AS TO THE ADMISSIBILITY OF

Application No. 23728/94
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
B. CONFORTI
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 application introduced on 26 February 1994 by Gerhard OBERSCHLICK against Austria and registered on 21 March 1994 under file No. 23728/94;

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 applicant, 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.

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.

On 20 November 1991 the applicant requested the Vienna Regional Court for Criminal Matters (Landesgericht für Strafsachen) to authorise him under Section 39 para. 2 of the Media Act to publish a notice about the outcome of the criminal proceedings, referring to the above Oberschlick judgment of the European Court for Human Rights as the last decision in his case. He submitted that in 1983 the Vienna Regional Court had ordered the publisher of "Forum" to publish an information under Section 37 of the Media Act about the institution of criminal proceedings against the applicant. His conviction of defamation in these proceedings was found by the European Court of Human Rights to be in violation of Article 10 of the Convention. Having regard to Article 53 of the Convention, a judgment of the European Court of Human Rights should be considered equal to a final decision by a domestic criminal court. Therefore a publication about the Oberschlick judgment of the European Court of Human Rights at the expense of the State should be authorised.

On 18 March 1993 the Regional Court refused the applicant's request of 20 November 1991. It found that Section 39 para. 2 of the Media Act only concerned the termination of the criminal proceedings by the Austrian courts under domestic law. This decision was served on the applicant on 2 April 1993 and contained the printed information that an appeal could be lodged within fourteen days.

On 14 April 1993 the applicant appealed to the Vienna Court of Appeal (Oberlandesgericht). Invoking Article 53 of the Convention, he requested, inter alia, the Court of Appeal to apply to the Constitutional Court (Verfassungsgerichtshof) for review of the constitutionality of Section 39 para. 2 of the Media Act.

On 7 July 1993 the Vienna Court of Appeal declared the applicant's appeal inadmissible as no appeal lay against a decision under Section 39 para. 2 of the Media Act. The Court of Appeal added that, in any event, the Regional Court's decision was correct. This decision was served on the applicant on 27 August 1993.

B. Relevant domestic law

Upon the request of the prosecutor, the competent court has to order that short information on the institution of criminal proceedings on the charge of an offence committed in the media (in particular defamation or insult) be published in the medium concerned. The costs of this publication are part of the costs of the criminal proceedings themselves (Section 37 of the Media Act). In case of conviction of an offence committed in the media the court, upon the request of the prosecutor, has to order the publication of the judgment in the medium concerned (Section 34 of the Media Act).

If the court had ordered previously the publication of information under Section 37 of the Media Act and the criminal proceedings mentioned therein did not result in the seizure of the relevant publication (which is linked to a conviction), the publisher may request that information about the outcome of the criminal proceedings be published at the expense of the State (Section 39

para. 2 of the Media Act).

COMPLAINTS

1. The applicant complains under Article 1 of Protocol No. 1 about the refusal by the Vienna Regional Court to authorise the publication of information about the outcome of criminal proceedings under Section 39 para. 2 of the Media Act. He submits that this decision violated his right to property because if he wished to inform the public about the outcome of the proceedings before the Convention organs he had to do this at his own expense. He also invokes Article 53 of the Convention.

2. He also complains about discrimination prohibited by the Convention in that Section 39 para. 2 of the Media Act only provided for the publication of the outcome of criminal proceedings at the expense of the State if domestic proceedings ended without a conviction and thus without the order of seizure of the relevant publication, while this provision did not apply if someone obtained a finding of a violation by the European Court of Human Rights. He relies on Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.

3. The applicant complains under Article 6 para. 1 of the Convention about the proceedings regarding his request under Section 39 para. 2 of the Media Act in several respects. He submits that the Court of Appeal failed to apply to the Constitutional Court for review of the constitutionality of Section 39 para. 2 of the Media Act as it did not sufficiently take into account Austria's obligation under Article 53 of the Convention to comply with judgments of the European Court of Human Rights. He also submits that the Court of Appeal failed to hold a public hearing on his appeal and to pronounce its decision in public and that his case was not heard within a reasonable time as required by Article 6 para. 1 of the Convention.

THE LAW

1. The applicant raises various complaints about Austrian court decisions and also about the proceedings concerned. The Commission notes that the Vienna Regional Court dismissed the applicant's request on 18 March 1993, and that the applicant only lodged his application on 26 February 1994. On 7 July 1993 the Vienna Court of Appeal declared the applicant's appeal inadmissible as no appeal lay against the Regional Court's decision. The question therefore arises whether the Court of Appeal's decision can, in these circumstances, be regarded as the "final" decision for calculating the six months' time-limit under Article 26 (Art. 26) of the Convention. However, the Commission notes that the Regional Court's decision of 18 March 1993 contained the printed information that an appeal could be lodged and that the applicant lodged his appeal relying on this information.

Under these circumstances the Commission finds that the applicant has complied with the six months' time-limit under Article 26 (Art. 26) of the Convention.

2. The applicant complains under Article 1 of Protocol No. 1 (P1-1) about the refusal by the Vienna Regional Court to authorise the publication of information about the outcome of criminal proceedings under Section 39 para. 2 of the Media Act.

The Commission finds that the Vienna Regional Court's refusal of 18 March 1993 to authorise a publication of the outcome of the criminal proceedings in his periodical "Forum" at the expense of the State did not interfere with his right to peaceful enjoyment of property as protected by Article 1 of Protocol No. 1 (P1-1).

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. He further complains under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (Art. 14+P1-1) about alleged discrimination in the application of this provision by the Austrian courts.

The Commission recalls that Article 14 (Art. 14) of the Convention has no independent existence in that, as stated in the Convention itself, it covers only "rights and freedoms recognised in the Convention" (No. 10733/84, Dec. 11.3.85, D.R. 41 p. 211; No. 10503/83, Dec. 16.5.85, D.R. 42 p. 162).

The Commission refers to the above finding that the complaint under Article 1 of Protocol No. 1 (P1-1) falls outside the scope of the Convention and therefore is incompatible ratione materiae with its provisions.

It follows that this part of the application must likewise 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.

4. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention about the proceedings regarding his request under Section 39 para. 2 of the Media Act in several respects.

Article 6 para. 1 (Art. 6-1) of the Convention, as far as relevant, provides as follows:

> "In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Commission finds that the proceedings before the Austrian courts regarding the applicant's request of 20 November 1991 did not determine any criminal charge against the applicant.

It remains to be examined whether they concerned the determination of the applicant's civil rights and obligations.

In this respect the Commission recalls that Article 6 (Art. 6) of the Convention only applies to disputes over "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law. Article 6 (Art. 6) does not in itself guarantee any particular content for "rights and obligations" in the substantive law of the Contracting States (see Eur. Court H.R., James and others judgment of 21 February 1986, Series A no. 98, p. 46, para. 81, and Lithgow and others judgment of 8 July 1986, Series A no. 102, p. 70, para. 192). The dispute which gives a right to a determination by a court must be "genuine and of a serious nature" (see Eur. Court H.R., Benthem judgment of 23 October 1985, Series A no. 97, p. 14, para. 32).

In the present case the applicant claimed in the domestic proceedings a right to the publication at the expense of the Austrian state of the outcome of proceedings before the Convention organs in which he was the applicant. Section 39 of the Media Act, however, only provides for a publication of the outcome of criminal proceedings in case the seizure of the relevant publication was not ordered and thus refers to domestic proceedings. The Regional Court in its decision of 18 March 1993 therefore refused the applicant's request. The applicant in his appeal of 14 April 1993 requested the Court of Appeal to institute proceedings before the Constitutional Court as he considered Section 39 of the Media Act to be unconstitutional as not being in compliance with Austria's obligations under Article 53 (Art. 53) of the

Convention.

The Commission therefore finds that the applicant could not on arguable grounds claim a right to the publication of the outcome of proceedings before the Convention organs at the expense of the Austrian state. The dispute thus did not concern a right within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention and the applicant therefore cannot rely on that provision in this instance.

It follows that this part of the application must also 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.

For these reasons, the Commission unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)