

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 20602/92

Zoltán Szücs

against

Austria

REPORT OF THE COMMISSION

(adopted on 3 September 1996)

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I. INTRODUCTION	
1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.	
A. The application	
2. The applicant is a Hungarian citizen, born in 1971 and resident in Halaszetelek (Hungary). He was represented before the Commission by Mr. T. Schreiner, a lawyer practising in Eisenstadt.	
3. The application is directed against Austria. The respondent Government were represented by their Agent, Mr. F. Cede, Ambassador, Head of the International Law Department at the Federal Ministry of Foreign Affairs.	
4. The case concerns the applicant's complaints about the failure of the Court of Appeal to pronounce publicly its decisions taken in the proceedings on his compensation claim for detention on remand. The applicant invokes Article 6 para. 1 of the Convention.	
B. The proceedings	
5. The application was introduced on 24 August 1992 and registered on 9 September 1992.	
6. On 29 June 1994 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on the admissibility and merits of the applicant's complaint under Article 6 para. 1 of the Convention relating to the lack of a public pronouncement by the Court of Appeal of its decisions on the applicant's application for compensation. It declared the remainder of the application inadmissible.	
7. The Government's observations were submitted on 11 October 1994. The applicant replied on 9 December 1994.	
8. On 23 October 1995 the Commission declared the applicant's remaining complaints admissible.	

9. The text of the Commission's decision on admissibility of 23 October 1995 was sent to the parties on 6 November 1995 and they were invited to submit such further information or observations on the merits as they wished. Neither the Government nor the applicant made any further observations.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

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

12. The text of this Report was adopted on 3 September 1996 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under

the Convention.

14. The Commission's decisions on the admissibility of the application are annexed hereto as Appendices I and II.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

16. On 8 October 1990 the investigating judge of the Wiener Neustadt Regional Court (Kreisgericht) opened preliminary investigations and issued a warrant of arrest (Haftbefehl) against the applicant and three others for suspicion of aggravated professional fraud committed between 9 and 31 May 1990 in Austria. The investigating judge found that there existed a danger of absconding as the suspects had no fixed abode in Austria and had left Austria after having committed the offences they were suspected of. He further found that there existed a danger of collusion as it was unclear how the suspects had come into possession of the credit card of Mrs. S.K. which was used in committing the offences.

17. On 25 February 1991 the applicant was arrested upon his entry into Austria at the Austro-Hungarian border.

18. On 26 February 1991 an investigating judge at the Eisenstadt Regional Court questioned the applicant, who stated that he had only accompanied the other suspects on a trip to Italy as their driver and had never been present when they went shopping. The investigating judge ordered the applicant's detention on remand. Referring to the warrant of arrest of 8 October 1990, he found that there was a reasonable suspicion that the applicant together with other suspects had committed aggravated fraud by buying goods of a value of some 200.000 AS in different shops in Austria with a stolen credit card (issued to Mrs. S.K.). According to information received from Interpol, the applicant together with three other suspects had been arrested on 31 May 1990 in Italy and had then been found in possession of the stolen credit card. After an interrogation by the Italian police the applicant had been expelled from Italy. The investigating judge also considered that there was a danger of collusion, a danger of the applicant absconding and a danger of commission of new offences.

19. On 4 April 1991 the applicant was heard again by the investigating judge.

20. On 12 April 1991 the public prosecutor requested that the expert opinion of a graphologist be taken for ascertaining whether the applicant had signed the credit card purchase receipts.

21. On 15 April 1991 the applicant requested that an ex officio defence counsel be appointed and waived his right to a hearing in regard to the examination of the lawfulness of his detention on remand (Haftprüfungsverhandlung). On the same day the investigating judge ordered that a defence counsel be appointed for the applicant, that a graphologist prepare an expert report within 10 days and that samples of the applicant's handwriting be taken.

22. On 6 May 1991 the graphological expert stated that the signatures on the purchase receipts were unlikely to have been made by the applicant. On the same day, upon a request by the public prosecutor,

the investigating judge decided to discontinue the criminal proceedings and ordered the applicant's release from detention on remand.

23. On the same day the applicant requested compensation for his detention.

24. On 8 May 1991 the Judges' Chamber (Ratskammer) at the Wiener Neustadt Regional Court dismissed the applicant's claim for compensation under Section 2 para. 1 (b) of the Criminal Proceedings Compensation Act (Strafrechtliches Entschädigungsgesetz). The Judges' Chamber found that at the time of the applicant's arrest a serious suspicion against him had existed. Criminal proceedings had been discontinued against him because clear evidence could not be produced. Nevertheless a serious suspicion against him continued to exist.

25. On 17 May 1991 the applicant again requested that compensation be granted pursuant to Section 2 para. 1 (b) of the Criminal Proceedings Compensation Act.

26. On 27 May 1991 the applicant appealed against the decision of 8 May 1991 to the Vienna Court of Appeal (Oberlandesgericht). He submitted, inter alia, that the Judges' Chamber's finding according to which a serious suspicion against him continued to exist violated the principle of presumption of innocence. He also submitted that the length of his detention had been unreasonable and requested compensation for unlawful detention under Section 2 para. 1 (a) of the Criminal Proceedings Compensation Act in this respect.

27. On 9 January 1992 the Court of Appeal dismissed the applicant's appeal. It found that, as the other suspects could not be traced in Austria, it had been necessary to establish whether the signatures on the purchase receipts with the credit card had been made by the applicant, who could have disguised himself as a woman on the occasion of the purchases. The graphological expert had only indicated that the signatures were unlikely to have been made by the applicant. Furthermore, there was still the suspicion that he had aided and abetted the other suspects. Therefore, the suspicion against the applicant had not been dissipated.

28. On the same day, the Court of Appeal, in a separate decision, dismissed the applicant's claim for compensation for unlawful detention under Section 2 para. 1 (a) of the Criminal Proceedings Compensation Act. The applicant did not appeal to the Supreme Court (Oberster Gerichtshof) against this decision.

B. Relevant domestic law

a. Compensation for pecuniary damage resulting from detention on remand

29. The Criminal Proceedings Compensation Act (Strafrechtliches Entschädigungsgesetz) provides for compensation for pecuniary loss resulting from detention on remand. The conditions to be met are laid down in Sections 2 and 3. Section 2 para. 1 (a) concerns the case of unlawful detention on remand. Section 2 para. 1 (b) specifies as conditions that the accused has been acquitted, or that the proceedings against him have been otherwise discontinued and that the suspicion that he has committed the offence in question no longer subsists, or that there is a bar to prosecution which already existed at the time of his detention.

30. Section 6 para. 2 stipulates that where a person is acquitted or

criminal proceedings against him are discontinued by a court, the same court is competent to decide whether the conditions of Section 2 para. 1 (b) and Section 3 are met. If criminal proceedings are discontinued by decision of the investigating judge, the Judges' Chamber decides on a request for compensation. In these proceedings the detained person has to be heard and, if necessary, evidence has to be taken. The detained person and the Prosecutor's Office have a right to appeal to the superior court which can take, if necessary, further evidence. According to Section 6 para. 4 a decision on a compensation claim under Section 2 para. 1 must be served on the person concerned but is not to be made public.

31. If the said courts find that the conditions under Sections 2 and 3 are met, the person concerned must file a request with the Department of Finance (Finanzprokuratur) for acknowledgment of his claim.

32. If there is no decision upon his request within six months or if his claim is partly or fully refused, the person concerned can institute civil court proceedings against the Republic of Austria (Sections 7 and 8). The final decision in the proceedings under the Compensation Act is binding on the civil courts, whose task it is to assess the damage the person concerned has sustained on account of his having been kept in detention.

33. Generally, no public hearings are conducted before the Judges' Chambers and before the Courts of Appeal (in proceedings upon appeals (Beschwerden) against decisions of the Judges' Chambers). Both decide in private session, after having heard the Public Prosecutor's Office or the Senior Public Prosecutor's Office, respectively (Section 32 para. 1 and Section 35 para. 2 of the Code of Criminal Procedure).

b. Inspection of files under Section 82 of the Code of Criminal Procedure

34. According to Section 82 of the Code of Criminal Procedure it is left to the discretion of the courts, in other cases than those mentioned specifically in the Code of Criminal Procedure, to grant leave to third parties for inspection of a file if they show that the inspection is necessary for raising a claim for compensation or for other reasons.

c. Access by the public to decisions of the highest courts in Austria

35. It is the practice of the Constitutional Court (Verfassungsgerichtshof) and of the Administrative Court (Verwaltungsgerichtshof) to provide everybody upon simple request addressed to the Court's registry with decisions given by these courts. In addition they publish a selection of their decisions on an annual basis. Following an amendment of the Supreme Court Act in 1991 also the judgments of the Supreme Court (Oberster Gerichtshof) are available to the general public upon request. The Supreme Court also publishes a selection of its judgments on an annual basis.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

36. The Commission has declared admissible the applicant's complaint under Article 6 para. 1 (Art. 6-1) of the Convention that in the proceedings on his compensation claim for detention on remand the decisions of the Court of Appeal were not pronounced publicly.

B. Points at issue

37. Accordingly, the issue to be determined is whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

C. Article 6 (Art. 6) of the Convention

a. Applicability of Article 6 (Art. 6)

38. Article 6 para. 1 (Art. 6-1) of the Convention reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

39. The applicant submits that a claim for compensation under Section 2 para. 1 (a) and (b) of the Criminal Proceedings Compensation Act must be considered a civil right within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. The decision of a criminal court on the well-foundedness of such a claim is a decisive step in the proceedings for obtaining compensation since civil courts are bound by such a decision of a criminal court.

40. The Government submit that the proceedings under the Criminal Proceedings Compensation Act concern a public law claim. They point out that the Commission, in the case of *B. v. Austria* (No. 9661/82, Dec. 14.7.83, D.R. 34 p. 127) did not apply Article 6 (Art. 6) to proceedings under the said Act, finding that the claim is not comparable to claims under the Law of Damages, as it does not require punishable conduct by a civil servant or a violation of the law at all. Moreover, the proceedings under the Criminal Proceedings Compensation Act, as far as they are conducted by the criminal courts, are only of a preparatory nature. Once the criminal courts have decided that the compensation claim is well-founded in principle, compensation has to be requested from the Federal Government, represented by the Department of Finance. If the Department does not decide within six months or if it refuses the claim, an action must be brought before the civil courts. Therefore, the outcome of the contested proceedings was not directly decisive for the applicant's civil rights.

41. The Commission recalls that Article 6 para. 1 (Art. 6-1) extends to disputes (contestations) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 para. 1 (Art. 6-1) into play (see *Eur. Court HR, Zander v. Sweden* judgment of 25 November 1993, Series A no. 279-B, p. 38, para. 22; *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, pp. 45-46, para. 56; *Masson and Van Zon v. Netherlands* judgment of 27 October 1995, Series A no. 327-A, p. 17, para. 44).

42. As regards the question whether a right is of a "civil" character, the Commission recalls that the concept of "civil rights and obligations" is not to be interpreted solely by reference to the respondent State's domestic law and that Article 6 para. 1 (Art. 6-1) applies irrespective of the status of the parties, as of the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter (Eur. Court HR, *Baraona v. Portugal* judgment of 8 July 1987, Series A no. 122, p. 17-18, para. 42). For a right to be a civil right it is sufficient that the action is pecuniary in nature and is founded on an alleged infringement of rights which are likewise pecuniary rights (Eur. Court HR, *Éditions Périscope v. France* judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40).

43. In the present case, there was a dispute over the applicant's right to compensation for detention on remand. Under the Criminal Proceedings Compensation Act the applicant had a right to compensation if the conditions laid down therein had been met. The applicant claimed that he was entitled to compensation under the relevant provisions of Austrian law. The competent criminal courts, however, found that the requirements laid down in the Criminal Proceedings Compensation Act for such a claim were not met. Moreover, the Commission notes that according to Section 6 of the Criminal Proceedings Compensation Act, the decision taken by the criminal courts in the proceedings at issue is binding. Irrespective of the necessity of further procedural steps, their outcome was, therefore, directly decisive for the applicant's right to compensation.

44. Further, the compensation claim asserted by the applicant, in accordance with Section 1 of the Criminal Proceedings Compensation Act, concerned financial compensation for pecuniary damage resulting from detention on remand. Therefore, the right at issue was a "civil right" within the meaning of Article 6 (Art. 6) of the Convention, notwithstanding the origin of the dispute and the fact that the criminal courts had jurisdiction (see *mutatis mutandis*, *Éditions Périscope v. France* judgment, loc. cit.).

45. In the Commission's view the present case must be distinguished from the *Masson and Van Zon* case. In that case the Court had found that a compensation claim for detention on remand under the relevant provisions of the Dutch Code of Criminal Procedure did not constitute a right recognised by domestic law as the granting of such compensation was left essentially to the discretion of the courts (Eur. Court HR, *Masson and Van Zon v. the Netherlands* judgment, loc. cit. p. 19, para. 52). In the present case, however, the applicant had a right to compensation for detention on remand under the Criminal Proceedings Compensation Act, provided the conditions laid down therein were met.

46. For these reasons, the Commission finds that Article 6 para. 1 (Art. 6-1) of the Convention is applicable to the proceedings at issue.

b. Compliance with Article 6 para. 1 (Art. 6-1)

aa. The Austrian reservation to Article 6 (Art. 6)

47. In the applicant's view, the Commission is not prevented by the Austrian reservation to Article 6 (Art. 6) of the Convention from examining his complaint. He submits that the Act of 18 August 1918 on Compensation for Detention Pending Investigation may have regulated issues similar to those of the Criminal Proceedings Compensation Act. However, this in itself is not sufficient to remove the matter of compensation for detention as a whole from the application of Article 6

(Art. 6) of the Convention.

48. The Government consider that the applicant's complaint regarding the lack of the public pronouncement of the courts' decisions in the compensation proceedings is covered by the Austrian reservation to Article 6 (Art. 6) of the Convention which provides as follows:

"The provision of Article 6 (Art. 6) of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitutional Act."

49. The Government submit that the Austrian reservation is in accordance with Article 64 (Art. 64) of the Convention. The relevant provision excluding public pronouncement of the court's decision on a claim for compensation was in force at the time the reservation was made. Although the Criminal Proceedings Compensation Act dates from 1969, the previous Act of 18 August 1918 on Compensation for Detention Pending Investigation similarly provided in Section 3 para. 1 that the State's obligation to pay compensation should be determined by a decision which should not be made public but should be served on the person affected. Furthermore the reservation is sufficiently specific for the purpose of Article 64 (Art. 64) of the Convention. As regards the requirement of the "brief statement of the law" the reservation reproduces almost literally the contents of Article 90 of the Federal Constitution. From these words it can be deduced that the reservation refers to procedural laws in the judicial sphere which contain regulations concerning the publicity of proceedings deviating from Article 6 (Art. 6) of the Convention.

50. Article 90 of the Federal Constitution provides:

"Hearings in civil and criminal cases before the trial court shall be oral and public. Exceptions may be prescribed by law."

51. Article 64 (Art. 64) of the Convention reads as follows:

"1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned."

52. The Commission recalls that the European Court of Human Rights has considered the question of the compatibility of declarations and reservations with Article 64 (Art. 64) of the Convention on several occasions (see, for example, Eur. Court HR, *Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132; *Weber* judgment of 22 May 1990, Series A no. 177; *Chorherr v. Austria* judgment of 25 August 1993, Series A no. 266-B; *Gradinger v. Austria* judgment of 23 October 1995, para. 51, to be published in Series A no. 328-C). The Court has held that Article 64 para. 1 (Art. 64-1) of the Convention requires "precision and clarity" and that the requirement set forth in Article 64 para. 2 (Art. 64-2) that a reservation shall contain a brief statement of the law concerned is not a "purely formal requirement but a condition of substance" which "constitutes an evidential factor and contributes to legal certainty" (*Belilos v. Switzerland* judgment, paras. 55 and 59).

53. In the case of Stallinger and Kuso the Commission, when examining the validity of the Austrian reservation under Article 64 (Art. 64) of the Convention, has found as follows:

"In this respect the Commission notes that the reservation at issue does not contain a "brief statement" of the law which is said not to conform to Article 6 (Art. 6) of the Convention. From the wording of the reservation it might be inferred that Austria intended to exclude from the scope of Article 6 (Art. 6) all proceedings in civil and criminal matters before ordinary courts insofar as particular laws allowed for non-public hearings. However, a reservation which merely refers to a permissive, non exhaustive, provision of the Constitution and which does not refer to, or mention, those specific provisions of the Austrian legal order which exclude public hearings, does not "afford to a sufficient degree 'a guarantee ... that [it] does not go beyond the provision expressly excluded' by Austria" (see Gradinger judgment, para. 51, Chorherr judgment, para. 20). Accordingly, the reservation does not satisfy the requirements of Article 64 para. 2 (Art. 64-2) of the Convention. In such circumstances the Commission finds that there is no need also to examine whether the other requirements of Article 64 (Art. 64) were complied with (Stallinger and Kuso v. Austria, Comm. Report 7.12.95, para. 61)."

54. The Commission therefore considers that the Austrian reservation cannot prevent it from examining the applicant's complaint.

bb. The absence of a public pronouncement of the Court of Appeal's decisions

55. The applicant complains that, contrary to what is required by Article 6 para. 1 (Art. 6-1) of the Convention, the Court of Appeal did not pronounce publicly its decisions taken in the compensation proceedings. He submits that he could have requested neither a public hearing nor the public pronouncement of the decisions taken, since this was not provided for in the relevant law. The possibility that third parties inspect the file under Section 82 of the Code of Criminal Procedure is no substitute for the public pronouncement of decisions, since this right is too restrictive as it requires that these persons must demonstrate a legitimate interest in the outcome of the proceedings at issue.

56. The Government submit that the Vienna Court of Appeal, when deciding on the applicant's appeal, could take its decision on the basis of the file. According to the Convention organs' case-law, a public hearing, including the public pronouncement of a decision, is only necessary when a court is concerned with establishing the facts. Referring to the Sutter judgment of the Court (Eur. Court HR, Sutter v. Switzerland judgment of 22 February 1984, Series A no. 74), the Government also finds that the requirement of public pronouncement of the decision was met because third parties could be given access to the files and be allowed to make copies, if they proved a legitimate interest.

57. The Commission recalls that the public character of proceedings before judicial bodies referred to in Article 6 para. 1 (Art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1, (Art. 6-1) namely a fair trial, the guarantee of which is one of the fundamental principles of

any democratic society, within the meaning of the Convention (Eur. Court HR, Pretto and Others v. Italy judgment of 8 December 1983, Series A no. 71, p. 11, para. 21).

58. The Commission observes that the European Court of Human Rights has dealt on various occasions with the requirement of public pronouncement of judgments under Article 6 para. 1 (Art. 6-1) of the Convention. The Court confirmed that for the purpose of Article 6 para. 1, (Art. 6-1) the qualification of a judicial act under domestic law as a "decision" (Beschuß) as opposed to a "judgment" (Urteil) was not decisive for the operation of the requirement of public pronouncement of the given act (see Eur. Court HR, Axen v. Germany judgment of 8 December 1983, Series A no. 72, p. 13, para. 29). The Court also held that the form of publicity to be given to a judgment under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1 (Art. 6-1) (Eur. Court HR, Axen v. Germany judgment, loc. cit., p. 14, para. 31; Pretto and Others v. Italy judgment, loc. cit., p. 12, para. 26). Thus, in the Axen case the Court found that the public pronouncement of a judgment of a court of highest instance was not necessary if the judgments by the lower courts had been pronounced publicly (Eur. Court HR, Axen v. Germany judgment, loc. cit., p. 14, para. 32). In the Pretto case the Court found that, having regard to the limited jurisdiction of the Court of Cassation, the fact that this court deposited its judgment with the Court's registry, thus making the full text of the judgment available to everyone, was a sufficient means to ensure publicity of judgments under Article 6 para. 1 (Art. 6-1) of the Convention (Eur. Court HR, Pretto and Others v. Italy judgment, loc. cit., p. 13, para. 27). In the Sutter case the Court found that a public pronouncement of a judgment given by the Military Court of Cassation was not necessary as the access of the public to the judgment was secured by other means, that is by asking for a copy of the judgment from the Court's registry and by its subsequent publication in an official collection of judgments (see Eur Court HR, Sutter v. Switzerland judgment, loc. cit., p. 14, para. 33).

59. The Commission notes that two distinct proceedings on claims by the present applicant for compensation for detention on remand took place. The first set of proceedings concerned his compensation claim under Section 2 para. 1 (b) of the Criminal Proceedings Compensation Act, on the ground that the suspicion against him had been dissipated. In this set of proceedings the Judges' Chamber at the Wiener Neustadt Regional Court dismissed the applicant's claim and the Vienna Court of Appeal dismissed his appeal on 9 January 1992. The second set of proceedings concerned the compensation claim under Section 2 para. 1 (a) of the Criminal Proceedings Compensation Act, on the ground that his detention on remand had been unlawful. In this set of proceedings the Court of Appeal, also on 9 January 1992, dismissed the applicant's claim and the applicant did not appeal to the Supreme Court. The Commission is therefore confronted with two distinct decisions given by the Court of Appeal.

60. In the Government's view, the applicant should have asked for an oral hearing, including the public pronouncement of the decisions taken. His failure to do so must be deemed a waiver of this right. However, the Commission shares the applicant's opinion that, since the relevant provisions did not provide for a public hearing or the public pronouncement of decisions taken in proceedings on compensation for detention on remand, he could not be deemed to have waived such a right. In this respect the Commission recalls that the question of whether or not an applicant has requested a public hearing becomes irrelevant for examining compliance with Article 6 para. 1 (Art. 6-1) of the Convention when the respective domestic law excludes the holding

of public hearings (see Eur. Court HR, Diennet v. France judgment of 26 September 1995, para. 34, to be published in Series A no. 325-A).

61. Furthermore, with regard to the applicant's compensation claim under Section 2 para. 1 (a) of the Criminal Proceedings Compensation Act the Government argues that the applicant should have filed an appeal with the Supreme Court. In the Commission's view, however, the applicant could not be expected to have filed an appeal with the Supreme Court against the dismissal of his compensation claim under Section 2 para. 1 (a) of the Criminal Proceedings Compensation Act. The Government has not shown that an appeal, solely based on the argument that the decision of the Court of Appeal had not been pronounced publicly, would have had any prospect of success in view of the fact that this was not provided for in the procedural rules to be applied by the Court of Appeal. The access which interested members of the public might have had to a decision given by the Supreme Court on an appeal by the applicant (see para. 35 above) cannot, in the circumstances of the present case, be considered as a substitute for a sufficient publicity of the decision of the Court of Appeal at issue.

62. In the Government's view the public pronouncement of the decisions taken by the Court of Appeal was not necessary in the instant case as the Vienna Court of Appeal, when deciding on the applicant's appeal, could take its decision on the basis of the file. According to the Convention organs' case-law a public hearing, including the public pronouncement of a decision, was only necessary when a court is concerned with establishing the facts.

63. In this respect the Commission recalls that, provided a public hearing has been held at first instance, the absence of such a hearing before a second or third instance court may be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, (Art. 6) although the appellant was not given the opportunity of being heard in person by the appeal or cassation court (Eur. Court HR, Jan-Åke Andersson v. Sweden judgment of 29 October 1991, Series A no. 212, p. 45, para. 27).

64. The Commission observes that in the proceedings on the applicant's compensation claim under Section 2 para. 1 (b) of the Criminal Proceedings Compensation Act no public hearing was held before the Judges' Chamber, nor was its decision pronounced publicly. In the proceedings on the applicant's compensation claim under Section 2 para. 1 (a) of the Criminal Proceedings Compensation Act the Court of Appeal, acting as court of first instance, neither held a public hearing nor pronounced its decision in public. Furthermore, since the issue of criminal responsibility is quite distinct from the question of compensation for detention, the compensation proceedings cannot be conceived as "appeal proceedings" in respect of the underlying criminal proceedings in the course of which detention on remand had been ordered. Moreover, the Commission observes that neither in the criminal proceedings nor in the compensation proceedings was there a public hearing as required by Article 6 para. 1 (Art. 6-1) of the Convention.

65. In any event, the question of whether Article 6 para. 1 (Art. 6-1) of the Convention requires, in a given set of proceedings, a court to hold a public hearing must be separated from the question whether and in which form a decision so taken has to be made public. The Commission finds that although a court may, in compliance with Article 6 para. 1, (Art. 6-1) in some cases take a decision without previously having held a public hearing, this does not mean that the court is dispensed from giving its decision the publicity required by

Article 6 para. 1 (Art. 6-1) of the Convention.

66. The Government argue that the requirement of public pronouncement of the decision was met because third parties could be given access to the files and allowed to make copies of the judgments contained therein. In this respect the Commission observes that in Austria only with regard to judgments of the Supreme Court, the Administrative Court and the Constitutional Court does the possibility exist for interested members of the public to obtain the full text of judgments from the court's registry, together with a select publication of judgments. No such possibility exists with regard to judgments and decisions of the Courts of Appeal or of courts of first instance. To these courts the provision of Section 82 of the Code of Criminal Procedure applies (see para. 34 above). Having regard to the contents of this provision, the Commission considers that the mere possibility of being granted, upon request, access to the judgments and the file cannot be considered a substitute for public pronouncement of the decisions.

67. The Commission therefore finds that the requirement of the public pronouncement of judgments under Article 6 para. 1 (Art. 6-1) of the Convention has not been met in the present case, as neither of the Court of Appeal's decisions had been pronounced publicly nor was publicity of the decisions otherwise sufficiently secured.

CONCLUSION

68. The Commission concludes, by 27 votes to 2, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

DISSENTING OPINION OF MRS. G.H. THUNE AND MR. H.G. SCHERMERS

Unfortunately we have been unable to find that there had been a violation of Article 6 para. 1 in the present case.

We agree with the majority that Article 6 applies to the proceedings at issue (para. 42) and that the Commission is not prevented by the Austrian reservation from examining the applicant's complaints (para. 50). We do not, however, consider that Article 6 para. 1 is to be interpreted in such a way as to require a particular form of public pronouncement of the decisions taken on the applicant's compensation claim.

While access by the general public to judgments given by a court by means of inspection of the case file upon request (see para. 34) might not be sufficient to comply with Article 6 para. 1 in normal civil cases, we find that it can be considered acceptable in the circumstances of the present case in order to provide the necessary public scrutiny which is the main purpose of the requirement as to publicity under Article 6 para. 1.

We recall in this context the Court's judgment in the Schuler-Zraggen case, where it suggested that the nature of the issue involved may be considered decisive with regard to the publicity requirement under Article 6 para. 1 (see Eur. Court HR, Schuler-Zraggen v.

Switzerland judgment of 24 June 1993, Series A no. 263, p. 20, para. 58, subpara. 2 and 3). The Court considered that the dispute in the said case did not raise issues of particular public importance. On the contrary, it involved matters of a highly personal nature which better could be dealt with without the public being present during an oral hearing. We have found these considerations to be valid also in the present case, and find support in the concurring opinion of Judge Martens to the Court's judgment in the Masson and Van Zon case (para. 5 of the Concurring Opinion) which also concerned proceedings relating to a claim for compensation after acquittal (Eur. Court HR, Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327-A). Since Judge Martens was the only member of the Court who considered Article 6 para. 1 to be applicable, he accordingly was also the only Judge to take a stand on whether or not the requirements of Article 6 para. 1 had been complied with.

We find that the requirement of public pronouncement of judgments under Article 6 para. 1 had been met in the present case as publicity of the decisions given had sufficiently been secured by the possibility of inspection of the file under Section 82 of the Austrian Code of Criminal Procedure. Therefore, we find conclude that there had been no violation of Article 6 para. 1.