order had been carried out. The order confirmation No. 263/76 addressed by R to the client A.O named the vendor U, the amount of wine ordered and the price per litre (3 DM), as well as a commission of 5%. In a letter of 13 December 1976 addressed by R to U it was again stressed that after delivery and payment 1.25 DM would have to be refunded to R. A further copy annexed to W's request was an order confirmation No. 272/76 of 13 December 1976 by R addressed to A.O relating to the order by A.O of 3,000 hectolitres of Austrian wine for the price of 1.25 DM per litre and a commission of 2% from 0.95 DM per litre.

On 15 February 1985 the applicant sent a circular letter to the offices (Gremien) of his professional organisation. Joining copies of the documents sent to him by W he stated in that letter that these copies clearly indicated dubious business practices such as tax evasion, violation of foreign exchange regulations or even fraud committed by U who should be ousted from his functions in the professional association at least until the scandalous events were fully cleared up.

On 25 February 1985 U refuted these accusations by way of a circular letter sent to the offices concerned.

The applicant sent his reply on 5 March 1985 to the various authorities concerned stating inter alia:

"A man managing his business in such an unlawful, unscrupulous and reckless manner has certainly nothing to do in our profession's organisation" (Ein Mann, der so

verantwortungs- und rücksichtslos seine Geschäfte führt, hat in der Berufsvertretung sicher nichts verloren).

According to the further findings of the District Court the applicant was himself a business partner of the firm A.O. However, the applicant did not contact A.O in order to obtain concrete information about possible unfair business practices committed by U.

The tax audit report on U's enterprise for the period 1977-79 revealed no irregularities. Investigations by the Public Prosecutor in Eisenstadt relating to U's wine business were pending.

In the years 1976/77 the average export price for wine of the quality in question was 5 DM per litre and U's sales corresponded to this price. U had agreed to the creation of a fund for advertisement in Germany. This fund was to be financed by an increase of the habitual retail-price per litre which the seller then refunded to the wholesaler by way of a commission.

All details of this arrangement were, according to the District Court, properly recorded in U's accounts.

In view of these findings the District Court concluded that the applicant's accusations were based on untrue allegations and that the applicant was aware of this as none of the documents sent to him by W confirmed what he said in his letters incriminating U. He therefore violated Sec. 111 (1) of the Criminal Code (StGB) for having, on the basis of untrue factual allegations, wrongly accused and denigrated another person for having acted in a dishonest or unfair manner.

The applicant was sentenced to a fine of 30 day rates in the amount of 1000 AS each corresponding to 15 days' imprisonment in case of non-payment.

The applicant lodged an appeal (Berufung). He argued that his letters about U did not contain any untrue factual allegations as he had only pointed out in them that it followed from the documents submitted to him by W that U had accepted to repay a certain percentage of the price obtained by selling his wines. This business practice was not contested by U and therefore he, the applicant, was not punishable for the only reason that as an official of the professional organisation he communicated to the instances concerned his own opinion on this practice.

On 28 April 1987 the Regional Court (Kreisgericht) in Krems dismissed the appeal concerning the conviction. It granted however the appeal against sentence stating that it was not necessary to impose a further fine (Zusatzstrafe) as the applicant had already been fined 200 day rates of 800 AS each on 7 April 1986. The judgment imposing this fine had become final and the appellate court considered that had the two matters been decided jointly no higher fine would have been fixed.

The appellate court pointed out in its decision that both U and U's counsel had informed the applicant that the tax authorities had examined U's business activities and found no reason for objections. In these circumstances the applicant disposed of no evidence allowing the conclusion that U had committed tax evasion, fraud or any violation of currency exchange regulations. A possible violation of the law committed by the firm A.O did not justify the accusations made against U.

The written judgment was served on the applicant on 1 July 1987.

COMPLAINTS

The applicant complains that he was wrongly convicted and sentenced.

He alleges that his conviction is based on the statements made by the plaintiff U. He further alleges that at the hearing of his appeal he requested the Court to examine the file 3 St 223/85 of the Public Prosecutor's office in Eisenstadt. It relates allegedly to investigations against U on the basis of suspicion of fraud and violations of the Food Act (Lebensmittelgesetz). The request was not granted allegedly on the ground that according to U's submission the investigation proceedings referred to were not at all related to the case at issue. The applicant argues that he was thus deprived of the possibility to prove that his allegations about U's illegal business activities were correct. He invokes Article 6 paras. 1 and 3 (d) of the Convention.

THE LAW

The applicant has complained of his conviction on 27 June 1986 by the Langenlois District Court and also of the court proceedings concerned.

With regard to the judicial decisions of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its established case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

It is true that in this case the applicant also complains that certain files of the Public Prosecutor in Eisenstadt concerning investigations against U, plaintiff in the criminal proceedings against the applicant, were not examined. Allegedly the applicant's defence counsel had, at the hearing of the applicant's appeal, requested the Court to have the file submitted by the Eisenstadt prosecution as evidence in the applicant's case. In this connection the applicant now alleges a violation of Article 6 paras. 1 and (3) (d) (Art. 6-1, 6-3-d) of the Convention.

However, even assuming that the request to examine the file relating to criminal investigations against U was not belated, the applicant has not shown that the investigation proceedings in question relate to the business transactions which he referred to in the letters leading to his conviction of slander. In any event, only a final conviction of U in those proceedings might possibly have justified the accusations levied by the applicant against his competitor U within their professional organisation. It can, in these circumstances, not be found that the files in question were relevant for the determination of the charges brought in the criminal proceedings against the applicant.

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

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission Acting President of the Commission

(H.C. KRÜGER) (J.A. FROWEIN)