AS TO THE ADMISSIBILITY OF

Application No. 15974/90
by M.P. and G.O.
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
J.-C. SOYER
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

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 21 December 1989 by M.P. and G.O. against Austria and registered on 11 January 1990 under file No. 15974/90;

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 submitted by the parties, may be summarised as follows.

The first applicant, born in 1949, is an Austrian national and resident in Vienna. The second applicant, born in 1942, is also an Austrian national and resident in Vienna. Both applicants are journalists by profession, the second applicant is editor of the periodical "FORUM - Internationale Zeitschrift für kulturelle Freiheit, politische Gleichheit und solidarische Arbeit", i.e., according to its subtitle, an international magazine for cultural freedom, political equality and solidarity. Before the Commission they are represented by Mr. G. Lansky, a lawyer practising in Vienna.

A. The particular circumstances of the case

On 15 March 1987 the first applicant, in "FORUM" No. 397/398, published a report under the heading "Attention! Severe Judges!"

("Achtung! Scharfe Richter!"), criticising on several pages Austrian judges in criminal cases. After a brief summary of his main idea and a general introduction, the applicant described in particular nine judges at the Vienna Regional Court sitting in criminal matters (Landesgericht für Strafsachen), inter alia Judge J.

In the brief summary, the applicant stated:

<German>

> "Sie behandeln jeden Angeklagten von vornherein, als wäre er bereits verurteilt; sie lassen vom Saal heraus aus dem Ausland Angereiste wegen Fluchtgefahr verhaften; sie fragen Bewußtlose, ob sie ihre Strafe annehmen; Unschuldsbeteuerungen kosten sie nur noch ein Achselzucken und den Angeklagten die Höchststrafe, weil er nicht geständig ist. - Einige von Österreichs Strafrichtern sind zu allem imstande. Zu einigem sind alle imstande: das Ganze hat Methode."

<Translation>

> "They treat each and every accused as if he were already convicted; they have people who have travelled back from abroad arrested in court for danger of absconding; they ask people who have fainted if they accept their sentence; claims of innocence merely make them shrug their shoulders and earn the accused the stiffest penalty because he has failed to confess. Some of Austria's judges are capable of anything. All of them are capable of quite something. There is method in all this."

In the general introduction, the applicant wrote that the Austrian judges at regional courts (Landes- und Kreisgerichte) exercised absolute power in court and that the most insignificant personal weaknesses and peculiarities could have serious consequences. In such circumstances, the principle of free assessment of evidence (freie Beweiswürdigung), the principle of the judge appointed in accordance with the law (gesetzlicher Richter), the rules on the distribution of cases, and the principle of the independence of the judiciary (richterliche Unabhängigkeit) could be perverted. He criticised that there were judges who acquitted the accused only if there was no other choice, whose judgments were in principle more severe than those of most of their colleagues, who treated defence counsel as if they were the accused, who plagued and humiliated the accused. He also reported about his experiences in making the inquiries for the report. He concluded with short remarks about some particular judges mentioning the "cynical vexations" ("menschen-verachtende Schikanen") of Judge J.

In the main part of his report relating to individual judges, the applicant stated about Judge J. as follows:

<German>

> "Typ: rabiat
>
> ...
>
> [J.]: "Kurz plädieren, Herr Verteidiger. Das Urteil steht schon fest." - Zum Wiener Rechtsanwalt [K.], vor einigen Jahren.
>
> [J.]: Ein Richter, der Bewährungshelfern nicht gestattet, in seinem Zimmer Platz zu nehmen. Mit denen redet er nämlich nicht.
>
> [J.]: Ein Richter, der einmal eine Prostituierte angezeigt hat, weil er schon gezahlt hatte, sie aber mit ihrem Zuhälter abrauschte, ohne daß etwas passiert wäre. Sie dachte wohl, der

Freier wäre zu besoffen, um den Unterschied zu merken. Aber der legte sich auf die Lauer und notierte die Autonummer.

Mit seiner Anzeige handelte [J.] der Dirne sogar eine Verurteilung ein - sich selbst aber ein Disziplinarverfahren, das sich gewaschen hatte, weil die pikante Story - die immerhin für die Querköpfigkeit [J.s] spricht - in die Zeitung kam.

Fast wäre er übrigens trotzdem Staatsanwalt geworden. Aber die Zeitung ließ eine Geschichte platzen, in der wieder einmal sein Name vorkam - diesmal in Zusammenhang mit einem Kriminalprozeß und Verdacht auf Winkelschreiberei. Zwei Herren, Vater und Sohn L., waren angeklagt, mittels betrügerischer Verträge Leuten für Eigentumswohnungen in Althäusern Geld herausgerissen zu haben. Als klar wurde, daß die Verträge von [J.] aufgesetzt worden waren, nahm die Anklage eine andere Richtung: plötzlich waren nicht mehr die Verträge betrügerisch, sondern die Absichten, mit denen sie verwendet worden waren.

[J.] blieb Richter, statt Staatsanwalt zu werden. Den `Kurier'-Autoren tut's heute leid, Staatsanwalt ist weniger gefährlich.

Das `profil' belegte im September, warum: [J.] hatte in seiner Funktion als Untersuchungsrichter einen Rauschgiftsüchtigen über ein Jahr lang in U-Haft belassen, obwohl er von den Pflichtverteidigern des Inhaftierten immer wieder darauf hingewiesen worden war, daß er die Rauschgiftmenge falsch beurteile und der Strafrahmen nur vier bis sechs Monate sei.

Wobei [J.] die letzte Nichtigkeitsbeschwerde vorschriftswidrig nicht an den Obersten Gerichtshof weitergeleitet hatte, sondern ans Oberlandesgericht und den Gerichtspräsidenten, die nochmals drei Monate prüften, ob enthaftet werden sollte und ob mögliche Verfehlungen des U-Richters vorlägen.

Zumindest diese drei Monate hätte ein Kopierapparat dem Untersuchungshäftling erspart: Anfang März von dem neuen Richter enthaftet, an den die endlich eingeschalteten Oberstrichter den Akt zurückschickten, wurde der 13 Monate Inhaftierte schließlich Ende März verurteilt. Zu fünf Monaten.

Allein die Anwaltkosten hätten bis dahin 85.000 Schilling betragen, wie die beiden Pflichtverteidiger des [J.]-Opfers, [B.] und [L.], errechnet haben.

Ganz spurlos scheint das alles auch an Richter [J.] nicht vorbeigegangen zu sein. Der hochgewachsene bärtige Richter hat eine tiefe, klangvolle Stimme. Aber während des ganzen Prozesses gegen die `Urlaubsräuberin' Marianne O. hält sich ein hartnäckiges Zucken im Gesicht des [S.]-Beisitzers.

Dann wird das Geschworenenurteil ausgesetzt und Anwalt [G.] bekommt ein Disziplinarverfahren angehängt."

<Translation>

"Type: ruthless

...

[J.], addressing the Vienna lawyer [K.] some years ago: `Keep it short. I've already made up my mind.'

[J.]: a judge who does not allow probation officers to sit down in his office. He does not talk to such people.

[J.]: a judge who once laid a complaint against a prostitute because he had already paid her, but she and her pimp vanished without anything having happened. She might have thought that her client was too drunk to notice the difference. [J.] however lay in wait and noted the car number.

[J.]'s complaint resulted in a conviction for the prostitute - and disciplinary proceedings for himself, which proved effective because the saucy story, which says much for [J.]'s pigheadedness, got into the newspapers.

Despite all this he almost became a public prosecutor. But the press revealed a story in which his name cropped up again, this time in connection with criminal proceedings and the suspicion of dishonest practices. Two men, MM. L., father and son, were accused of having obtained money from people seeking to buy flats in old property, by means of fraudulent contracts. When it became clear that the contracts had been drawn up by [J.], the accusation took another tack: suddenly it was no longer the contracts which were fraudulent, but the intention with which they had been used.

[J.] remained a judge instead of becoming a public prosecutor. The authors working for the `Kurier' [N.B.: an Austrian magazine] now regret this because a public prosecutor is less dangerous.

In September `profil' [N.B.: an Austrian magazine] showed why. In his capacity as an investigating judge, [J.] had left a drug addict in detention on remand for over one year, although the remand prisoner's official defence counsel repeatedly told him that he was making a mistake regarding the amount of drugs involved and that the relevant sentence would be four to six months' imprisonment.

In breach of the regulations, [J.] did not forward the latest plea of nullity to the Supreme Court, but to the Court of Appeal and to the President of the Court of Appeal, which took a further three months to consider whether the man should be released from prison and whether there had been any misconduct on the part of the investigating judge.

A photocopier would have spared the prisoner at least three months. Released at the end of March by the new judge to whom the Supreme Court judges, finally brought into play, forwarded the case file, the prisoner was at last convicted at the end of March and sentenced to five months' imprisonment. He had been detained on remand for thirteen months.

The two official defence counsel [B.] and [L.] of the [J.]-victim calculate that solely the legal fees up to that date amounted to AS 85,000.

All this does not seem to have left Judge [J.] unscathed. The tall, bearded judge has a deep, resonant voice. Yet throughout the trial of Marianne O., the `holiday'-thief, an obstinate tick was to be seen in the face of Judge [S.]'s colleague on the Bench.

Then the jury's verdict was suspended and defence counsel [G.] found himself facing disciplinary proceedings."

In his report the applicant referred to inquiries of two criminal sociologists relating to decisions on detention on remand and sentencing in the district of the Vienna Court of Appeal, and to a university study in 1985 on regional sentencing practices in Austria.

On 23 April 1987 Judge J., as a private prosecutor, requested the Vienna Regional Court to institute criminal proceedings against the first applicant, to which the second applicant, as editor of the periodical in question, was a party. J. considered that certain passages in the report summarised and partly cited above were defamatory within the meaning of S. 111 of the Austrian Penal Code (Strafgesetzbuch). In these proceedings, both applicants were represented by Mr. Lansky.

On 5 August 1987 the Austrian Supreme Court (Oberster Gerichtshof) dismissed the applicants' motion to challenge the Vienna Court of Appeal for bias. On 17 September 1987 the Vienna Court of Appeal, upon the applicants' challenge of the Vienna Regional Court for bias, transferred the case to the Eisenstadt Regional Court.

On 17 November 1987 the Eisenstadt Regional Court ordered the second applicant to print in the periodical "FORUM" a notice that [J.] had brought a private prosecution for defamation in respect of particular passages in the above-mentioned report. The applicants' appeal (Beschwerde) remained unsuccessful.

On 15 December 1987 the President of the Eisenstadt Regional Court dismissed the applicants' motion to challenge the Presiding Judge for political reasons.

On 11 October 1988 the Eisenstadt Regional Court found the first applicant guilty of having defamed the private prosecutor [J.] in that, in his report "Attention! Severe Judges!" as published in the periodical "FORUM" on 15 March 1987, he made the following remarks:

(1) "They treat each and every accused as if he were already convicted."

(2) "Some of Austria's judges are capable of anything."

(3) "Nothing compared to ... the cynical vexations of Judge [J.]."

(4) "Type ruthless... [J.]."

(5) "Despite all this he almost became a public prosecutor. But the press revealed a story in which his name cropped up again, this time in connection with criminal proceedings and the suspicion of dishonest practices. Two men, Messrs. L., father and son, were accused of having obtained money from people seeking to buy flats in old property, by means of fraudulent contracts. When it became clear that the contracts had been drawn up by [J.], the accusation took another tack: suddenly it was no longer the contracts which were fraudulent, but the intention with which they had been used.

[J.] remained a judge instead of becoming a public prosecutor. The authors working for the `Kurier' now regret this because a public prosecutor is less dangerous."

The Regional Court convicted the first applicant of defamation under S. 111 paras. 1 and 2 of the Penal Code and sentenced him to 120 daily rates (Tagessätze) of AS 30, in default of payment to 60 days' imprisonment. The costs of the proceedings were awarded against the first applicant. The Court also ordered the confiscation of the remaining copies of the periodical concerned, and the publication of the relevant parts of the judgment. Furthermore, it ordered that the second applicant, as editor of the periodical, was jointly liable for the payment of the fine, the costs of the proceedings, and the costs of publishing the judgment. Moreover, it ordered the second applicant to pay J. compensation of AS 30,000.

The Regional Court, in its detailed reasoning, examined first the objectively defamatory nature of the five passages mentioned above.

It found that, in everyday language, the term "ruthless" meant "wild, angry, acting without consideration, brutally and violently". The term "vexation" denoted a measure taken on the basis of public or official powers which caused unnecessary difficulties for a third person, and only applied to intentional actions. A "cynical" person regarded human beings as bad, inferior and unworthy, thus detested others and thereby degraded them. The reproach that accused persons were treated as if they were already convicted meant that such a judge lacked impartiality and fairness and acted contrary to Article 6 para. 2 of the Convention. In the context of the other accusations, the reproach with being "capable of anything" also meant an intolerable behaviour. The fifth passage contained the suspicion that J. had committed criminal and disciplinary offences.

The Court considered that the accusations, taken together, were so strong that an impartial reader was bound to suspect J. of dishonourable behaviour and a contemptible character. The general public required a judge to be impartial, fair, reliable and conscientious in fulfilling his judicial tasks and, whether in pursuit of his profession or otherwise, to act above blame and as an ideal for others. The incriminated passages were contrary to all these legitimate ideas.

The Regional Court found that the first applicant had acted with the intent of defaming J.

Furthermore, he had failed to prove the truth of his statements mentioned above under items (1), (3) and (5), or to apply the necessary diligence as a journalist (Einhaltung der journali-stischen Sorgfalt). The accusations under items (2) and (4) were value-judgments and as such not subject to proof.

The Regional Court noted the first applicant's arguments and evidence adduced to prove the truth of his accusations, and his statement that, in having applied the necessary diligence, he could regard these facts as true. The Regional Court summarised the first applicant's submissions as follows: repeatedly disciplinary proceedings had been brought against J.; J. had once kept an accused unreasonably long in detention on remand and further delayed these proceedings; a disciplinary complaint against a lawyer had been unsubstantiated; J. had asked defence counsel to keep his pleadings short because the judgment was already definitive; J. had been involved in the fraud proceedings against Messrs. L., and refused to talk to social workers. The first applicant had requested that various files concerning criminal proceedings against third persons and all disciplinary files concerning J. be consulted, and that two counsel, two judges of the Vienna Court of Appeal and a judge of the Vienna Regional Court be heard as witnesses on disciplinary matters relating to J. Furthermore, he had requested inquiries into J.'s application for a post as public prosecutor, and the reasons why he was not admitted.

The Regional Court considered, in detailed reasoning, that the evidence offered by the first applicant to prove the truth of the incriminated passages was not pertinent. The single incidents which the first applicant offered as proof did not show a general lack of impartiality, or intent to delay proceedings concerning detention matters or otherwise to raise unnecessary obstacles. Moreover, J., in disciplinary proceedings in 1982 relating to his role in the criminal proceedings against Messrs. L., had been completely discharged. The files concerning J.'s application for a post as public prosecutor were confidential.

With regard to the first applicant's failure to prove that he had applied the necessary diligence as a journalist, the Regional Court noted in particular that he had not heard J. on the reproaches against him, and had not attended any trial conducted by J. He had copied

earlier press reports without checking them and he had reproduced allegations which he only knew by hearsay.

Finally, the Regional Court considered that the first applicant's obvious negligence, his strong criminal intent and his continuing journalistic activities as well as considerations of general deterrent required that the sentence be fully executed. The compensation was fixed with regard to the serious harm inflicted upon J.'s professional reputation and the second applicant's financial situation.

The Regional Court also noted that the second applicant, though duly summoned, had not appeared at the trial.

On 26 June 1989 the Vienna Court of Appeal, upon the applicants' appeal, reduced the compensation to AS 20,000. It dismissed the remainder of the appeal. The Court of Appeal considered in particular that the applicants' defence rights had not been unduly restricted at first instance. The first applicant had failed to show that the evidence offered to prove the truth of his statements was pertinent. His difficulties in this respect resulted from his own broad and general formulation of the incriminated passages. Furthermore, the applicant's case could not be compared to the "Lingens case" (Eur. Court H.R., Lingens judgment of 8 July 1986, Series A no. 103).

The judgment was served upon the applicants on 25 July 1989.

The Regional Court's order to confiscate the remaining copies of the periodical concerned was finally not executed.

B. Relevant domestic law

SS. 111, 112 and 114 of the Austrian Penal Code (Strafgesetz-buch) concern the offence of defamation. S. 111 provides as follows:

> "1. Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine ...
>
> (2) Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine ...
>
> (3) The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."

Under S. 112, evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the accuracy of his statement or his good faith.

By virtue of S. 114 para. 1, conduct of the kind mentioned in S. 111 is justified if it constitutes fulfilment of a legal duty or the exercise of a right. According to S. 114 para. 2, a person who is forced for special reasons to make an allegation within the meaning of S. 111 in the particular form and manner in which it was made, is not to be punished, unless that allegation is untrue and the offender could have been aware thereof if he had acted with the necessary care.

S. 6 of the Austrian Media Act (Mediengesetz) provides for the strict liability of the publisher in cases of defamation; the victim

can thus claim compensation from him. Furthermore, in accordance with S. 35 of the Media Act, the publisher may be declared to be liable jointly and severally with the person convicted of a media offence for the fines imposed and for the costs of the proceedings. The Media Act also contains various supplementary provisions on the confiscation of publications and the publication of convictions for defamation.

COMPLAINTS

1. The first applicant complains under Article 10 of the Convention about his conviction for defamation, the confiscation of the remaining copies of the periodical concerned and the publication of the judgment.

2. The second applicant, in this respect, complains about his joint liability for the fine and the cost of the proceedings as well as the award of damages.

3. The second applicant also considers that the confiscation of the remaining copies of the periodical as a whole, instead of only the report concerned, violates his right under Article 14 in conjunction with Article 10 of the Convention.

4. The applicants also complain under Article 6 paras. 1 and 3 (d) of the Convention that they did not have a fair trial, in particular that their defence rights were unduly restricted. They submit that they could not properly put questions to the private prosecutor J., and that their requests to take evidence on the truth of the incriminated statements were incorrectly dismissed. The repeated refusal of their requests to take evidence gave rise to doubts as to the impartiality of the judges involved.

5. The applicants complain under Article 13 in conjunction with Article 10 of the Convention that the Austrian courts did not duly consider their right to freedom of expression.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 December 1989 and registered on 11 January 1990.

On 6 January 1992 the Commission decided to communicate the application to the respondent Government.

The Government's observations were submitted on 24 April 1992. The applicant's observations in reply were submitted on 24 June 1992.

THE LAW

1. The first applicant complains about his conviction by the Eisenstadt Regional Court of defamation, the confiscation of the remaining copies of the periodical concerned and the publication of the judgment. He invokes Article 10 (Art. 10) of the Convention.

Article 10 (Art. 10) of the Convention, so far as relevant, provides 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 ...
>
> 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, ... for the protection of the reputation or rights of others, ... or for maintaining the authority and impartiality of the judiciary."

The Government submit that the interference with the first applicant's right to freedom of expression was justified under Article 10 para. 2 (Art. 10-2) of the Convention as being prescribed by Austrian law and necessary in a democratic society for the protection of the reputation or rights of others as well as for maintaining the authority and impartiality of the judiciary. As regards the question of whether the interference was necessary in a democratic society for the aforesaid aims, they refer primarily to the Barfod judgment of the European Court of Human Rights (22 February 1989, Series A no. 149). They consider that the subject of the first applicant's article was neither a matter of political debate, where the limits of criticism are wider, nor did the incriminated passages contribute to a critical discussion on the Austrian administration of criminal justice. The incriminated article could not be qualified as a reasonable reaction to any behaviour of the private prosecutor. Rather, the article contained defamatory accusations against a judge personally which were likely to degrade him in public esteem.

The first applicant submits that he intended to criticise misuse of powers in the administration of criminal justice. In formulating his article, he had not gone beyond the limits of acceptable criticism. He considers that the Austrian courts, when convicting him of defamation, did not duly balance the public interest in critical information by the press about the performance of the administration of justice and the working methods of particular criminal judges.

The Commission finds that the first applicant's complaint under Article 10 (Art. 10) of the Convention raises difficult questions of fact and of law which require an examination of the merits. This part of the application is therefore not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

2. The second applicant complains under Article 10 (Art. 10) of the Convention about his joint liability for the fine and the cost of the proceedings as well as the award of damages against him.

a. The Government rely on Article 25 (Art. 25) of the Convention and submit that the second applicant cannot claim to be a victim of a violation of his right to freedom of expression. They submit that the second applicant, as editor of the periodical "FORUM", did not exercise any influence on the article concerned. Furthermore, the first applicant paid the fine imposed upon him personally. The other payments ordered by the Eisenstadt Regional Court were not made by the second applicant, either. In any case, he could have claimed compensation from the first applicant. In this respect, the Government also refer to Article 26 (Art. 26) of the Convention.

Article 25 para. 1 (Art. 25-1), first sentence, of the Convention, so far as relevant, provides as follows:

"The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention ..."

The Commission notes that the second applicant brought his application in his personal capacity and as editor of the periodical "FORUM" where the incriminated article had been published. The applicant, as editor, was also affected by the private prosecution proceedings for defamation and in particular the Eisenstadt Regional Court's judgment of 11 October 1988, as confirmed upon appeal. The

Commission finds, that, in these circumstances, the second applicant can claim within the meaning of Article 25 para. 1 (Art. 25-1) to be a victim of a violation of his right under Article 10 (Art. 10) of the Convention.

b. Furthermore, the Commission considers that the respondent Government have not pointed at any efficient remedy as regards the alleged violation of the second applicant's right under Article 10 (Art. 10) of the Convention, which he ought to have exhausted under Article 26 (Art. 26) of the Convention.

The Commission finds that the second applicant's complaint under Article 10 (Art. 10) of the Convention also raises difficult questions of fact and of law which require an examination of the merits. No other ground for declaring it inadmissible has been established.

3. The second applicant considers that the confiscation of the remaining copies of the periodical as a whole, instead of only the report concerned, violates his right under Article 14 in conjunction with Article 10 (Art. 14+10) of the Convention.

a. The Government repeat their argument under Article 25 para. 1 (Art. 25-1) of the Convention. They submit in particular that in fact no copy of the periodical was confiscated.

The Commission notes that the judgment of the Eisenstadt Regional Court, including the order of confiscation, as confirmed by the Court of Appeal, is final. The order of confiscation has not been set aside. The second applicant may, therefore, claim to be a victim of a violation of the above Convention rights, in accordance with Article 25 para. 1 (Art. 25-1) of the Convention.

b. The Government also consider that the second applicant failed to exhaust domestic remedies in this respect, as he did not challenge the order of confiscation in his appeal with the Vienna Court of Appeal, and did not request the courts to allow him, under the relevant provisions of the Media Act, to secure by detaching the incriminated passages or other means that those passages could no longer be perceived in case of future distribution.

The Commission finds that the applicants did in fact appeal against the Eisenstadt Regional Court's judgment. The Government failed to show to what extent the second applicant could have separately challenged the order of confiscation or otherwise remedied the alleged violation of his Convention rights. The second applicant must therefore be regarded as having exhausted the remedies available to him, as required by Article 26 (Art. 26) of the Convention.

c. The Commission finds that the second applicant's complaint about the order of confiscation relating to the remaining copies of the periodical concerned cannot be separated from the serious issues of fact and law raised by the applicants' complaints under Article 10 (Art. 10) of the Convention. No other ground for declaring it inadmissible has been established.

4. Both applicants also complain under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention that they did not have a fair trial, in particular that their defence rights were unduly restricted. They submit that they could not properly put questions to the private prosecutor J., and that their requests to take evidence on the truth of the incriminated statements were incorrectly dismissed. The refusal of their requests to take evidence gave rise to doubts as to the impartiality of the judges involved.

Article 6 para. 1 (Art. 6-1) of the Convention, so far as relevant, provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled

to a fair hearing by an independent and impartial tribunal. According to Article 6 para. 3 (d) (Art. 6-3-d) everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

As regards the second applicant the Government repeat their submissions relating to his complaint under Article 10 (Art. 10), namely that he cannot claim to be a victim of a violation of his Convention rights within the meaning of Article 25 (Art. 25). They also contend that in respect of the second applicant there was no determination of a criminal charge, but, in the context of the criminal proceedings against the first applicant, of civil rights and obligations under the Media Act.

The Commission does not find it necessary to address these issues on the ground that the applicants' complaint under Article 6 (Art. 6) is manifestly ill-founded for the following reasons.

There is no indication that the applicants, assisted by counsel, could not adequately present their arguments or were limited in the rights of defence. The Eisenstadt Regional Court, in its judgment of 11 October 1988, as confirmed by the Vienna Court of Appeal on 26 June 1989, carefully examined the first applicant's requests to take evidence by hearing witnesses and also consulting various files relating to criminal and disciplinary proceedings, and considered that the evidence offered was not relevant in the circumstances, namely in view of the broad accusations published by the applicants. The detailed reasoning of the Eisenstadt Regional Court appears tenable in the circumstances.

Consequently, the Commission considers that the applicants' submissions do not disclose any appearance of unfairness, arbitrariness or otherwise improper conduct of the proceedings concerned.

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 applicants further complain under Article 13 in conjunction with Article 10 (Art. 13+10) of the Convention that the Austrian courts did not duly consider their right to freedom of expression.

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

In the present case, the applicants' complaint is directed against the judgments of two courts, namely of the Eisenstadt Regional Court of 11 October 1988, and of the Vienna Court of Appeal of 26 June 1989. A remedy against the alleged violation of the applicant's Convention rights committed by these courts would require a possibility to appeal against their judgments. However, the right to appeal is not as such guaranteed by Article 13 (Art. 13) of the Convention (cf. Eur. Court H.R., Delcourt judgment of 17 January 1970, Series A No. 11, p. 14, para. 25). This provision cannot, therefore, be relied upon in circumstances where the alleged violation of the Convention lies in the decision of a court (cf. Appl. Nos. 12629/87 and 13965/88, Dec. 9.11.89, to be published in D.R.).

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits, the applicants' complaints that the Eisenstadt Regional Court's judgment of 11 October 1988, as confirmed by the Vienna Court of Appeal on 26 June 1989, violated their right to freedom of expression and constituted discrimination,

DECLARES INADMISSIBLE the remainder of the application.

Deputy Secretary to the Commission — President of the Commission

(M. de Salvia) — (C.A. Nørgaard)