AS TO THE ADMISSIBILITY OF

Application No. 22714/93
by Alfred WORM
against Austria

The European Commission of Human Rights sitting in private on 27 November 1995, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

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 28 July 1993 by Alfred WORM against Austria and registered on 30 September 1993 under file No. 22714/93;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 2 May 1995 and the observations in reply submitted by the applicant on 23 June 1995;

- the decision of the First Chamber of 18 October 1995 to relinquish jurisdiction in favour of the Plenary Commission;

- the deliberations of the plenary Commission on the application of the six months' time-limit;

Having deliberated;

Decides as follows:

THE FACTS

The facts, as submitted by the parties, may be summarised as follows.

The applicant, born in 1945, is an Austrian national, residing in Vienna. In the proceedings before the Commission he is represented by Mr. W. Masser, a lawyer practising in Vienna.

A. The particular circumstances of the case

The applicant, who is a journalist by profession, was working for "profil", an Austrian periodical dealing mostly with politics. He investigated in and reported on the case of Mr. Androsch, a former Minister of Finance, who was involved in the following sets of criminal proceedings.

In 1989 Mr. Androsch was convicted by the Vienna Court of Appeal (Oberlandesgericht), of having made false statements as a witness in two incidents. The Court found that he had, before a parliamentary investigation committee (Untersuchungsausschuß), inter alia wrongly stated that certain amounts of money on an account belonging to him, had been put at his disposal by a Mr. S., whereas they had actually been transferred from anonymous accounts, belonging to him and his wife. Further, he had, in criminal proceedings against financial officers charged with abuse of authority, stated that several anonymous accounts belonged to Mr. S., although they belonged to him, his wife and his mother.

In 1991 the Vienna Regional Criminal Court (Landesgericht für Strafsachen) conducted criminal proceedings against Mr. Androsch concerning charges of tax evasion. It held hearings, inter alia, on 25 and 26 May 1991.

On 1 July 1991 the periodical "profil" published a two-page article by the applicant, relating to the above proceedings.

The article starts with describing the atmosphere in the court room, stating that Mr. Androsch and his counsel displayed a condescending attitude towards the presiding judge and the public prosecutor. In contrast, the latter two are described as being well-prepared and polite. Then the article turns to the anonymous accounts at issue in the proceedings. It suggests that the construction used was quite simple, because Mr. Androsch, being in office as a Minister of Finance until January 1981, could count on the misinterpreted loyalty of his financial officers. After he left, these officers were busy covering up the whole matter. When this was no longer possible, as a court started investigations, Mr. Androsch's advisers delayed the proceedings. Next, the article turns to Mr. Androsch's defence, stating that he brought his deceased adoptive father into play, to whom he had already earlier ascribed black money, which the latter had actually never owned. The article then states that inter alia the Vienna Court of Appeal and the Finance Authorities had already proved that Mr. Androsch was lying, as regards this question. It continues as follows:

<German>

"Der Geldfluß der sieben Schwarzgeldkonten läßt keine andere Auslegung als die der Steuerhinterziehung durch Androsch zu. Dessen Verantwortung vor Gericht war - nach so vielen Jahren hätte man sich zumindest zurechtgezimmerte Argumente erwartet - blamabel: Immer dann, wenn ihn Richter Zeilinger auf den Punkt fragte, flüchtete er sich entweder in Erinnerungslücken oder schob den toten 'Wahlvater' vor. Sogar der verblichene Sir Arthur Stein, der Erforscher der

Seidenstraße, wurde strapaziert: Von ihm will er ein Legat geerbt haben."

<Translation>

"The sloshing around of money of the seven "black" accounts permits no other interpretation than that Androsch was evading taxes. His defence before the court - after so many years one would at least have expected tenable arguments to have been made up - was disgraceful: Whenever judge Zeilinger asked him a precise question he escaped into memory lapses or dragged in his deceased 'adoptive father'. Even the late Sir Arthur Stein, the explorer of the silk route, was invoked: He is supposed to have inherited a legacy from him."

The article goes on to state that Mr. Androsch did not present any new arguments, while his counsel tried to describe him as a victim of politics. Then it turns again to the psychological relationship between the presiding judge and the accused, stating that the presiding judge remained polite, even when ostentatious self-confidence of the accused obviously unnerved him. Mr. Androsch on the other hand turned more and more to the public in the court room, holding general speeches instead of answering precise questions. Finally, the article reports that the proceedings will continue in autumn, in order to take further evidence. It suggests that this will give Mr. Androsch time to reflect on whether it can be reconciled with the principles of the rule of law that a Minister of Finance holds black money accounts.

Subsequently, the applicant was charged under S. 23 of the Media Act (Mediengesetz) as regards the passage quoted above, for having exercised prohibited influence on criminal proceedings (verbotene Einflußnahme auf ein Strafverfahren).

On 12 May 1992 the Vienna Regional Criminal Court acquitted the applicant. It found that the text at issue was not likely to influence the outcome of the proceedings against Mr. Androsch and that it was not established that the applicant had acted with such an intention.

The Court recalled that the Vienna Regional Criminal Court sitting as a court of two judges and two lay judges (Schöffengericht) had, on 8 October 1991, convicted Mr. Androsch of having evaded taxes between 1973 and 1981 and had imposed a fine of AS 1,8 million. The Court found that, in establishing whether the incriminated passage had been likely to influence the result of these proceedings, the wording and contents of the article as a whole, as well as the contents of the proceedings reported upon, the person of the accused, Mr. Androsch, and the person of the applicant had to be taken into account. The article, unlike court reports of the scandal press, analysed the conduct of the presiding judge, the public prosecutor, the defence counsel and in particular the accused, Mr. Androsch, almost as a psychologist would do it.

Further, the Court found that it was clear for every reader, who was vaguely familiar with the issue, that the applicant, who had been working for "profil" as a journalist since many years, had intensely dealt with the so called "Causa Androsch" and had frequently reported upon it. It appeared from the article that the applicant assumed that the investigations of the Finance Authorities were correct. He subjected the statements made by the accused at the trial on 25 and 26 May 1991 to a critical discussion from a psychological point of view. However, his way of writing and the wording used were not likely to influence these proceedings. Even to a lay judge, the applicant's person and his activities as a journalist in the "Causa Androsch" were well-known. Thus he would not expect the applicant to give a neutral account of the proceedings. Moreover, it could not be established that the applicant had acted with the intention to influence the outcome of the proceedings, in particular as it appeared from his statements in court that he was convinced that Mr. Androsch would in any case be

convicted.

On 19 October 1992, the Vienna Court of Appeal, on the Public Prosecutor's appeal, held a hearing in presence of the applicant and his counsel. The applicant was questioned and stated in particular that the first sentence of the incriminated passage, namely that "the sloshing around of money of the seven "black" accounts permits no other interpretation than that Mr. Androsch was evading taxes", was a quote from the public prosecutor's statement during the trial. The latter had also frequently referred to the judgment of the Vienna Court of Appeal in the proceedings against Mr. Androsch relating to charges of having made false statements as a witness.

At the end of the hearing, the operative part of the judgment as well as the relevant reasons were given orally. The Court convicted the applicant under S. 23 of the Media Act for having exercised prohibited influence on criminal proceedings and imposed a fine of 40 daily rates of AS 1.200 each (i.e. AS 48,000) or 20 days' imprisonment in case of default of payment.

The Court found that the applicant had subjected Mr. Androsch's defence, i.e. evidence in criminal proceedings, not only to a critical discussion from a psychological point of view, as assumed by the Regional Court, but to a negative evaluation. It also contested the Regional Court's assumption that everybody including the lay judges knew the applicant's long-standing commitment in the Androsch case and would, therefore, not be influenced by his article. It was in no way certain that the lay judges regularly read "profil". On the contrary, in spectacular proceedings like the ones at issue, it happened frequently that lay judges followed the reports in papers they did not usually read. There was no doubt that, at least with regard to the lay judges, the reading of the incriminated article was likely to influence the outcome of the criminal proceedings.

Moreover, the applicant's expertise and involvement in the subject matter were rather an argument for, not against, establishing that he had written the article with the intention to influence the outcome of the proceedings. He had made research in the case since 1978 and had written more than hundred articles about it. From the beginning he had been convinced that Mr. Androsch had committed tax evasion. In the incriminated article he had not only criticised Mr. Androsch's statement but had also anticipated the outcome of the proceedings, namely the conviction of the accused.

The judgment was served on the applicant on 25 March 1993.

B. Relevant domestic law

S. 23 of the Media Act (Mediengesetz) is entitled 'prohibited influence on criminal proceedings' (Verbotene Einflußnahme auf ein Strafverfahren) and reads as follows:

<German>

"Wer in einem Medium während eines gerichtlichen Strafverfahrens nach rechtskräftiger Versetzung in den Anklagestand, ... , vor dem Urteil erster Instanz den vermutlichen Ausgang des Strafverfahrens oder den Wert eines Beweismittels in einer Weise erörtert, die geeignet ist, den Ausgang des Strafverfahrens zu beeinflussen, ist vom Gericht mit Geldstrafe bis zu 180 Tagessätzen zu bestrafen."

<Translation>

"Anyone who discusses, subsequent to the indictment, ..., (and) before the first instance judgment in criminal proceedings, the probable outcome of these proceedings or the value of evidence in a way likely to influence the outcome of the proceedings shall be fined by

the court up to 180 daily rates.

COMPLAINTS

The applicant complains under Article 10 of the Convention that his conviction under S. 23 of the Media Act violated his right to freedom of expression. He submits in particular that there was a public interest in reporting about the proceedings against Mr. Androsch, as he was a former Minister of Finance, and the alleged tax evasion concerned the period when he had been in office.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 July 1993 and registered on 30 September 1993.

On 17 January 1995 the Commission (First Chamber) decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 2 May 1995. The applicant replied on 23 June 1995.

On 18 October 1995 the First Chamber decided to relinquish jurisdiction in favour of the plenary Commission.

THE LAW

The applicant complains under Article 10 (Art. 10) of the Convention that his conviction under S. 23 of the Media Act violated his right to freedom of expression.

Article 10 (Art. 10), so far as relevant, reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ..., for the protection of the reputation or rights of others, ... or for maintaining the authority and impartiality of the judiciary."

a. The Government submit that the applicant failed to introduce his complaint within the six months' time-limit laid down in Article 26 (Art. 26) of the Convention. In the circumstances of the case, the time-limit should start running at the date of the oral pronouncement of the final decision, which was given by the Vienna Court of Appeal on 19 October 1992. In particular the Government, referring to the Commission's decision on the admissibility of Application No. 5759/72 (Dec. 20.5.76, D.R. 6 p. 15), argue that the applicant and his counsel were present when the judgment was pronounced. Moreover, all the reasons were given orally, using almost the same wording as the later written version of the judgment, as a draft had already been prepared.

The applicant contests the Government's view. He submits that the time-limit under Article 26 (Art. 26) of the Convention should only start to run on the date on which the written version of the final decision was served, i.e. on 25 March 1993. Referring to the Commission's decision on the admissibility of Application No. 10889/84 (Dec. 11.5.89, D.R. 56 p. 40), he argues that even if a judgment has been pronounced orally, the applicant is not in a position to acquaint himself with its entire reasoning, until he has received the written version. In particular where complex legal issues are concerned, an

applicant cannot be expected to introduce his complaint on the basis of an oral decision. Moreover, he argues that he was heard in considerable detail at the hearing of 19 October 1992 before the Vienna Court of Appeal. Therefore, he did not expect and was not aware of the existence of a readily prepared draft judgment.

According to Article 26 (Art. 26) of the Convention, the "Commission may only deal with the matter ... within a period of six months from the date on which the final decision was taken."

The Commission, in the case relied upon by the Government, which related to complaints about the alleged unfairness of criminal proceedings, has held that, if a judgment is delivered in open court in presence of the applicant's lawyer, the period starts to run from the date of delivery provided that the applicant would understand from the spoken judgment that his grievances had not been corrected or remedied (No. 5759/72, Dec. 20.5.1976, loc. cit.).

In a case concerning the length of criminal proceedings, in which first the operative part of the final judgment was notified to the applicant, and the reasons later, the Commission found that the period of six months must be counted from the date on which the applicant received the full text, giving reasons, of the judgment at issue. The Commission considered that the serving merely of the operative provisions of the decision rejecting his appeal did not enable the applicant to decide whether an application to the Commission was likely to succeed or to give reasons, even briefly, for such an application (No. 9299/81, Dec. 13.3.84, D.R. 36 p. 20). Likewise, in a further case concerning the alleged unfairness of criminal proceedings, in which only the operative part of the final judgment was given orally, the Commission found that the period of six months only started to run from the moment when the applicant was able to acquaint himself with the reasons for the judgment concerned, which were made public when the text of the judgment was lodged with the court registry (No. 10889/84, Dec. 11.5.88, D.R. p. 40, p. 56 et seq.).

The question whether the period of six months should run from the oral pronouncement of the final decision or the service of the written text of the judgment, raised by the parties in the case of Oberschlick v. Austria, was left open, as the application had been filed on the last day of the period of six months if it should have to be counted from the date when the judgment was pronounced orally (No. 11662/85, Dec. 10.5.89, not published; see also Eur. Court H.R., Oberschlick judgment of 23 May 1991, Series A no. 204, p. 21, paras. 38-40).

In recent decisions, the Commission found that since an applicant, who was acquitted in the second instance proceedings, only complained about the length of the proceedings, he could lodge his application with the Commission within six months from the pronouncement of the operative part of the final judgment without knowing the reasons for the judgment (No. 19528/94, Dec. 30.11.94, not published; No. 19029/91, Dec. 16.1.95, not published).

Moreover, the Commission considered that when an ex tempore judgment is delivered orally, in the presence of an applicant's counsel, and reasons are given, the later formal order recording the judge's decision which merely repeats the operative part of the judgment and contains no further reasoning, is irrelevant for the determination of the period of six months (No. 24856/94, Dec. 7.12.94, not published).

Furthermore, in a case relating to complaints under Article 6 (Art. 6) about the alleged unfairness of disciplinary proceedings, the Commission found that, as a general rule, the period of six months must be counted from the date of the final decision and that this rule applied in particular when the decision concerned had been pronounced in open court and in the presence of the applicant's counsel

(No. 24631/94, Dec. 28.2.95, not published).

The Commission observes that in cases where, pursuant to domestic law, the applicant did not obtain knowledge of the final decision other than by its notification, the date of the notification of the full text of the decision was considered relevant for the purposes of calculating the period of six months (No. 9908/82, Dec. 4.5.83, D.R. 32 p. 266; No. 17116/90, Dec. 11.5.92, not published; No. 24631/94, Dec. 28.2.95, not published; see also Eur. Court H.R., Otto-Preminger-Institut judgment of 20 September 1994, Series A no. 295-A, p. 16, para. 41).

The Commission considers it desirable in the interests of potential applicants as well as the High Contracting States against which applications are brought to clarify the date from which the period of six months should be counted and for this purpose to reconsider its previous case-law.

The Commission recalls that the period of six months provided for in Article 26 (Art. 26) has a double aim. It has the primary purpose of ensuring legal certainty (No. 6181/73, Dec. 5.10.74, Collection 46 p. 188; No. 9587/81, Dec. 13.12.82, D.R. 29 p. 228; No. 10626/83, Dec. 7.05.85, D.R. 42 p. 205), but also fulfils the need of providing the person concerned with sufficient time to evaluate the desirability of submitting an application to the Commission and to decide on the content thereof (cf. No. 10889/84, loc. cit.; No. 19029/91, Dec. 16.1.95, not published).

The Commission finds that Article 26 (Art. 26) contains an autonomous rule which has to be interpreted and applied in a given case in such a manner as to ensure to any applicant claiming to be the victim of a violation by one of the Contracting Parties of one of the rights set forth in the Convention and its Protocols the effective exercise of the right of individual petition, pursuant to Article 25 para. 1 (Art. 25-1) of the Convention. The Commission therefore considers that when, in accordance with domestic law, the written text of the final decision has to be served on the applicant, or in case of legal assistance, upon his counsel, the period of six months should be counted from the date of this service, irrespective of whether the judgment concerned, or part thereof, was previously pronounced orally.

The Commission notes that the Vienna Court of Appeal, on 19 October 1992, convicted the applicant, after he had been acquitted by the lower court, and that this decision was served on 25 March 1993. The application was introduced on 28 July 1993, i.e. less than six months later.

In conclusion, the Commission finds that the applicant has lodged his application within the period of six months laid down in Article 26 (Art. 26) of the Convention.

b. As regards the merits of the application, the Government submit that the prohibition contained in S. 23 of the Media Act is necessary in a democratic society in order to enable the judges, and in particular the lay judges, to exercise their office independently without undue influence through media campaigns. The said provision only incriminates such reports on criminal proceedings as are likely to influence their outcome and are disseminated before the judgment of first instance. In the present case, the applicant, in writing that no other interpretation was possible than that Mr. Androsch was evading taxes, made a statement, which amounted to a typical media prejudgment of the accused. He thereby went beyond the limits of a permissible reporting on the trial. Moreover, the Government submit that the interference complained of was also necessary for the protection of the accused, and in particular to guarantee that the presumption of innocence was respected by the media. Finally, the Government submit that the fine imposed on the applicant was not disproportionate to these aims.

The applicant contests the necessity of the interference with his right to freedom of expression. He submits in particular that his aim was not to discuss the value of Mr. Androsch's statements as evidence in the pending criminal proceedings, but to comment on his moral responsibility and the condescending attitude he adopted during the trial. He points out that Mr. Androsch was a former Minister of Finance and that the charges of tax evasion related to the time when he was in office. Moreover, the applicant submits that Mr. Androsch had already in 1989 been convicted of making false statements in the context of the same facts as were relevant in the criminal proceedings at issue. He contests that the incriminated statements were likely to influence the court, as Mr. Androsch's former conviction was a fact which the court had to take into account in any case. In the circumstances of the case, the public interest in reporting on this matter outweighed the interest in protecting the court from undue influence.

After an examination of this issue in the light of the parties' submissions, the Commission considers that it raises questions of fact and law, which can only be determined by an examination of the merits. It follows that the application cannot be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE,
without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)