AS TO THE ADMISSIBILITY OF

Application No. 19255/92
by Gerhard OBERSCHLICK
against Austria

and

Application No. 21655/93
by Gerhard OBERSCHLICK
against Austria

The European Commission of Human Rights sitting in private on 16 May 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN

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 applications introduced on 21 November 1991 and 12 March 1993 by Gerhard OBERSCHLICK against Austria and registered on 2 January 1992 and 8 April 1993 under file Nos. 19255/92 and 21655/93.

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

Having regard to the observations submitted by the respondent Government on 15 June 1994 and the observations in reply submitted by the applicant on 25 August 1994;

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 applicant, an Austrian national born in 1942 and residing in Vienna, is a journalist by profession and editor of the periodical "Forum". Since 1986 the applicant is also its owner and publisher.

The present applications concern the applicant's complaint about the alleged failure of Austria to implement the judgment of the European Court of Human Rights given in his case (No. 19255/92) and various complaints regarding the proceedings on a plea of nullity for the preservation of the law introduced by the Attorney General following the judgment of the European Court of Human Rights (No. 21655/93).

A. Particular circumstances of the case

On 23 May 1991 the European Court of Human Rights delivered its judgment in a case which had been introduced by the applicant (Eur. Court H.R., Oberschlick judgment, Series A no. 204). In this judgment the European Court of Human Rights found a violation of Article 10 of the Convention as regards the applicant's conviction for defamation for having published in issue No. 352 of 20 April 1983 of the periodical "Forum" a criminal information he had laid against a politician. The European Court of Human Rights also found a violation of Article 6 para. 1 of the Convention in that three of the judges of the Court of Appeal who decided on the applicant's appeal had already decided on an earlier appeal of the applicant in the same proceedings. The European Court of Human Rights further decided that Austria should pay the applicant 18,123.84 ATS for pecuniary damage and reimburse his costs and expenses and dismissed his further claim for just satisfaction.

On 5 August 1991 the compensation awarded by the European Court of Human Rights was paid to the applicant.

Subsequently, the applicant applied to the Vienna Regional Court (Landesgericht) for re-opening (Wiederaufnahmeantrag) of the criminal proceedings which had led to his conviction for defamation. He also addressed a request to the Attorney General's Department (Finanz-prokuratur) for payment of his claims for compensation which had been dismissed by the European Court of Human Rights. All his requests remained unsuccessful.

On 6 February 1992 the Attorney General's Office (General-prokuratur) introduced a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) with the Supreme Court (Oberster Gerichtshof) against the judgment of the Vienna Regional Court of 11 May 1984 and the appeal judgment of the Vienna Court of Appeal (Oberlandesgericht) of 17 December 1984. The Attorney General's Office requested the Supreme Court to find that these judgments had violated the law, to quash them, to acquit the applicant and to lift the seizure of the relevant edition of "Forum".

On 17 September 1992 the hearing before the Supreme Court took place in the course of which submissions were made by the Attorney General's representative, the lawyer of the private prosecutor (Privatankläger) and the applicant's lawyer. The applicant was also present at the hearing.

On the same day the Supreme Court held that the Court of Appeal's judgment of 17 December 1984 violated provisions of the Code of Criminal Procedure and Article 6 para. 1 of the Convention as regards the composition of the Court of Appeal. The Supreme Court dismissed the remainder of the plea of nullity and did not quash the applicant's conviction.

As regards the applicant's conviction for defamation, the Supreme Court found that the applicant had expressed, in the form of a criminal information published in issue No. 352 of "Forum", the opinion that G.M., the plaintiff in the defamation proceedings, had made proposals which amounted to revival of National Socialism. The applicant's accusations were an excessive value judgment (Wertungsexzess) which exceeded criticism proportionate to the aim of raising public concern for a statement of a politician and, thus, was defamatory. The Supreme Court concluded that the Regional Court and the Court of Appeal had correctly applied the law in force at the time of their decisions, as they could not have been aware of subsequent developments in the case-law of the European Court of Human Rights. A plea of nullity for the preservation of the law was not designed for adapting an originally lawful decision to subsequent changes of the law or of standards of value.

On 4 December 1992 the applicant filed a request for rectification of the transcripts of the hearing before the Supreme Court on 17 September 1992. He submitted that his lawyer's name was misspelled and that the events in the hearing were not recorded in a sufficiently precise manner.

On 3 February 1993 the Supreme Court rectified the spelling of the name of the applicant's lawyer and dismissed the remainder of the request.

B. Relevant domestic law

Section 33 para. 2 of the Code of Criminal Procedure (Strafprozeßordnung) reads as follows:

> "The Attorney General at the Supreme Court may introduce a plea of nullity for the preservation of the law against judgments of criminal courts based on a violation or incorrect application of the law as well as against any unlawful decision or step of criminal courts which come to his notice, and it can do so even where the accused or the prosecutor has not made use of the remedy of plea of nullity within the time-limit prescribed by law. It is the duty of Public Prosecutors to submit all cases they consider suitable for a plea of nullity for the preservation of the law to the Senior Public Prosecutors; the latter shall assess whether these cases should be brought to the notice of the Attorney General at the Supreme Court."

Section 292 of the Code of Criminal Procedure, as in force at the relevant time, reads as follows:

> "The proceedings on a plea of nullity for the preservation of the law are in principle governed by Sections 286 paras. 1 to 3 and 287 to 291. In case it will not lead to an undue delay of the proceedings, the accused (convicted) should be informed of the hearing with the remark that he may be present. The same applies to a private party if the decision on its civil law claims is affected by the plea of nullity. If the Supreme Court reaches the conclusion that the plea of nullity for the preservation of the law is well-founded, it shall find that in the criminal case in question the law had been violated by the challenged decision or step, by the procedure used or the judgment given. As a rule, this finding has no effect on the accused. But where the accused has been convicted by a judgment found null and void, the Supreme Court may, at its discretion, either acquit the accused or pass a less severe sentence, or, depending on the circumstances, order a renewal of the proceedings conducted against him."

COMPLAINTS

1. The applicant complains under Article 53 in conjunction with Articles 6, 10 and 13 of the Convention and Article 1 of Protocol No. 1 that Austria has violated its obligation under the judgment of the European Court of Human Rights of 23 May 1991, because the Supreme Court neither quashed his conviction nor lifted the seizure of the relevant issue of "Forum".

2. The applicant complains under Article 10 of the Convention that his right to freedom of expression has been violated because the Supreme Court dismissed the plea of nullity for the preservation of the law as regards his conviction for defamation, which the European Court of Human Rights had found to be in violation of Article 10 of the Convention.

3. The applicant further complains under Article 1 of Protocol No. 1 that his right to property has been violated because the Supreme Court had also refused to lift the seizure of the relevant issue of "Forum". The applicant submits that after the judgment of the European Court of Human Rights the seizure was no longer justified.

4. The applicant also complains under Article 6 paras. 1 and 3 (b) and (c) of the Convention about the Supreme Court's decision of 17 September 1992 and alleges that the proceedings on the plea of nullity for the preservation of the law were unfair.

5. The applicant also complains about the length of the criminal proceedings against him. He regards these proceedings as still pending because his appeal against the Regional Court's judgment of 11 May 1984 has not yet been decided upon by a Court of Appeal correctly composed. He further submits that the Supreme Court prevented him from having his conviction reviewed by a Court of Appeal correctly composed. After having found that the Court of Appeal which had decided on the applicant's appeal on 17 December 1984 was not correctly composed, the Supreme Court should have quashed the Court of Appeal's decision and have remitted the case to the Court of Appeal. Instead, the Supreme Court entered into a consideration of the merits of the plea of nullity. The applicant invokes Article 6 para. 1 of the Convention and Article 2 of Protocol No. 7.

6. Lastly the applicant complains under Article 25 of the Convention that he has been hindered in the effective exercise of his right of petition. He submits that by refusing his request for rectification of the transcript of the hearing on 17 September 1992 the Supreme Court prevented him from gathering necessary evidence for his application to the Commission as regards the events at the hearing.

PROCEEDINGS BEFORE THE COMMISSION

Application No. 19255/92 was introduced on 21 November 1991 and registered on 2 January 1992. Application No. 21655/93 was introduced on 12 March 1993 and registered on 8 April 1993.

On 28 February 1994 the Commission decided to communicate the applications to the respondent Government for observations on the admissibility and merits.

On 15 June 1994 the Government submitted their observations. The applicant's observations in reply were submitted on 25 August 1994.

THE LAW

1. The Commission, having regard to the similar nature of the issues raised, considers it necessary to order the joinder of the present applications under Rule 35 of its Rules of Procedure.

2. The applicant complains under Article 53 in conjunction with Articles 6, 10 and 13 (Art. 53+6, 53+10, 53+13) of the Convention and

Article 1 of Protocol No. 1 (Art. 53+P1-1) that Austria has failed to comply with the judgment of the European Court of Human Rights of 23 May 1991, because the Supreme Court neither quashed his conviction nor lifted the seizure of the relevant issue of "Forum".

The Commission recalls that it has no competence to examine whether the High Contracting Party has complied with its obligation under a judgment given by the European Court of Human Rights. The Commission cannot assume any function in relation to the supervision of the Court's judgment, this supervision being entrusted under Article 54 (Art. 54) of the Convention to the Committee of Ministers (see No. 10243/83, Dec. 6.3.85, D.R. 41 p. 123 at 129; No. 19438/92, Dec. 29.3.93, to be published in D.R.).

The Commission notes that the Committee of Ministers has discharged its supervisory functions in relation to the above-mentioned judgment by the adoption of its Resolution DH (93) 60 of 14 December 1993.

It follows that this part of the application must be rejected as incompatible ratione materiae with the provisions of the Convention in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant complains under Article 10 (Art. 10) of the Convention that his right to freedom of expression has been violated because the Supreme Court dismissed the plea of nullity for the preservation of the law as regards his conviction for defamation, which the European Court of Human Rights had found to be in violation of Article 10 (Art. 10) of the Convention.

a. The Government submit that the Supreme Court's decision of 17 September 1992 concerned the same case as dealt with by the European Court of Human Rights. Thus, the applicant was not entitled to raise again the same issue before the Commission.

This is disputed by the applicant. He submits that the present case concerns a new violation of his rights under the Convention and not the same issue as his previous case dealt with by the European Court of Human Rights.

The Commission observes that it would, pursuant to Article 27 para. 1 (b) (Art. 27-1-b) of the Convention, be barred from dealing with this complaint raised by the applicant if it was substantially the same matter as that which has already been examined by the Commission and if his submissions contained no relevant new information.

The Commission finds that the applicant does not complain about his previous conviction, which was the subject of Application No. 11662/85, but about the Supreme Court's decision of 17 September 1992 which was taken after the European Court of Human Rights had given its Oberschlick judgment on 23 May 1991.

In the circumstances of the present case, the Commission is not prevented by virtue of Article 27 para. 1 (b) (Art. 27-1-b) of the Convention from dealing with this part of the application.

b. The Government submit that the applicant cannot claim to be a victim of an alleged violation of the Convention within the meaning of Article 25 (Art. 25) of the Convention. The plea of nullity for the preservation of the law which the Supreme Court partially rejected on 17 September 1992 was an extraordinary remedy which the applicant himself was not entitled to use. He did not suffer any negative legal consequence because of the rejection of the plea of nullity for the preservation of the law, as any violation of the law found by the Supreme Court in such proceedings normally had no effect on the person convicted in the underlying criminal proceedings. As the applicant had no right to have a plea of nullity for the preservation of the law

lodged, he has no reason to consider himself in any way aggrieved by its partial rejection.

The Commission finds that the question whether the applicant could claim to be a victim of an alleged violation of Article 10 (Art. 10) of the Convention is so closely linked to the issue whether there was a violation of his rights under Article 10 (Art. 10) of the Convention that these questions cannot be separated.

c. As regards the question of an alleged violation of Article 10 (Art. 10) of the Convention, the Government submit that a plea of nullity for the preservation of the law had the purpose of reviewing the lawfulness of criminal justice in general, and may therefore be introduced against a final judgment. The Supreme Court's decision on such a plea of nullity normally had no effect on the accused or convicted person. The rejection of such a plea of nullity could not change the legal position of the person concerned. A negative judgment on an earlier expression of opinion by the applicant was neither confirmed nor newly delivered by the partial rejection of the plea of nullity for the preservation of the law. In any event, the Supreme Court's decision of 17 September 1992 was not in contradiction to the Oberschlick judgment of the European Court of Human Rights. The Supreme Court did not state that the previous judgments of the Vienna Regional Court and the Vienna Court of Appeal were in accordance with the Convention, but it merely refused to quash them.

The applicant submits that by filing a plea of nullity for the preservation of the law a possibility was opened up for removing the conviction by a judgment which, though final, was in violation of the Convention. The Supreme Court's refusal to quash the judgment was a new violation of his right to freedom of expression under Article 10 (Art. 10) of the Convention. Though the Supreme Court in its decision of 17 September 1992 did not formally confirm the applicant's earlier conviction, it was tantamount to such a confirmation if it refused the Attorney General's request to quash the conviction. Furthermore, the Supreme Court in its decision explicitly stated that it was in disagreement with the assessment of the case by the European Court of Human Rights and also considered the value judgment expressed by the applicant to be worthy of condemnation, referring to it as excessive.

Article 10 (Art. 10) of the Convention, as far as relevant, reads as follows:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Commission has to determine first whether the Supreme Court's decision of 17 September 1992 amounted to an interference with the applicant's rights under Article 10 (Art. 10) of the Convention.

The Commission notes that the issue of the proceedings on the plea of nullity for the preservation of the law introduced by the

Attorney General before the Supreme Court was whether the applicant's conviction had violated Austrian law and, if so, whether the conviction should be quashed and the applicant acquitted or criminal proceedings against him be resumed. In its decision of 17 September 1992, the Supreme Court found that the applicant, in the article at issue published in "Forum", had expressed an excessive value judgment which was defamatory and that the Regional Court and the Court of Appeal had correctly applied the law in force at the time of their decisions, since they could not have been aware of subsequent developments in the case-law of the European Court of Human Rights.

The Commission observes that, having regard to the obligations under Article 53 (Art. 53) of the Convention to abide by any decision of the European Court of Human Rights, the above reasoning of the Supreme Court might be open to criticism. However, taking into account the specific features of a plea of nullity for the preservation of the law and in particular the fact that the Supreme Court by its decision of 17 September 1992 merely refused to re-open proceedings, the applicant's legal situation was not affected to such an extent that the said decision could be regarded in itself as a new interference with his right under Article 10 (Art. 10) of the Convention.

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.

4. The applicant further complains under Article 1 of Protocol No. 1 (P1-1) that his right to property had been violated because the Supreme Court had also refused to lift the seizure of the relevant issue of "Forum". The applicant submits that after the judgment of European Court of Human Rights the seizure was no longer justified.

The Commission notes that the seizure of issue No. 352 of "Forum" was ordered by the Regional Court in its judgment of 11 May 1984, and confirmed by the Court of Appeal in its judgment of 17 December 1984, against the then owner of "Forum", the "Association of Editors and Employees of Forum" (see Eur. Court H.R., Oberschlick judgment of 23 May 1991, Series A no. 204, pp. 14, paras. 20 et seq.). The applicant bought "Forum" only in 1986.

The Commission finds that in these circumstances the Supreme Court's refusal to lift the seizure of issue No. 352 of "Forum" did not constitute an interference with the applicant's right to property, which did not, by virtue of the seizure, extend to this issue of "Forum".

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.

5. The applicant further complains under Article 6 paras. 1 and 3 (b) and (c) (Art. 6-1, 6-3-b, 6-3-c) of the Convention that the proceedings on the plea of nullity for the preservation of the law were unfair in several respects.

The Commission recalls that Article 6 (Art. 6) of the Convention does not apply to proceedings for the re-opening of criminal proceedings given that someone who applies for his case to be reopened and whose sentence has become final is not "charged with a criminal offence" within the meaning of the said Article (No. 7761/77, Dec. 8.5.78, D.R. 14 p. 171).

Having regard to the specific features of a plea of nullity for the preservation of the law as provided for in Sections 33 para. 2 and 292 of the Code of Criminal Procedure, the Commission finds that in these proceedings the applicant was not "charged with a criminal offence". It follows that Article 6 (Art. 6) of the Convention does

not apply to the proceedings in question.

Consequently, this part of the application must be rejected as incompatible ratione materiae with the provisions of the Convention in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

6. The applicant also complains about the length of the criminal proceedings against him. He regards these proceedings as still pending because his appeal against the Regional Court's judgment of 11 May 1984 has not yet been decided upon by a Court of Appeal correctly composed. He further submits that the Supreme Court prevented him from having his conviction reviewed by a Court of Appeal correctly composed. After having found that the Court of Appeal which had decided on the applicant's appeal on 17 December 1984 was not correctly composed, the Supreme Court should have quashed the Court of Appeal's decision and have remitted the case to the Court of Appeal. Instead, the Supreme Court entered into a consideration of the merits of the plea of nullity. The applicant invokes Article 6 para. 1 (Art. 6-1) of the Convention and Article 2 of Protocol No. 7 (P7-2).

The Commission observes that the domestic proceedings regarding the applicant's conviction for defamation were terminated by the Court of Appeal's judgment of 17 December 1984. The proceedings before the Supreme Court did not concern the determination of a criminal charge within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that in respect of his complaint under Article 6 para. 1 (Art. 6-1) of the Convention and Article 2 of Protocol No. 7 (P7-2), the applicant did not comply with the time-limit stipulated by Article 26 (Art. 26) of the Convention. This part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

7. Lastly the applicant complains under Article 25 (Art. 25) of the Convention that he has been hindered in the effective exercise of his right of petition. He submits that by refusing his request for rectification of the transcript of the hearing on 17 September 1992 the Supreme Court prevented him from gathering necessary evidence for his application to the Commission as regards the events at the hearing.

The Commission observes that this complaint refers to the applicant's above complaint regarding the alleged unfairness of the proceedings on the plea of nullity for the preservation of the law. As the Commission has already found above that Article 6 (Art. 6) of the Convention does not apply to these proceedings there is no appearance of a violation of the applicant's right under Article 25 (Art. 25) of the Convention to unhindered exercise of his right of petition in this respect.

It is therefore not necessary to take further action in this matter.

For these reasons, the Commission by a majority

1. ORDERS THE JOINDER OF APPLICATIONS NOS. 19255/92 AND 21655/93;

2. DECLARES THE APPLICATIONS INADMISSIBLE;

3. DECIDES to take no further action in respect of the alleged interference with the effective exercise of the applicant's right of petition under Article 25 para. 1 (Art. 25-1) in fine of the Convention.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)