AS TO THE ADMISSIBILITY OF

Application No. 18640/91 and 19574/92
by U.R. P.
against Austria

The European Commission of Human Rights sitting in private on 2 March 1994, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

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

Having regard to the applications introduced on 4 March 1991 and 19 December 1991 by U.R. P. against Austria and registered on 7 August 1991 and 3 March 1992 respectively under file Nos. 18640/91 and 19574/92;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1934, is an Austrian national. At present he is serving a life sentence for, inter alia, murder in the prison of Karlau. Before the Commission he is represented by Mr. R. Wandl, a lawyer practising in St. Pölten (Austria).

The applicant has previously lodged Application No. 16697/90 against Switzerland concerning defamation proceedings instituted by the applicant against a journalist and declared inadmissible on 30 November 1992, and Application No. 13618/88 against Austria, concerning alleged lack of access to the case file during the preliminary investigations in the criminal proceedings against the applicant in the so-called "Lucona Case", and declared inadmissible on 11 October 1989.

The present applications concern the alleged influence of a press campaign on the applicant's conviction (No. 18640/91) and defence rights as regards witnesses and experts (No. 19574/92) in the above proceedings.

The facts, as submitted by the applicant, may be summarised as follows:

On 23 January 1977 the ship "Lucona" sank off the Maldives in the

Indian Ocean, causing the death of six sailors. The freight which went down with the ship allegedly consisted of an uranium recycling plant, which the applicant had insured in the amount of 31,360,725,-- Swiss francs with a major Austrian insurance company. Doubt arose as to the circumstances of the accident and the nature of the freight.

In 1983 criminal proceedings were instituted against the applicant. He was suspected of having insured material without any value as a uranium recycling plant with an insurance company, the Bundesländerversicherung, having organised the shipping of the insured freight and caused the sinking of the ship and having tried to cash the insurance policy.

In March 1988 the public prosecutor filed an indictment against the applicant and a co-accused, charging the applicant with fraud and intentional causing of danger by explosives.

On 30 January 1990 the trial (Hauptverhandlung) against the applicant and a co-accused commenced before a Court of Assizes of the Vienna Regional Court for Criminal Matters sitting with a jury (Geschwornengericht). The public prosecutor extended the bill of indictment and charged the applicant also with murder and attempted murder.

The criminal proceedings were of considerable public interest and commented upon in the Austrian and also foreign media. It appears that on 31 January 1990, in the course of the trial, the "Kurier", a Vienna daily newspaper, published an article with the headline "Public prosecutor extends charge in 'Lucona Case': 'It was murder!'". Eventually, the publisher of the newspaper was convicted for having discussed the probable result of criminal proceedings in a way which could influence the outcome of the proceedings.

On 31 May 1990 the bench of the Court of Assizes granted the defence's request for evidence to search for the sunken ship to recover the wreck and to take photographs and metallurgic samples.

On 15 January 1991 the search for the ship commenced under the supervision of the presiding judge.

On 15 February 1991 the presiding judge announced at a court hearing that the search, which had been interrupted temporarily, would continue and fixed the next hearing for 7 March 1991. Eventually in February 1991 the wreck was discovered at a depth of some 4200 metres in the Indian Ocean off the Maldives, and a video documentation was made.

On 7 March 1991 a further hearing of the Court of Assizes took place at which an expert for explosives and one for ship building presented their revised expert opinion.

According to the transcripts of the court hearing, the applicant's lawyer made the following requests for taking of evidence: He requested to have read out in court the statements of Mr. D (a co-suspect of the applicant prosecuted separately) as evidence that the applicant could not be the author of the offence. He secondly requested that the expert for explosives be ordered to complete his investigations and calculations and to prepare an expert opinion showing that the ship could also have been blown up from outside. He thirdly requested to hear as witnesses the three surviving members of the crew not heard by the court, in order to prove that the applicant had not caused the sinking of the ship. Furthermore, the applicant's lawyer requested the court to adjourn the trial in case it should grant these requests. Counsel explained that he had had received the opinions of the expert for shipbuilding and for explosives. He would need more time for having these expert opinions examined by an expert at his disposal for preparing the further defence of the applicant.

The Court of Assizes allowed the applicant's first request for evidence (concerning D.), but dismissed the others. It found that it was not necessary to order the expert for explosives to prepare a further opinion on the issue that the ship might have been blown up from outside, as the expert had already stated in a clear manner and without contradictions that the ship could not have been blown up from outside. Nor was it necessary to hear the three witnesses proposed by the applicant because they could not make any statements on the question whether the applicant had caused the blowing up of the ship.

On 8 March 1991 the last of altogether 56 court hearings took place before the Court of Assizes. According to the transcript of the hearing, the applicant's lawyer repeated his request for the hearing of three of the surviving crew members as witnesses. They should confirm that all members of the crew had access to all rooms of the ship, that a time fuse which had allegedly been used would have been too easy to detect.

The bench of the Court of Assizes dismissed this request. It found that according to common sense a switch fixed on a container could be so small and well concealed that none of the crew members would have noticed it.

Upon a question by the presiding judge, the defence and the public prosecutor then stated that they had no more requests for evidence. Thereupon the presiding judge closed the taking of evidence and the bench of the Court of Assizes retired to deliberate on the list of questions to be put to the jury. When neither the defence nor the public prosecutor requested any corrections or amendments the list was handed over to the jury. The public prosecutor and the defence made their final submissions. The presiding judge closed the hearing and announced that the deliberation of the jury would take place on 11 March 1991. The members of the jury were released from their duties during the weekend.

During the weekend, after the members of the jury had been released from their duties on 8 March 1991, the media reported extensively on the trial and in particular on the final submissions of the public prosecutor and the defence.

On 11 March 1991 the jury found the applicant guilty of murder, attempted murder, attempted aggravated fraud and intentional causing of danger by explosives. The applicant's co-accused was acquitted.

The Court of Assizes found that the applicant by falsely declaring that on the ship "Lucona", which sank on 23 January 1977 in the Indian Ocean, there was a uranium recycling plant in the value of SF 31,360,725,--, although the freight only consisted of material without value, and by his attempt to cash the insurance policy, had committed fraud. Moreover, the applicant had installed in at least one of the boxes of the freight explosive material and a fuse, and had by igniting the explosive material which caused the sinking of the ship murdered six members of the crew and attempted to murder the others who were rescued by chance. The bench sitting with the jury set the applicant's sentence at twenty years' imprisonment.

On 12 April 1991 the applicant filed a plea of nullity (Nichtigkeitsbeschwerde) and an appeal (Berufung) with the Supreme Court (Oberster Gerichtshof). He complained that the Court of Assizes had refused his requests for further evidence of 7 March 1991 that the members of the jury had been influenced by a press campaign, particularly virulent as from the time when the Court of Assizes had decided to search for the wreck of the ship. On 8 March 1991, a Friday, the members of the jury had been released from their duties by the bench of the Court of Assizes until their deliberation on the verdict on Monday 11 March 1991. Though the press vastly covered the

criminal proceedings against the applicant during that weekend, the Court of Assizes failed to shield the members of the jury against this influence.

Also the public prosecutor appealed against the sentence requesting a life sentence to be imposed on the applicant.

On 1 October 1991 the Supreme Court dismissed the applicant's plea of nullity.

The Supreme Court found that the decision of the Court of Assizes of 8 March 1991 to postpone the jury's deliberations on the verdict until Monday 11 March 1991 and not to order them to deliberate immediately, did not constitute a reason for nullity of the proceedings. Moreover, the applicant's lawyer who was aware of this way of proceeding of the Court of Assizes did not object.

The Supreme Court further considered that the Court of Assizes had acted correctly in dismissing counsel's request for granting him a delay to have the opinions prepared by the court appointed experts considered by an expert of his choice. The expert opinions were clear and without contradictions, leaving no doubts as to their correctness. Moreover, the applicant's lawyer had made this request explicitly only in case all his other requests for taking of evidence were granted. Furthermore, the Code of Criminal Procedure did not provide for a time for reflection which the parties should enjoy once the trial had started and only provided for expert opinions prepared by experts appointed by the court under oath and not for private expert opinions. Thus, the only purpose of private expert opinions could consist in assisting the defence in formulating questions to the court experts; this, however, had to be done without causing delays in the proceedings.

The Supreme Court finally held that the Court of Assizes had rightly refused to hear the witnesses proposed by the applicant on 7 and 8 March 1991, as the defence had failed to indicate why these persons could make any statements which would go beyond the statements of the three other surviving crew members, who had been questioned as witnesses. The proposed witnesses had already made written statements in the proceedings, and one of them had been heard by the Rotterdam Regional Court. These statements coincided with the statements of the three surviving crew members heard by the Court of Assizes. In any event, all experts had agreed that an ignition device with a switch could without any difficulties have been installed while the ship was loaded in a way that its discovery need not have been feared.

On 28 January 1992 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal while allowing the public prosecutor's appeal, and sentenced the applicant to life imprisonment.

On 24 April 1992 the Vienna Regional Court dismissed the applicant's request for having his case re-opened. His appeal against the Regional Court's decision remained unsuccessful.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention that the criminal proceedings conducted against him were not fair.

a) He submits that during the criminal proceedings he was the victim of a press campaign which influenced the jury. The publisher of the daily newspaper "Kurier" was convicted by the Vienna Court of Appeal for having discussed the probable result of criminal proceedings in a way which could influence the outcome of the proceedings by having published on 31 January 1990, at the beginning of the trial, an article with the headline "Public prosecutor extends charge in 'Lucona Case': 'It was murder!'". Moreover, the Court of Assizes, when releasing the

members of the jury from their duty on 8 March 1991 until their deliberations on the verdict on Monday 11 March 1991 failed to shield them against influences from the media during the weekend.

b) The applicant further complains that he was not granted adequate time to prepare his defence. He submits that the Court of Assizes refused to adjourn the trial and thus did not grant him the possibility to have the expert opinion presented in the court hearing of 7 March 1991 examined by an expert of his own choice. This would have been necessary to prepare his further defence. Moreover, the Court of Assizes refused his requests to hear three of the surviving crew members as witnesses.

2. Finally, the applicant complains that his request for re-opening of his case was dismissed by the Austrian courts.

THE LAW

1. The Commission considers it necessary to order the joinder of the present applications under Rule 35 of its Rules of Procedure.

2. The Commission notes that an aspect of the criminal proceedings against the applicant was already the subject of Application No. 13618/88 declared inadmissible on 11 October 1989. Under Article 27 para. 1 (b) (Art. 27-1-b) the Commission shall not deal with any petition under Article 25 (Art. 25) which is substantially the same as a matter which it has already examined, provided it contains no relevant new information.

The Commission notes that the complaint raised in Application No. 13618/88 - alleged lack of access to the case-file during the investigation - is not repeated in the present applications. It finds moreover that the present applications contain new relevant information, in that the proceedings which were still pending in 1989 have in the meanwhile been terminated by the decision of the Court of Appeal of 28 January 1992. It follows that the present applications are not inadmissible under Article 27 para. 1 (b) (Art. 27-1-b) of the Convention.

3. The applicant complains under Article 6 (Art. 6) of the Convention that the criminal proceedings conducted against him were not fair, in that he was the victim of a press campaign which influenced the jury.

Article 6 para. 1 (Art. 6-1) of the Convention provides inter alia that, in the determination of any criminal charge against him, everyone is entitled to a fair hearing by an impartial tribunal.

The Commission recalls that, in certain cases, a virulent press campaign could prejudice the fairness of the trial by influencing public opinion and, consequently, the jurors called upon to decide on the guilt of an accused and, thus, involve the liability of the State (see No. 8403/78, Dec. 15.10.80, D.R. 22 p. 100 at 127; No.10486/83, Dec. 9.10.86, D.R. 49 p.86 at 101).

The Commission notes that the "Lucona Case" aroused considerable interest in the press, given the importance attached to the circumstances of this case and the criminal investigations by Austrian public opinion. In one case of reporting the Austrian authorities intervened in order to protect the fairness of the proceedings and criminal proceedings were conducted against the editor of a newspaper which led to his conviction by the Vienna Court of Appeal.

The Commission, having carefully considerd the applicant's submissions regarding the reporting on his case in the media, finds no indication of an influence upon the members of the jury which could be regarded as prejudicial to the fairness of the proceedings as a whole.

In particular, he failed to show that the press published more than an account of what had happened in court, i.e. the presentation of the evidence and the submissions of the prosecution and defence at the trial.

The Commission also notes that the applicant, assisted by counsel, did not object to the release of the jury members from their duties between 8 and 11 March 1991.

The press coverage alone cannot, in the Commission's opinion, be sufficient to consider that the proceedings were, as a whole, unfair.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant complains further that the Court of Assizes refused his request for time to prepare his defence in the form of a private expert opinion and his request to hear further witnesses.

The Commission will consider these complaints from the angle of Article 6 para. 1, taken together with the principles inherent in para. 3 (b) and (d) (Art. 6-1+6-3-b+6-3-d) (cf. mutatis mutandis; Eur. Court H.R., Bönisch judgment of 6 May 1985, Series A no. 92, p. 15, para. 29; Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29).

a) The Commission recalls that the right to a fair trial does not require that a national court should appoint, at the request of the defence, further experts when the opinion of the court expert supports the prosecution case (Eur. Court H.R., Brandstetter judgment of 28 August 1991, Series A no. 211, p. 22, para. 46).

The Commission notes that on 15 February 1991 the presiding judge informed the parties that the next court hearing would take place on 7 March 1991. At this hearing the court appointed experts for shipbuilding and explosives presented their revised reports. The Commission finds that the applicant and his lawyer had the possibility to put questions to these experts at the court hearing of 7 March 1991. The applicant did not show that, on this occasion, he could not have availed himself of the assistance of an expert of his own choice to formulate his questions to the court appointed experts. In any case, the applicant's lawyer made his request for adjournment dependent upon the success of all his other requests for evidence which were, however, all but one dismissed. Moreover, at the hearing on 8 March 1991, applicant's counsel expressly stated that the defence had no further requests to take evidence.

b) As regards the applicant's complaint about the refusal of his request to hear three witnesses named by him, the Commission recalls that Article 6 para. 3 (d) (Art. 6-3-d) of the Convention does not give an absolute right to the examination of every witness proposed by the defence (Eur. Court H.R., Engel and others judgment of 6 June 1976, Series A no. 22, p. 38, para. 91). In particular a court is justified in refusing to summon witnesses when it considers that their statements could not be of any relevance to the case (see No. 4124/69, Dec. 13.7.70, Collection 35 p. 132; No. 10486/83, Dec. 9.10.86, D.R. 49, p. 86 at 102).

In the present case the Court of Assizes, on 7 and 8 March 1991, dismissed the applicant's request for the hearing of these witnesses as it found that their statements would not be relevant. The Supreme Court, upon the applicant's plea of nullity, considered in particular that the proposed witnesses had already made written statements in the proceedings and one of them had been heard by the Rotterdam Regional Court and these statements coincided with the statements of the three surviving crew members heard by the Court of Assizes. Moreover, the

Supreme Court pointed out that all experts had agreed that an ignition device with a switch could without any difficulties have been installed while the ship was loaded in a way that its discovery need not have been feared. Furthermore, there is no indication that the Court of Assizes by refusing the applicant's request to hear further witnesses failed to consider relevant evidence or acted in an arbitrary and unfair manner.

c) In these circumstances, the Commission finds that the conduct of the trial by the Court of Assizes as regards experts and witnesses did not entail a disadvantage which was likely to influence the material position of the defence at the trial and thus, the outcome of the proceedings.

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

5. Finally, the applicant complains that his request for re-opening his case was dismissed by the Austrian courts.

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

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously

1. ORDERS THE JOINDER OF APPLICATIONS NOS. 18640/91 AND 19574/92;

2. DECLARES THE APPLICATIONS INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)