PARTIAL

AS TO THE ADMISSIBILITY OF

Application No. 10802/84
by P. & P.
against Austria

The European Commission of Human Rights sitting in private on 15 December 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

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 23 September 1983 by P. and P. against Austria and registered on 31 January 1984 under file No. 10802/84;

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

Having regard to the Commission's partial decision of 13 May 1987;

Having regard to the Government's observations of 27 July 1987 and the applicants' observations in reply of 23 September 1987;

Having regard to the information submitted by the Government on 16 December 1987 and the applicants' comments thereon of 3 February 1988;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are Austrian citizens born in 1945 and 1952 respectively. Both are represented by Mr. Reinhard Peters, a German citizen residing in Munich, Federal Republic of Germany.

Certain complaints of the first applicant, concerning

proceedings in which he sought to protect his reputation against allegations that he had instigated a murder, were rejected by the Commission's partial decision of 13 May 1987. As regards the remaining parts of the application, the facts agreed between the parties may be summarised as follows:

Criminal proceedings were taken separately against both applicants before the Regional Court (Landesgericht) of Klagenfurt. The first applicant complains of the conduct of the criminal proceedings against him and of his subsequent detention (see I below), both applicants complain of certain restrictions imposed on them during their detention on remand (see II and III below), and the second applicant complains of the length of her detention on remand (see IV below).

I. The criminal proceedings against the first applicant

On the basis of a warrant of arrest issued by the Regional Court of Klagenfurt on 12 November 1982, the first applicant was arrested in Klagenfurt on 20 November 1982. The warrant was based on the suspicion of his having committed various criminal offences (aggravated fraud, professional burglary, forgery and suppression of documents, professional receiving of stolen goods, and illegal possession of firearms) and it referred to a danger of absconding, of collusion and of repetition under Section 175 para. 1, sub-paras. 2-4 of the Code of Criminal Procedure (Strafprozessordnung).

On 21 November 1982 the first applicant was brought before a judge in accordance with Section 179 para. 1 of the Code of Criminal Procedure, i.e. the judge on duty (Journalrichter) Dr. A. He informed the first applicant of the reasons for the arrest. The first applicant denied having committed the above criminal offences, except the offence of illegal possession of firearms. The merits of the case were not discussed.

Also on 21 November 1982 the judge competent for the first applicant's case, Dr. K, ordered the transfer of the first applicant to the Vienna Regional Court for Criminal Affairs (Landesgericht für Strafsachen) which had issued a warrant of arrest against this applicant on 20 November 1982, on the suspicion of his having participated in an armed robbery in Vienna. The Klagenfurt proceedings were joined to those of the Regional Court of Vienna. However, on 20 January 1983 they were severed again and referred back to the Regional Court of Klagenfurt. The first applicant was detained on remand in the prison of the Vienna Regional Court from 22 November 1982 until 24 February 1983.

On 25 February 1983, the investigating judge of the Regional Court of Klagenfurt who was now competent, Dr. St, ordered the opening of a judicial investigation (Voruntersuchung) against the first applicant, and his detention on remand in the prison of this Court.

The warrant of arrest based on Section 180, para. 1 and para. 2 sub-paras. 1 - 3 (danger of absconding, collusion and repetition) was brought to his knowledge by judge Dr. St on the same day.

On 23 May 1983 the first applicant challenged judge Dr. St on the ground of bias. However, on 26 May 1983 the President of the Regional Court of Klagenfurt rejected this challenge as being unsubstantiated.

On 10 June 1983 the investigating judge made a request under Section 193 para. 2 of the Code of Criminal Procedure for the prolongation of the first applicant's detention on remand beyond the statutory time-limit of six months. On 16 June 1983 the Graz Court of Appeal (Oberlandesgericht) acceded to the request, authorising

detention for a maximum period of nine months, having regard to the volume and complexity of the judicial investigation. On 7 July 1983 the Review Chamber (Ratskammer) of the Regional Court of Klagenfurt ordered the first applicant's continued detention, on the grounds of danger of absconding and repetition. The first applicant lodged an appeal against this decision.

On 19 July 1983 the competent public prosecutor submitted an indictment charging the first applicant with the offences of receiving stolen goods and illegal possession of firearms. He requested that the remaining charges be severed as the investigation had not been concluded in this respect (two of the charges concerned - suppression of documents and one case of fraud - were subsequently dropped). The first applicant raised an objection (Einspruch) against the indictment.

Pending the decision on this objection, the investigating judge requested a further prolongation of the first applicant's detention on remand. The Graz Court of Appeal decided on 18 August 1983 to authorise his detention on remand for a maximum period of ten months and to reject his appeal against his continued detention and his objection against the indictment.

The trial was to be opened on 14 September 1983 before the Regional Court of Klagenfurt, sitting with two professional judges (Drs. K and A) and two lay assessors (Schöffengericht). The fact that the two professional judges had earlier acted as investigating judges (Dr. K had been the competent investigating judge until 31 December 1982, Dr. A had been the judge on duty at the applicant's first hearing on 21 November 1982), was raised with the first applicant by the presiding judge, Dr. K, on 31 August and 1 September 1983. He informed this applicant that the two judges were excluded from participating in the trial by virtue of Section 68 para. 2 under sanction of nullity as provided for in Section 281 para. 1 No. 1 of the Code of Criminal Procedure. However, the first applicant declared that he would not lodge a plea of nullity on this account; he further observed that he did not consider it necessary to consult his defence counsel on this question. The trial was held with the participation of the above two professional judges on 14 September and 7 October 1983.

The defence did not raise any objection to the composition of the Court. In particular, it did not invoke Section 68 para. 2 of the Code of Criminal Procedure on the ground that the judges, Drs. K and A, had previously acted as investigating judges.

Nor did the defence draw the Court's attention to the fact that the first applicant had in the meantime instituted criminal proceedings against the investigating judge, Dr. St, because of the manner in which that judge had conducted the investigation and which, according to the first applicant, involved an abuse of public powers. In those proceedings against the investigating judge the applicant had, on 23 September 1983, challenged all judges of the Regional Court as being biased, but at the trial on 7 October 1983 the defence did not refer to this circumstance and to the fact that the challenge, which also concerned Drs. K and A, had not yet been determined. (A decision on this matter was only taken on 10 November 1983 by the Graz Court of Appeal. As all judges of the Regional Court of Klagenfurt, being colleagues of Dr. St, had themselves declared to be biased in the proceedings against the latter judge, the challenge was allowed and the case referred to the Regional Court of Leoben.)

On 7 October 1983, the Regional Court of Klagenfurt convicted the first applicant of qualified receiving of stolen goods under Section 164 para. 3 of the Penal Code (Strafgesetzbuch) and of illegal possession of firearms under Section 36 of the Firearms Act (Waffengesetz). It sentenced him to three years' imprisonment. The periods of the first applicant's detention on remand in Vienna and Klagenfurt and of an earlier detention in Innsbruck (17 July -

10 September 1982) were deducted from the sentence. Two further periods of detention, however, were not taken into account because the relevant criminal proceedings were still pending before the Regional Court of Salzburg.

The first applicant lodged a plea of nullity (Nichtigkeits-beschwerde) against his conviction and appealed from the sentence (Berufung). However, these remedies were rejected by the Supreme Court on 29 February 1984.

The Supreme Court, dismissing the plea of nullity, held in particular that the judgment was not attended with nullity because of the participation of biased judges. Insofar as the first applicant had referred to his undetermined challenge of all judges of the Regional Court prior to the trial, the Supreme Court observed that he had not requested a decision at the trial in which case the Regional Court would have been obliged to take an interim decision. The fact that the challenge of the whole Regional Court of Klagenfurt was subsequently allowed in the criminal proceedings against the investigating judge, Dr. St, did not justify the conclusion that the judges of the Regional Court were also biased in the criminal proceedings against the applicant. The fact that the two professional judges, Drs. K and A, should, in principle, have been excluded from the trial by virtue of Section 68 para. 2 of the Code of Criminal Procedure because they had been involved in the investigation could not be invoked by the applicant because he had prior to the trial expressly renounced challenging these judges.

The Supreme Court further rejected the first applicant's complaints concerning alleged inconsistencies of the judgment regarding his income, his co-operation with Italian criminals, and his knowledge that the goods received stemmed from a robbery. The Supreme Court also confirmed the first applicant's sentence, rejecting his appeal (Berufung).

The above criminal proceedings pending before the Regional Court of Salzburg were discontinued on 24 May 1984 in view of the first applicant's conviction in the above proceedings before the Regional Court of Klagenfurt. The first applicant then applied to also deduct the earlier periods of detention on remand (in Innsbruck from 19 September 1979 to 23 May 1980, and in Klagenfurt from 28 March to 26 May 1981) from his sentence. The Regional Court of Klagenfurt rejected this request by a decision of 24 January 1985 finding that the conditions of Section 38 of the Penal Code were not fulfilled as the relevant detention periods were neither directly related to the case at issue nor imposed subsequently to the acts of which the first applicant was convicted. However, at the same time it applied to the Graz Court of Appeal for a supplementary mitigation of the applicant's penalty (nachträgliche Strafmilderung) under Section 410 of the Code of Criminal Procedure. By a decision of 14 February 1985 the Court of Appeal acceded to the request and reduced the first applicant's sentence from three years' to two years' and nine months' imprisonment.

II. Censorship of correspondence between the two applicants

During their detention on remand the applicants corresponded with each other. However, at some time in the early summer of 1983 their correspondence was interfered with by the investigating judge and this gave rise to a complaint of the second applicant to the Review Chamber of the Regional Court. She complained, in particular, of a measure of censorship whereby certain passages in a letter addressed to the first applicant had been crossed out and made illegible. She claimed that this form of censorship was unlawful as Section 187 para. 2 of the Code of Criminal Procedure provided only for the stopping of certain letters, i.e. letters likely to endanger

the aim of the detention, or letters suspected of involving a criminal offence except an offence liable to prosecution only at the request of the injured person. The relevant passages in the letter had been censored because they allegedly contained critical and insulting remarks on prison officers, but in the applicant's view they neither endangered the aim of her detention nor did they constitute a public prosecution offence.

The Review Chamber, after having heard the prosecution and having obtained a report of the investigating judge, rejected the second applicant's complaint on 26 July 1983. It observed that the censorship had been limited to one letter. The crossing out of certain passages in this letter was a less severe measure than its stopping to which the investigating judge was entitled by virtue of Section 187 para. 2 of the Code of Criminal Procedure. This measure was therefore implied in the investigating judge's powers and did not infringe the applicant's rights. The censorship had been justified as the passages in question, being described by the investigating judge in her report on the incident as "jokes of an insulting nature against prison officers", had constituted the offence of defamation of officials on duty (Section 111 para. 1 in conjunction with Section 117 para. 2 of the Penal Code), an offence which could be taken as the basis for a measure under Section 187 para. 2 of the Code of Criminal Procedure.

Following the communication of the present application to the respondent Government, the Attorney General's office (Generalprokuratur) lodged a plea of nullity for safeguarding the law (Nichtigkeits-beschwerde zur Wahrung des Gesetzes) in respect of the above decision of the Review Chamber of the Regional Court of Klagenfurt. It was claimed that the decision was unlawful because the applicant's remarks could not possibly have constituted an offence against the honour of prison officers "on duty" ("während der Ausübung seines Amtes oder Dienstes"), i.e. a public prosecution offence to be prosecuted with the consent of the officials concerned (Section 117 para. 2 of the Code of Criminal Procedure), because such an offence could only be committed "from person to person" and not in a letter. If there was an offence against the honour of prison officers, it was liable to prosecution only at the request of the injured persons and thus did not justify a measure of censorship under Section 187 para. 2 of the Code of Criminal Procedure. Unlawfulness of the measure was further claimed on the ground that the latter provision merely authorised the stopping of a letter, but not the crossing out of certain passages therein.

On 20 October 1987 the Supreme Court, after having held a public hearing in the presence of a representative of the Attorney General's office, but in the absence of the second applicant, rejected the argument that there was no public prosecution offence, but found a violation of the law as to the form of censorship. Assuming that the crossed-out passages actually contained "jokes of an insulting nature against prison officers" as found by the investigating judge, it was justified to suspect the second applicant of an offence, namely the offence of insult (Beleidigung) under Section 115 of the Penal Code (rather than defamation under Section 111). If committed against an official on duty this offence was to be prosecuted ex officio (with the consent of the official in question) under Section 117 para. 2 of the Penal Code. In the present case the possible offence would have been committed against prison officers "on duty" because the offence would have been completed by handing the letter to a prison officer for the purpose of submitting it to the investigating judge and this forwarding procedure would necessarily have created the possibility that the insulting contents of the letter became known to several prison or court officers on duty. This implied that Section 117 para. 2 of the Penal Code was applicable and the measure therefore was covered by Section 187 para. 2 of the Code of Criminal Procedure. However, this provision only authorised the investigating judge to stop a letter, but not to cross out passages. In this latter respect

the investigating judge and the Review Chamber had adopted an unlawful approach contrary to the ratio legis. The investigating judge had not taken a "less severe measure" implied in her powers under Section 187 para. 2, but a different measure which interfered with the interests of the prosecution authorities and of the officials concerned to have criminal proceedings instituted against the second applicant on account of her remarks in the letter. It was therefore sufficient to state that the law had been violated. The second applicant was not aggrieved and therefore could not complain of the rejection of her appeal by the Review Chamber.

III. Refusal of visits in prison to the two applicants

During their detention on remand the applicants received regular visits from Mr. Peters who represented them in certain legal proceedings.

In the summer of 1983 a visit by Mr. Peters was refused on the ground that on an earlier occasion he had handed cigarettes to them. Both applicants complained of this measure, but in separate decisions of 7 and 26 July 1983 respectively, the Review Chamber rejected their complaints.

It held that the refusal of the visit was justified under Section 94 para. 3 of the Execution of Sentences Act (Strafvollzugs-gesetz) applicable to remand prisoners by virtue of Section 183 para. 1 of the Code of Criminal Procedure. The handing over of objects to prisoners was not allowed and it could not be excluded that apart from the cigarettes Mr. Peters might have smuggled in other objects likely to endanger the security of the prison.

IV. The detention on remand of the second applicant

On 26 November 1982, the second applicant was remanded in custody by the Regional Court of Klagenfurt on a suspicion of aggravated fraud, attempted burglary and theft, and receiving stolen goods. The warrant of arrest was based on a danger of absconding, of collusion and of repetition of a crime. On 3 February 1983 the Review Chamber ordered the second applicant's continued detention on the grounds of danger of absconding and repetition.

On 6 June 1983, the Graz Court of Appeal acceded to a request by the investigating judge to prolong the detention beyond the statutory six months' time-limit, having regard to the complexity of the investigation. It authorised the second applicant's detention for a maximum period of one year.

The second applicant subsequently lodged a complaint with the Review Chamber of the Regional Court of Klagenfurt concerning the investigating judge's request to prolong her detention. The Review Chamber decided on 26 July 1983 that the investigating judge had acted in accordance with Section 193 para. 2 of the Code of Criminal Procedure.

On 16 June 1983 the second applicant made certain statements in her case to the Regional Court. This led to a request by the public prosecutor to hear this applicant and two witnesses concerning the charge of fraud. As a result of these interrogations the prosecution did not maintain the earlier charges. On 26 July 1983 it requested the second applicant's conviction on a charge of criminal bankruptcy (fahrlässige Krida). As regards certain other offences (burglary, receiving of stolen goods) the prosecution discontinued the proceedings under Section 109 para. 1 of the Code of Criminal Procedure.

On 9 August 1983, the Regional Court of Klagenfurt convicted the second applicant of criminal bankruptcy and sentenced her to a prison term of eight and a half months, which was considered as served by her detention on remand. The second applicant was accordingly released. She had also made a separate request for release which the prosecution did not oppose.

Upon the second applicant's appeal (Berufung) the Graz Court of Appeal quashed the above judgment on 16 February 1984 and referred the case back to the Regional Court with a view to holding a new trial. In proceedings in which the second applicant did not appear, the Regional Court again convicted her on 19 April 1985. It now imposed a prison sentence of eight months, which was considered as served by her detention on remand.

COMPLAINTS

1. The first applicant complains that the criminal proceedings against him in Klagenfurt were not conducted by an impartial court and therefore infringed Article 6 para. 1 of the Convention. He observes that he had challenged all judges of the Regional Court prior to the trial which nevertheless took place before the challenge was decided upon. Moreover, the professional judges sitting at the trial had been involved in the investigation and he had not validly renounced a trial by an impartial tribunal.

The first applicant also alleges that the trial was unfair insofar as it was based on an investigation by a judge who subsequently declared himself to be biased. He submits that the acts of the investigating judge should have been considered as void. The Regional Court further acted unfairly and violated the presumption of innocence in that it drew certain conclusions from unproven assumptions regarding in particular the sources of the applicant's income, his contacts with Italian criminals, and finally his knowledge of the origin of the goods received. Thus his conviction for qualified receiving of stolen goods lacked a legal basis. The judgment contained no statements regarding the form of his guilt and the professional character of his actions. In this respect he invokes Article 7 of the Convention.

The first applicant further complains that certain detention periods were not counted as part of his sentence. He notes that the sentence was subsequently reduced by three months in view of the detention periods in question, but submits that these periods had in fact been much longer and that Section 38 of the Penal Code which requires that all previous detention periods should be counted towards the sentence was thus violated. For this reason he considers his detention as contrary to Article 5 of the Convention.

2. Both applicants complain of the restrictive measures imposed on them during their detention on remand. They claim that the censorship of their correspondence infringed Article 8 of the Convention both as regards the object pursued and the method applied. The law allows censorship only in respect of a letter which constitutes a public prosecution offence, but not merely a private prosecution offence such as insulting an official. The law furthermore only allows the stopping of letters, but not the deletion of passages. This made it impossible to examine the reasons for the censorship, and therefore the applicants were allegedly deprived of an effective remedy contrary to Article 13 of the Convention.

The applicants further complain that the refusal of a visit by Mr. Peters was contrary to Article 5 of the Convention because their rights as remand prisoners were restricted beyond the level allowed by Austrian law. The aim of the measure could also have been achieved by supervision of the visit.

3. The second applicant claims that her detention infringed Article 5 of the Convention insofar as it was prolonged beyond the statutory time-limit of six months. She submits that the investigations concerning the original charges were completed by the time of the prolongation; in any event these charges were dropped shortly afterwards and replaced by another charge which had nothing to do with the initial case. The second applicant alleges that the detention was used to exercise pressure on her and on the first applicant; this is shown by the fact that she was eventually sentenced to a prison term of the same length as the period which she had already spent in detention on remand.

PROCEEDINGS

The application was introduced on 23 September 1983 and registered on 31 January 1984.

On 13 May 1987 the Commission rejected certain complaints of the first applicant by a partial decision. As regards the applicants' remaining complaints, the Commission decided to give notice of the application to the respondent Government and to invite them, in accordance with Rule 42 para. 2 (b) of the Rules of Procedure, to submit observations in writing on the admissibility and merits, in particular concerning the first applicant's complaint that two professional judges had taken part in his trial who previously had acted as investigating judges; the second applicant's complaint relating to the length of her detention on remand; and the complaint of both applicants relating to the censorship of their correspondence.

The Government submitted their observations on 27 July 1987. The applicants submitted observations in reply on 23 September 1987.

On 16 December 1987 the Government submitted further information concerning the Supreme Court's decision of 20 October 1987 on the Attorney General's plea of nullity for safeguarding the law. On 3 February 1988 the applicant submitted comments on this decision.

&_SUBMISSIONS OF THE PARTIES&S

A. The Government

1. Impartial tribunal

In the Government's view the first applicant's case cannot be compared with the De Cubber and Ben Yaacoub cases because the judges who had earlier acted as investigating judges had only exercised very limited functions in this capacity.

The first applicant's trial was presided over by the judge Dr. K, the assisting professional judge was Dr. A. Dr. K had been the first applicant's officially competent investigating judge between 20 November and 31 December 1982. However, during this time the first applicant was remanded in custody at the Vienna Regional Court and therefore Dr. K carried out no investigation. He had only ordered the arrest of the first applicant and the initiation of a preliminary investigation against him to be conducted separately from the proceedings against the second applicant. He was not the investigating judge who imposed the pre-trial detention in Klagenfurt, which was done by his successor, Dr. St, in February 1983. The assisting judge, Dr. A, had only interrogated the first applicant after his arrest and had ordered that he be remanded in custody. The interrogation included no questions on the merits.

The first applicant himself obviously had the impression that

the two professional judges were impartial. Dr. K expressly called it to his attention that he had been the investigating judge in the proceedings until 31 December 1982 and that the assisting judge, Dr. A, had conducted the compulsory interrogation. After having been instructed that these conditions would justify a plea of nullity, the first applicant declared that he accepted the participation of these two judges in the trial and renounced making a plea of nullity on this issue. The relevant records were signed personally by this applicant.

The exclusion of the judges according to Section 68 para. 2 of the Code of Criminal Procedure was raised by the first applicant neither at the trial nor in his plea of nullity, although he was fully informed of the facts. Section 281 para. 1 sub-para. 1 of the Code of Criminal Procedure prescribes that the participation at the trial of an investigating judge excluded under Section 68 para. 2 must be objected to as soon as one is informed about that fact. The first applicant did not challenge the judges since he had accepted their participation and did not question their impartiality.

It is true that in different proceedings instituted by him against the investigating judge, Dr. St, the first applicant had challenged all judges of the Regional Court of Klagenfurt on the ground of bias. This challenge could only apply to the proceedings against Dr. St because the other judges of the Regional Court of Klagenfurt were his colleagues. The same danger of bias could not exist in the first applicant's own case. At his trial, neither the first applicant nor his lawyer referred to the challenge of all judges of the Regional Court in the other case. Because it concerned a different case and no reference was made to it, the Court could not deal with this challenge. Its judgment would have been attended with nullity under Section 281 para. 1 sub-para. 4 of the Code of Criminal Procedure only if the first applicant had requested a decision on the point, and if no such decision had been taken.

The first applicant thus renounced pleading nullity under Section 281 para. 1 sub-para. 1 of the Code of Criminal Procedure of his own accord and after having been informed of the matter by the judge. He could not claim nullity under Section 281 para. 1 sub-para. 4 due to the fact that he had failed to raise the challenge during the trial, on which the Court would have had to take a decision. Because of these omissions, the first applicant has not exhausted the domestic remedies in this respect.

It is possible to renounce a claim for exclusion of the judges according to Section 68 para. 2 of the Code of Criminal Procedure. According to the consistent practice of the Supreme Court, Section 281 para. 1 of the Code of Criminal Procedure presupposes that the ground of nullity based on the participation of excluded judges is asserted either at the beginning of the trial or as soon as the defendant is informed of it. The legislator presumes that if the defendant does not assert a claim immediately, he shows that he renounces it. By consenting to the participation of these judges at the trial after having been informed of the situation by a judge, the first applicant acknowledged that he would be judged by an impartial tribunal. He did not renounce the guarantee of an impartial tribunal as such.

2. Censorship of correspondence

The letter presented to the investigating judge to be censored contained sarcastic and insulting remarks about prison officers, amounting to the offence of defamation under Section 111 para. 1 of the Penal Code. The judge therefore considered herself justified under Section 187 para. 2 of the Code of Criminal Procedure to stop the letter. However, she merely crossed out the objectionable passages and passed on the letter to the addressee.

Prior to the Supreme Court decision of 20 October 1987 (see p. 7

above) the Government submitted that the offence allegedly committed by the second applicant seems to have been a private prosecution offence, making the measure of censorship carried out by the investigating judge unlawful. In this respect the Government relied essentially on the first argument advanced by the Attorney General's office in the plea of nullity for safeguarding the law (see p. 6 above).

The Government subsequently informed the Commission of the Supreme Court's above decision which had found a violation of the law only in respect of the second argument in the plea of nullity, namely that the crossing out of passages instead of stopping the letter was unlawful.

Irrespective of the violation of the domestic law, the Government consider that there has been no violation of Article 8 of the Convention. The measure complained of did not consist in the stopping of the letter as in all other cases relative to an infringement of correspondence that have been dealt with by the Convention organs (cf. Eur. Court H.R., Silver and others judgment of 5 March 1983, Series A no. 61). The right of the second applicant to keep up correspondence was not prevented by this act. The crossing out and making illegible of a passage that is insulting towards a third person within the framework of a basically admissible inspection of correspondence is, in the Government's view, no violation of the right to respect for one's correspondence.

Nor did this measure of censorship infringe the right of the second applicant to an effective remedy before an Austrian authority. Under Section 113 of the Code of Criminal Procedure this applicant could complain to the Review Chamber of the Regional Court, which she did. The Review Chamber decided on the matter after having obtained observations of the investigating judge on the issue and the contents of the letter. Even if the legality of the measure of censorship caused difficulty under Section 187 para. 2 of the Code of Criminal Procedure, it must be assumed that, based on the statement by the investigating judge, a review of the substance of the measure of censorship was possible. Furthermore, the second applicant could oppose the statement of the investigating judge on the contents of the passages concerned. The Review Chamber was required to consider both statements when weighing the evidence. Therefore the fact that the complaint was rejected by the Review Chamber as being unfounded does not mean that the second applicant had no effective remedy at her disposal.

The Government conclude that the above complaints are manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. Length of detention

The most important charges against the second applicant were that she had acquired furniture, a luxury car and a fur coat without payment. These charges were first qualified by the public prosecutor as aggravated fraud because it was assumed that the second applicant had never intended to pay the price.

The decision to prolong her detention on remand beyond the statutory six months' time-limit under Section 193 para. 3 of the Code of Criminal Procedure was based on the fact that the reasons for her arrest were still valid and that the investigation was not yet completed. The complexity of the investigation arose from the collaboration in the offences between the first and the second applicants, and the fact that both refused to give any relevant information.

The second applicant's allegation that the investigation had been concluded at the beginning of May 1983 is incorrect. On the

contrary, on 19 May 1983 the public prosecutor requested further investigations. Such investigations also became necessary because of the second applicant's letter to the Regional Court of 16 June 1983. The second applicant herself and two witnesses were examined and as a result of these examinations the legal assessment of this applicant's offences was altered.

On 26 July 1983 the Public Prosecutor charged the second applicant with the offence of criminal bankruptcy under Section 159 para. 1 of the Penal Code. The original charge was not dropped and replaced by an altogether different charge. Rather the very same facts were reevaluated from a different legal point of view because of the results of the preliminary investigation. Fraud and criminal bankruptcy differ from each other as far as the element of mens rea is concerned. In the former the offender has the intention to commit fraud, whereas in the latter the offender negligently inflicts damage upon his creditors.

It was only in relation to certain secondary facts (e.g. concerning burglary and qualified receiving of stolen goods) that the public prosecutor discontinued the proceedings under Section 109 para. 1 of the Code of Criminal Procedure.

The second applicant's detention on remand lasted about eight and a half months. A prison sentence of up to two years is provided for an offence under Section 159 of the Penal Code. The second applicant had already two previous convictions, one being similar to the present case. The entire detention served on remand was counted towards the sentence imposed on 19 April 1985 by the Regional Court of Klagenfurt.

In these circumstances the length of detention was justified within the meaning of Article 5 para. 3 of the Convention. The investigations were complex but were carried out swiftly by the judicial authorities. The second applicant filed a great number of submissions and complaints either personally or through her lawyer, partly querulous in nature, each of which had to be passed on to the competent authorities to be decided upon, and for some of which the observations of the competent judges had to be procured. This naturally caused some delay for which this applicant was herself responsible.

B. The Applicants

1. Impartial tribunal

The first applicant contests that the functions of the investigating judges, who later participated in his trial, were of a limited nature. The compulsory interrogation under Section 179 of the Code of Criminal Procedure corresponds in his view to the requirements of Article 5 paras. 2 and 3 of the Convention. The investigating judge must immediately decide whether the arrested person should be released or whether detention on remand should be imposed on him. This necessarily presupposes that the judge deals with the substance of the matter. The Government's contention that in the present case the investigating judge, Dr. A, conducted a purely formal hearing at which he informed the first applicant of the reasons for his arrest without discussing the merits of the case is either incorrect or it implies that this applicant's detention was unlawful as he had not been heard on the substance.

As regards the decision of the judge, Dr. K, to order the first applicant's detention on remand, reference is made to Section 180 para. 1 of the Code of Criminal Procedure, according to which the investigating judge may take such a decision only if the accused has already been heard on the merits. Again the law was violated and therefore this applicant's detention was not in conformity with

Article 5 of the Convention.

In order to take the most important decisions in the investigation, those concerning the first applicant's provisional detention and his detention on remand, both judges were required to deal extensively with the matter.

Apart from that, the presiding judge, Dr. K, had also been the judge in the parallel media case which was concluded before the trial in the present case and in which the file in the present case was part of the evidence. Therefore this judge had a profound knowledge of the present case. This case cannot be distinguished from the De Cubber case.

It is true that the challenge of the judges on the ground of bias in the case against the investigating judge, Dr. St, concerned a different case. However, in substance, that case concerned the manner of conducting the pretrial investigation and the taking of evidence in the first applicant's own case. These acts of the investigating judge were ultimately at the basis of the first applicant's conviction. Therefore the judges dealing with the first applicant's case must also be considered as biased in this case. They should themselves have had doubts concerning their impartiality and should have declared to be biased under Section 72 para. 2 of the Code of Criminal Procedure. That the judges had stated to be biased in the other case was not known at the time to either the applicant or his defence counsel. The Supreme Court's judgment is contradictory on this point in that it was based on the formal argument that the challenge had been made in a different case and that the exclusion of the judges, because of their having acted as investigating judges, could not be raised because of the applicant's renunciation to a remedy in this respect.

It is true that the first applicant was informed prior to the trial of the grounds for the exclusion of the two judges and that he subsequently failed to use remedies. However, he was unlawfully led into error concerning his rights and unlawfully incited to renounce making a plea of nullity.

In view of the fact that the two judges were excluded, Dr. K, who was one of these judges, was required by Section 71 of the Code of Criminal Procedure to refrain, under sanction of nullity, from all judicial acts in the case. Therefore it was unlawful that he himself informed the first applicant of his exclusion and had this applicant's renunciation of a remedy recorded. When confronted with the excluded judge the first applicant could hardly contradict him. If at all, the information about the participation of excluded judges should have been given and the declaration by the first applicant that he renounced a remedy in this respect should have been obtained by another judge. Section 70 of the Code of Criminal Procedure requires an excluded judge to report this fact immediately to the court's president. The first applicant concludes that his renunciation was null and void.

Moreover, the decision to hold the trial notwithstanding the participation of excluded judges and to obtain the first applicant's consent thereto should have been served on the first applicant's defence counsel. However, his defence counsel was not informed and the applicant did not realise that the defence could still challenge the excluded judges at the trial.

It is true that procedural guarantees can be renounced and that a person who does not raise a ground of nullity may be prevented from lodging an application under the Convention. However, this does not mean that the Convention has been complied with. In any event it is inadmissible to renounce invoking the Convention in general and prior to the trial.

In the present case the procedure which led to the first applicant's renunciation was unlawful and this applicant was unable to realise that at the trial he could still challenge the judges. Therefore he was not required to take the relevant remedies. In any event the Supreme Court confirmed that the two judges should have been excluded by virtue of Section 68 para. 2 of the Code of Criminal Procedure. Even if the Court was impartial, it was not a court "established by law".

2. Censorship of correspondence

The applicants refer to the Government's admission that the censorship was unlawful. This shows that there has been a breach of Article 8 of the Convention.

They allege a further breach of Article 8 in that information about the contents of the applicants' letters was passed on to the investigating judge by the prison governor. This became known to the applicants through the Government's observations. The applicants observe that under the provisions of the Code of Criminal Procedure the censorship of the mail of remand prisoners is exclusively entrusted to the investigating judge, while in the present case a censorship has apparently been carried out by prison officers. This interferes with the confidentiality of correspondence.

The Government's argument that the crossing out of a passage in a letter does not interfere with the right to respect for correspondence, amounts to saying that there is no interference with correspondence if the letter is burnt and the ashes are delivered to the addressee.

Finally, as regards the question of an effective remedy, the applicants observe that it was the task of the Review Chamber to control the measures taken by the investigating judge. In doing so, it had itself to assess the facts rather than ratify the assessment by the investigating judge. Censorship was only admissible if there was a criminal offence. Therefore the Review Chamber was called upon to determine whether a criminal offence had been committed. This was not possible without examining the relevant facts. However, the actual contents of the objectionable passages of the letter could no longer be ascertained; in particular they were not described in the statement of the investigating judge who merely said that they were jokes which she considered as insulting. The second applicant was not heard on the matter and could not be heard as the applicable procedural rules provide for a decision to be taken in a non-public procedure after having heard the investigating judge (cf. Section 113 of the Code of Criminal Procedure). The applicants therefore did not have an effective remedy at their disposal.

In the light of the Supreme Court's judgment on the Attorney General's plea of nullity for safeguarding the law, the applicants submit the following:

The Government are contradicted by the Supreme Court's judgment which must now be considered as the relevant authority on the applicable Austrian law. It cannot be maintained that the censorship was illegal because it was exercised in relation to a private prosecution offence, the Supreme Court having held that defamation of an official gives rise to a public prosecution and thus is an offence on which a measure of censorship can be based.

However, more important are the grounds for the Supreme Court's conclusion that the conditions of this offence had been met. It was presupposed that the prison officers had "necessarily" acquired knowledge of the contents of the letter because it was required that the mail be handed to them unsealed. This is in line with the actual practice, which is unlawful. Sections 187 and 188 of the Code of

Criminal Procedure recognise the unlimited right of remand prisoners to correspond unless the correspondence is incompatible with the aims of the detention on remand or involves public prosecution offences. The control of correspondence is the exclusive task of the investigating judge. This differs from the regulations applicable to convicted prisoners which permit the control of correspondence by the prison staff. It therefore was unlawful in the present case that prison officers acquired knowledge of the contents of the second applicant's letter, in particular as the investigating judge was bound by the rule of confidentiality. The requirement of "publicity", which is a constituent element of the offence, was thus not fulfilled. The applicants accordingly maintain that, despite the Supreme Court's judgment, there was no public prosecution offence.

As regards the form of censorship, the Supreme Court confirmed the violation of the law because the aim of securing evidence was disregarded. A clarification of the question whether a criminal

offence had been committed by the second applicant's remarks was also in the interest of the applicants who could only in this way have obtained an objective decision on the justification of the censorship. The form of censorship therefore interfered with the applicants' possibility to make use of an effective remedy. Thus, it is not correct to say that the investigating judge took a measure which she was not authorised to take, but which did not interfere with the second applicant's rights.

The judgment of the Supreme Court therefore did not provide redress for the applicants' complaint and therefore they can still claim to be victims in this respect.

3. Length of detention on remand

The second applicant claims that she was detained in order to compel her to give evidence against the first applicant in a matter which had nothing to do with her own case, namely the suspicion raised against the first applicant that he had committed a murder. The relevant proceedings against the first applicant were later discontinued. If the second applicant had been prepared to give evidence against the first applicant in that case, she would have been released immediately. The investigation in her own case was neither complex nor difficult.

The Government have not indicated which acts of investigation were carried out during the relevant period nor have they shown why investigations taking such a long time were necessary. No investigation took place for a long time concerning the charges underlying the second applicant's detention. The extensive investigations which did take place concerned other matters.

The second applicant's statement that the investigation was concluded in May 1983 is based on information obtained from the investigating judge. The second applicant did not contribute to the length of the proceedings by her letter to the investigating judge of 16 June 1983. The relevant facts had not been sufficiently investigated by that time. Her representative made private investigations after having consulted the file which led to the submissions in the above letter. As a consequence the charges had to be modified. If the authorities had conducted appropriate investigations, they could have come to the same conclusion earlier. The investigations against the second applicant started in January 1982, i.e. long before this applicant was arrested. The arguments submitted in her defence remained the same throughout. The indictment was based on facts which were known prior to her arrest.

The only reason mentioned in the decision to prolong her detention was the possible involvement of the first applicant in the

offences with which the second applicant was charged. This means that the second applicant was detained on grounds concerning another person. Moreover, the Court decided to exclude the relevant facts from the proceedings against the second applicant. Thereafter these facts were no longer in issue in the case against the second applicant.

In Austria it is unusual to impose detention on remand in a case of criminal bankruptcy. This offence carries a maximum penalty of two years' imprisonment, but more often the courts impose fines on a conditional basis. The second applicant's conviction was the consequence of her failure to appear at the second trial. The first judgment had been quashed by the Graz Court of Appeal and it was doubtful whether the conditions of the offence of criminal bankruptcy were actually met.

The above considerations are relevant for judging the justification of the second applicant's detention. It was based on a charge of fraud and the sentence which could be imposed for this offence. The danger of absconding was related to this charge. The alleged danger of repetition did not really exist.

The investigations were not conducted speedily; they were not delayed by the second applicant. Her submissions related to the circumstances of her detention and in this respect Section 115 of the Code of Criminal Procedure was disregarded which provides that the authorities shall make the necessary arrangements (e.g. by copying the files) in order to prevent that remedies delay the proceedings.

THE LAW

a) As to the complaints of the first applicant concerning the criminal proceedings against him and his subsequent detention

1. The first applicant complains of the criminal proceedings against him before the Regional Court of Klagenfurt, alleging violations of Article 6 (Art. 6) of the Convention on various grounds, including, in particular, partiality of the Court because of the participation of excluded and biased judges. The applicant further alleges a violation of Article 7 (Art. 7) of the Convention in these proceedings and a violation of Article 5 (Art. 5) of the Convention as regards his subsequent detention as a convicted prisoner.

After having obtained the parties' observations in writing on the complaint relating to the impartiality of the Court, the Commmission considers that further clarifications are necessary which should be obtained from the parties at an oral hearing. The first applicant's other complaints, including his complaints under Article 5 (Art. 5), are in the Commission's opinion so closely linked to the issue of the impartiality of the Court that they cannot be severed. The Commission therefore reserves its decision concerning these complaints of the first applicant.

b) As to the complaints of both applicants concerning the censorship of a letter

2. Both applicants complain of the censorship of a letter which the second applicant addressed to the first applicant during the period when both were remand prisoners in the prison of the Regional Court of Klagenfurt. The applicants have invoked Articles 8 and 13 (Art. 8, 13) of the Convention in this respect.

After having obtained the parties' observations in writing on these complaints, the Commission considers that, also concerning this

part of the application, further clarifications are necessary which should be obtained from the parties at an oral hearing. The Commission therefore reserves its decision concerning these complaints of the applicants.

c) As to the complaints of both applicants concerning the refusal of a visit in prison

3. Both applicants complain of the refusal of a visit to them by Mr. Peters and invoke Article 5 (Art. 5) of the Convention which guarantees the right to liberty and security of person. However, this provision is not applicable to prison visits. An interference with such visits may raise issues under the Convention only if it affects other Convention rights such as the right to respect for a person's private or family life under Article 8 (Art. 8) of the Convention or the right to effective legal assistance insofar as this is included in Article 6 (Art. 6) of the Convention. The applicants have not claimed under Article 6 (Art. 6) that the refusal of Mr. Peters' visit had any impact on the proceedings in which he represented the applicants. As he was no relative of the applicants, the concept of family life within the meaning of Article 8 (Art. 8) did not apply and the only possible basis for an issue under the Convention could therefore be an interference with the applicants' private life. However, it may remain open whether or not the applicants' relations with Mr. Peters were of such a nature that they could be considered as forming part of their "private life" within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention. The interference with the visiting right was in any event justified under Article 8 para. 2 (Art. 8-2) as it appears that Mr. Peters was suspected of having, on an earlier occasion, tried to smuggle objects into the prison which might have endangered the prison's security. The refusal of the visit in these circumstances was both lawful and necessary in a democratic society to prevent disorder in the prison. The applicants' above complaint is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

d) As to the complaint of the second applicant concerning the length of her detention on remand

6. The second applicant complains of the length of her detention on remand and, in particular, of the fact that it was extended beyond the statutory time-limit of six months. Article 5 para. 3 (Art. 5-3) of the Convention provides that everyone detained in accordance with para. 1 (c) (Art. 5-1-c) of the same Article shall, inter alia, be entitled to trial within a reasonable time or to release pending trial.

It is true that the second applicant's detention was extended in accordance with the applicable legal provisions beyond the normal time-limit of six months in view of the complexity of the investigation and her first trial was held nearly nine months after her arrest. However, the Commission does not find that the total length of her detention was unreasonable in the circumstances. The second applicant admits that extensive investigations were conducted during the first period of her detention, although it appears that they did not concentrate on the facts for which she was ultimately convicted. Nevertheless, these investigations apparently related to charges which were included in the original warrant of arrest. Investigations concerning the main charge of fraud were still pending when the Court of Appeal authorised the prolongation of her detention on remand. They were concluded within six weeks after that date and her detention was shorter than the maximum period authorised. The fact that the original charges were not in the end maintained but replaced by a different charge of criminal bankruptcy is not relevant in this context. The new charge related to the same facts. It follows that the second applicant's above complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

1. ADJOURNS THE PROCEEDINGS

a) on the first applicant's complaints relating to the criminal proceedings against him and his subsequent detention;
b) on the complaints of both applicants concerning the censorship of a letter;

2. DECLARES INADMISSIBLE

a) the complaint of both applicants concerning the refusal of a visit in prison;
b) the complaint of the second applicant concerning the length of her detention on remand.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)