F I N A L

AS TO THE ADMISSIBILITY OF

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

The European Commission of Human Rights sitting in private on 8 May 1989, the following members being present:

MM. S. TRECHSEL, Acting President
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 September 1983 by P. and P. against Austria and registered on 31 January 1984 under file No. 10802/84;

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* Taking into account proposed amendments of Mr. Trechsel to the text as distributed during the May session. These amendments are marked in the margin.

Having regard to:

- the Commission's partial decisions of 13 May 1987 and 15 December 1988;

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

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

- the parties' submissions at the hearing on 8 May 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 applicants were rejected by the Commission's partial decisions of 13 May 1987 and 15 December 1988. As regards the remaining parts of the application, the facts agreed between the parties may be summarised as follows:

I. The criminal proceedings against the first applicant

On the basis of a warrant of arrest issued by the Regional Court (Landesgericht) 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 an investigating 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 investigating 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 disqualified 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, who, according to the first applicant, had committed an abuse of public powers in connection with the investigation. 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 declared themselves to be biased in the proceedings against the latter judge, the challenge was allowed and the case referred to the Regional Court of Leoben. The proceedings in question were later discontinued by a decision of the Review Chamber of that Court.)

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 (Oberster Gerichtshof) 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 for a deduction of 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. At some time in the early summer of 1983 the investigating judge censored a letter addressed by the second applicant to the first applicant by crossing out and making illegible certain passages. These passages were not reconstrued in the subsequent proceedings, but according to the applicants they contained critical remarks on prison officers in the following terms:

(German)

> "Ich frage mich, ob in diesem Affenhaus noch jemand normal ist .... Im Leben sind es Würstchen, hier sind sie, glauben sie, Götter. Einige von den Beamten sind ja Gäste wie wir. Dauernd wird hier spioniert bei den Frauen, züchtige Spanner, dieses Affenpack! Ich hasse

es so!"

(Translation)

> "I ask myself whether there is anybody left in this ape house who is still normal ... In normal life they are miserable creatures, here they think they are gods. Some of the officers are guests like us. They are for ever spying on the women, these apes are proper peeping toms! I hate it!"

The second applicant complained to the Review Chamber of the Regional Court. She claimed that the form of censorship was unlawful as Section 187 para. 2 of the Code of Criminal Procedure provided only for the stopping of letters but not for making them illegible. She further submitted that censorship was permissible only in respect of 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. In the applicant's view the relevant passages in the letter 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 crossing out of certain passages in the 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.

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 that the censorship of their correspondence during their detention on remand 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. Also it is allegedly unlawful and contrary to Article 8 that the letter was read

by prison officers, as assumed by the Supreme Court. 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.

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, inter alia, concerning the first applicant's complaint that two professional judges had taken part in his trial who previously had acted as investigating judges as well as 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.

On 15 December 1988 the Commission rejected certain further complaints of both applicants by a partial decision while reserving the decision concerning the first applicant's complaints relating to the criminal proceedings against him and his subsequent detention, and the complaints of both applicants concerning the censorship of a letter. In this respect the Commission decided to invite the parties, in accordance with Rule 42 para. 3 (b) of its Rules of Procedure, to submit further observations orally at a hearing on admissibility and merits.

The hearing took place on 8 May 1989. The parties were represented as follows:

For the Government

Ambassador Helmut Türk, Legal Adviser of the Ministry for Foreign Affairs, Vienna

Mr. Wolf Okresek, Adviser, Federal Chancellery, Vienna

Ms. Irene Gartner, Adviser, Federal Ministry of Justice, Vienna

For the applicants

Mr. Reinhard Peters, Munich

Ms. Anne Marie Schwarz, Adviser

THE LAW

a) As to the complaints of the first applicant regarding his trial and detention

1. The first applicant alleges violations of Article 6 para. 1 (Art. 6-1) of the Convention in several respects. Insofar as relevant, this provision reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ..."

The first applicant complains that two professional judges of the Regional Court, before which he was tried, had earlier acted as investigating judges and that for this reason the Court was not "impartial". He further observes that by virtue of Section 68 para. 2 of the Austrian Code of Criminal Procedure the judges were disqualified to sit and that therefore the Court was not a "tribunal established by law".

The Government claim that the first applicant has not exhausted the domestic remedies because he failed to challenge the judges at the trial and to lodge a plea of nullity on the ground that they had previously acted as investigating judges. However, the Commission notes the Supreme Court's finding that the taking of these remedies would not have been of any use as the first applicant previously waived his right to challenge the judges on this ground. The Commission considers that in these circumstances the remedies indicated by the Government would not have been effective, and that for this reason the first applicant must be absolved from using them. It follows that this complaint cannot be declared inadmissible, under Article 27 para. 3 in conjunction with Article 26 (Art. 27-3+26) of the Convention, for non-exhaustion of domestic remedies.

The question nevertheless arises whether the first applicant can claim to be a victim, in the sense of Article 25 (Art. 25), of a violation of his rights under Article 6 (Art. 6) of the Convention having waived objections against the participation of the disqualified judges. In this respect the Commission recalls that a person may validly waive invoking the guarantees under Article 6 (Art. 6) of the Convention (cf. No. 1197/61, Dec. 5.3.62, Collection 8 pp. 68, 73; No. 6903/75, Deweer v. Belgium, Comm. Report 5.10.78, paras. 55 et seq., confirmed by Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 25, paras. 49 et seq.; No. 9177/80, Dec. 6.10.81., D.R. 26 pp. 255, 258). However, the Commission also notes the first applicant's submission that his waiver was obtained in an unlawful procedure and was therefore invalid. The Commission does not consider it appropriate to examine the validity of the waiver at the present stage of the proceedings.

As regards the participation of two judges in the first applicant's trial who had earlier acted as investigating judges, the Commission recalls that such participation may raise an issue concerning the impartiality of the court (cf. in particular Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A no. 86; No. 9976/82, Ben Yaacoub v. Belgium, Comm. Report 7.5.86; and e contrario, No. 10486/83, Hauschildt v. Denmark, Comm. Report 16.7.87). The Government submit in the present case that the functions exercised by the two professional judges of the Regional Court in their previous capacity as investigating judges were of a limited nature. This is contested by the first applicant who refers to the wide powers conferred upon investigating judges in Austria and who argues that the presiding judge, Dr. K., had a profound knowledge of his case.

The Comission has considered these arguments, but finds that the first applicant's above complaints cannot be rejected at this stage as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. Having regard to the Court's De Cubber judgment of 26 October 1984 (Eur. Court H.R., Series A no. 86), it finds that these complaints raise complex issues of fact and law regarding the application of Article 6 para. 1 (Art. 6-1) of the Convention which require a determination on the merits.

The applicant has also complained that the Regional Court was not impartial as required by Article 6 para. 1 (Art. 6-1) of the Convention

because the trial took place although he had previously challenged the judges of the Court and this challenge had not yet been determined. The Commission notes, however, that the challenge was made in criminal proceedings instituted by the applicant against the investigating judge, Dr. St., and that in the present case the applicant's plea of nullity based on this ground was rejected because the applicant had not referred to that challenge at the trial. The Government conclude from this that the applicant has not exhausted the domestic remedies in this respect as required by Article 26 (Art. 26) of the Convention. The applicant objects that at the trial he did not know that the judges concerned had declared themselves to be biased in the case of Dr. St.

The Commission considers that the whole issue is so closely related to the above complaint concerning the disqualification of the same judges because they had previously acted as investigating judges that it cannot be separated. This part of the application must therefore also be considered on the merits.

2. The first applicant submits that the trial was unfair because the investigating judge, Dr. St., had admitted to have been biased. The investigation should therefore have been considered as void.

However, Dr. St. had not declared himself to be biased in relation to the investigation in the applicant's case, but in the context of the above criminal proceedings instituted against him by the first applicant. The Commission finds that this does not justify the conclusion that he was also biased in the criminal proceedings against the applicant at the time when he conducted the investigation against him. A challenge for bias was in fact rejected by the President of the Regional Court of Klagenfurt on 26 May 1983. The fact that the applicant later instituted criminal proceedings against Dr. St. equally does not show that the investigation was carried out improperly or that Dr. St. was biased. It follows that the trial court did not act unfairly when using the result of the investigation.

There is thus no appearance of unfairness of the proceedings in this respect, and this part of the application must therefore be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The first applicant further complains that the Regional Court acted unfairly and violated the presumption of innocence in that it drew certain conclusions from allegedly unproven assumptions. Insofar as the judgment did not contain statements regarding the form of his guilt and the professional character of his actions the judgment allegedly lacked a legal basis and violated Article 7 (Art. 7) of the Convention.

With regard to the judicial decisions complained of, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222/236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45). In the present case the Commission finds that the first applicant's above complaints under Article 6 paras. 1 and 2 (Art. 6-1-2) and Article 7 para. 1 (Art. 7-1) of the Convention have not been substantiated. These complaints are therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The first applicant finally complains that certain periods of detention on remand were not fully counted towards his sentence, and he alleges a breach of Article 5 (Art. 5) of the Convention in this respect. Insofar as relevant this provision reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..."

The Commission observes that the prison sentence which the first applicant had to serve constituted a lawful detention after conviction by a competent court and was thus covered by Article 5 para. 1 (a) (Art. 5-1-a) of the Convention. This holds true both as regards the original sentence imposing a prison term of three years and as regards the subsequent reduced sentence of two years and nine months.

The Convention does not require that periods of remand custody should be counted towards the sentence. As regards the two detention periods which were not fully taken into account in the first applicant's revised sentence, the Regional Court found that Section 38 of the Penal Code did not apply as these detention periods were neither directly related to the case at issue nor imposed subsequently to the acts of which the first applicant was convicted.

In these circumstances there is no appearance that the first applicant's detention following his conviction was unlawful. This part of the application is therefore manifestly ill-founded.

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

6. Both applicants complain of the censorship of a letter which the second applicant addressed to the first applicant. In this respect they invoke Article 8 (Art. 8) of the Convention which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission notes that only the second applicant, being the author of the letter, exhausted the domestic remedies, but the first applicant was affected as well, being the addressee. The Commission

finds that, in the circumstances, he was absolved from exhausting the domestic remedies which would have been identical to those taken by the second applicant.

The Commission next notes the Supreme Court's judgment of 20 October 1987 according to which the censorship was as such justified although the form in which it was carried out was unlawful. It further notes the Supreme Court's finding that the applicants suffered no disadvantage as it would in any event have been possible to stop the letter. This raises the question whether the applicants can still claim to be victims, within the meaning of Article 25 of the Convention, of the measure of censorship in question. The Government deny this.

The Commission accepts that, by the Supreme Court's above judgment, the applicants obtained redress in respect of their complaint that the form of censorship had been unlawful because Section 187 para. 2 of the Code of Criminal Procedure allows only the stopping of letters, but not the crossing out of passages. However, the applicants did not obtain redress insofar as they claimed that the measure of censorship was in substance unjustified. In this respect the applicants still can claim to be victims of their rights under the Convention.

The Government submit that the measure of censorship in question was justified under Article 8 para. 2 (Art. 8-2) of the Convention as being lawful and necessary in a democratic society for the prevention of disorder or crime, and for the protection of the rights of others. The applicants deny this, stressing in particular that the actual contents of the letter did not justify the censorship and that the forwarding procedure as described by the Supreme Court involved a further violation of Article 8 (Art. 8) in that it was unlawful and unjustified to allow the mail of remand prisoners to be read by prison officers.

The Commission has considered these arguments and finds that the applicants' above complaints cannot be rejected at this stage as being manifestly ill-founded. Having regard to the Court's Silver and Others judgment of 25 March 1983 (Eur. Court H.R., Series A no. 61) it finds that these complaints raise complex issues of fact and law regarding the application of Article 8 (Art. 8) of the Convention which require a determination on the merits.

7. The applicants finally complain that because of the particular form of censorship the actual content of the letter in question could not be established in the complaints procedure before the Review Chamber in which they could not take part and that, for this reason, their right under Article 13 (Art. 13) of the Convention to an effective remedy before an national authority was violated. Article 13 (Art. 13) reads as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission notes, however, that in its decision of 20 October 1987 the Supreme Court declared the particular form of censorship applied in this case as having been unlawful. As the applicants obtained redress in this respect, they can no longer claim to be victims of a violation of Article 13 (Art. 13) based essentially on the particular form of censorship applied. It is clear that apart from this there existed a remedy whereby the justification of the censorship could be reviewed. The fact that this remedy was unsuccessful in the present case cannot be seen as a violation of Article 13 (Art. 13). The applicants' complaint in this respect is

therefore manifestly ill-founded.

For these reasons, the Commission

1. DECLARES ADMISSIBLE, without prejudging the merits of the case,

   a) the complaint of the first applicant that the Regional Court which tried his case was not an "impartial tribunal established by law";

   b) the complaint of both applicants that the censorship of the letter addressed by the second applicant to the first applicant and its reading by prison officers were unjustified;

2. DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — Acting President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)