

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 21835/93

Johannes Werner

against

Austria

REPORT OF THE COMMISSION

(adopted on 3 September 1996)

TABLE OF CONTENTS

	Page
I. INTRODUCTION (paras. 1-16) . . . . .	.1
A. The application (paras. 2-4) . . . . .	.1
B. The proceedings (paras. 5-11) . . . . .	.1
C. The present Report (paras. 12-16) . . . . .	.2
II. ESTABLISHMENT OF THE FACTS (paras. 17-31) . . . . .	.4
A. The particular circumstances of the case (paras. 17-24) . . . . .	.4
B. Relevant domestic law (paras. 25-31) . . . . .	.5
III. OPINION OF THE COMMISSION (paras. 32-74) . . . . .	.7
A. Complaints declared admissible (para. 32) . . . . .	.7
B. Points at issue (para. 33) . . . . .	.7
C. Article 6 of the Convention (paras. 34-74) . . . . .	.7
a. Applicability of Article 6 (paras. 34-42) . . . . .	.7
b. The absence of a public hearing before the Judges' Chamber and the Court of Appeal and	

the absence of a public pronouncement of the decisions given (paras. 43-68)	9
aa. The Austrian reservation to Article 6 (paras. 43-50)	9
bb. The absence of a public hearing (paras. 51-58)	11
CONCLUSION (para. 59).	12
cc. The absence of a public pronouncement of the courts' decisions (paras. 60-67)	13
CONCLUSION (para. 68).	14
d. Fair hearing before a tribunal (paras. 69-73)	14
CONCLUSION (para. 74).	15
D. Recapitulation (paras. 75-77).	16
CONCURRING OPINION OF MR. M. PELLONPÄÄ.	17
DISSENTING OPINION OF MRS. G.H. THUNE AND MR. H.G. SCHERMERS	18
DISSENTING OPINION OF MR. I. CABRAL BARRETO JOINED BY MM. S. TRECHSEL AND I. BÉKÉS	19
DISSENTING OPINION OF MR. K. HERNDL JOINED BY MR. F. MARTINEZ	20
APPENDIX (I): PARTIAL DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY OF THE APPLICATION	21
APPENDIX (II): FINAL DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY OF THE APPLICATION	27
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 an Austrian citizen, born in 1963 and resident in Vienna. He was represented before the Commission by Mr. T. Prader, a lawyer practising in Vienna.	
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 that the proceedings regarding his compensation claim for detention on remand were unfair and that in these proceedings the Austrian courts neither held a public hearing nor pronounced their decisions publicly. The applicant invokes Article 6 para. 1 of the Convention.

B. The proceedings

5. The application was introduced by the applicant and Mr. and Mrs. Hauser on 16 March 1993 and was registered on 12 May 1993.

6. By letter of 7 March 1994, the lawyer of the applicant and Mr. and Mrs. Hauser informed the Commission that Mr. and Mrs. Hauser wished to withdraw their application.

7. On 2 September 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 complaints under Article 6 para. 1 of the Convention relating to the lack of a public hearing and of a public pronouncement of the decisions and about a breach of the principle of equality of arms in the proceedings before the Judges' Chamber of the Vienna Regional Court and the Vienna Court of Appeal. It declared the remainder of the application inadmissible.

8. The Government's observations were submitted on 18 November 1994. The applicant replied on 22 December 1994.

9. On 23 October 1995 the Commission declared the applicant's remaining complaints admissible.

10. The text of the Commission's decision on admissibility of 23 October 1995 was sent to the parties on 3 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.

11. 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

12. 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

13. 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.

14. 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.

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

16. 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

17. On 15 May 1991 M.H. and H.H. were arrested on the suspicion of having fraudulently used the credit card of a third person for purchases in several shops in Vienna and were taken into detention on remand. On 3 July 1991 the applicant, suspected of having forged the signature on the credit card and on the purchase receipts, was also taken into detention on remand. On 8 July 1991 M.H. and H.H., and on 19 July 1991 the applicant, were released from detention.

18. On 24 February 1992, by decision of the Investigating Judge of the Vienna Regional Court (Landesgericht), criminal proceedings were discontinued against M.H., H.H. and the applicant, as a graphological expert had found that the applicant was not likely to be the author of the signatures on the purchase receipts and as the Public Prosecutor's witnesses did not have a sufficient recollection.

19. Meanwhile, on 4 February 1992 the Public Prosecutor's Office (Staatsanwaltschaft) had requested the Regional Court to decide that M.H., H.H. and the applicant were not entitled to compensation for

detention on remand, pursuant to Section 2 para. 1 (b) of the Criminal Proceedings Compensation Act (Strafrechtliches Entschädigungsgesetz), as the suspicion against M.H., H.H. and the applicant had not been dissipated.

20. On 21 April 1992 the Investigating Judge heard M.H., H.H. and the applicant and informed them about the Public Prosecutor's Office's request of 4 February 1992. They filed a claim for compensation for detention on remand.

21. On 3 June 1992 the Judges' Chamber (Ratskammer) of the Vienna Regional Court, sitting in camera, dismissed the claim for compensation under Section 2 para. 1 (b) of the Criminal Proceedings Compensation Act. No representative of the Public Prosecutor's Office was present at the deliberations. The Judges' Chamber found that there still remained a suspicion against M.H., H.H. and the applicant.

22. On 15 June 1992 M.H., H.H. and the applicant appealed against the Judges' Chamber's decision. In their appeal they requested the taking of further evidence, in particular the hearing of witnesses.

23. On 2 September 1992 the Senior Public Prosecutor's Office (Oberstaatsanwaltschaft) submitted written observations on the appeal. It found that the appeal would have to be dismissed. The Senior Public Prosecutor's Office also submitted that it was not necessary to take further evidence as the statements of the witnesses requested could not lead to the dissipation of the suspicion. These observations were not served on M.H., H.H. and the applicant.

24. On 29 October 1992 the Vienna Court of Appeal (Oberlandesgericht), sitting in camera, dismissed the appeal. No representative of the Senior Public Prosecutor's Office was present at the deliberations.

The Court of Appeal considered that the criminal proceedings had been discontinued as no sufficient evidence could be produced, but that, nevertheless, a suspicion persisted. Such a discontinuation did not suffice to give rise to a claim for compensation under the relevant provision of the Compensation Act, as, according to the constant jurisprudence of the Austrian courts, it had to be established that the person concerned was not punishable. However, in the present case, M.H., H.H. and the applicant had not refuted the suspicion existing against them, nor was this suspicion otherwise dissipated.

The Court of Appeal further considered that the requests for the taking of further evidence and for the questioning of the witnesses on which the Public Prosecutor had based his information could not have helped to elucidate the facts. The Court noted that the criminal proceedings had been discontinued due to the insufficient recollection of these witnesses. Their statements could, therefore, not have proved the innocence of M.H., H.H. and the applicant.

B. Relevant domestic law

a. Compensation regarding pecuniary damages resulting from detention on remand

25. 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 (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.

26. 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.

27. 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.

28. 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.

29. 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

30. 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

31. 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

32. The Commission has declared admissible the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention concerning the lack of a public hearing in the compensation proceedings before the Judges' Chamber of the Vienna Regional Court and the Vienna Court of Appeal, the failure of these courts to pronounce publicly their decisions and an alleged infringement of the principle of equality of arms in the proceedings before the Court of Appeal.

B. Points at issue

33. The issues to be determined are:

- whether there has been a violation of the applicant's right under Article 6 para. 1 (Art. 6-1) of the Convention to a public hearing in the proceedings regarding his compensation claim for detention on remand;

- whether there has been a violation of the applicant's right under Article 6 para. 1 (Art. 6-1) of the Convention to a public pronouncement of the decisions taken by the Austrian courts in the proceedings regarding his compensation claim for detention on remand;

- whether there has been a violation of the applicant's right to a fair hearing by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention in the proceedings before the Court of Appeal.

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

a. Applicability of Article 6 (Art. 6)

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

"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."

35. The applicant submits that the proceedings at issue concerned the determination of his civil rights. He wished to assert a claim for pecuniary damages resulting from his detention on remand and there was a serious dispute as regards his right to compensation. Further, the applicant submits that Article 6 (Art. 6) of the Convention applies to the area of public-liability law. He argues that the proceedings under the Austrian Criminal Proceedings Compensation Act, though the claim does not in all cases depend on a violation of the law, follow the same procedural rules as public-liability suits, once the claim has been accepted in principle by the criminal courts. As the later stage of the proceedings is undoubtedly civil in nature, it would be incomprehensible to exclude the first but indispensable stage before the criminal courts from the applicability of Article 6 (Art. 6).

36. 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.

37. 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. the Netherlands* judgment of 27 October 1995, Series A no. 327-A, p. 17, para. 44).

38. 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).

39. 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, because the original suspicion against him had been dissipated. 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.

40. Further, the compensation claim asserted by the applicant, in accordance with Section 1 of the Criminal Proceedings Compensation Act, concerned financial compensation for pecuniary damages 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 Périoscope v. France judgment, *loc. cit.*).

41. 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 an enforceable right to compensation for detention on remand under the Criminal Proceedings Compensation Act, provided the conditions laid down therein were met.

42. 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. The absence of a public hearing before the Judges' Chamber and the Court of Appeal and the absence of a public pronouncement of the decisions given

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

43. The applicant complains that in the proceedings regarding his compensation claim for detention on remand neither the Judges' Chamber of the Vienna Regional Court nor the Vienna Court of Appeal held a public hearing. In addition these courts have failed to pronounce their decisions publicly. In his view, the Commission is not prevented from examining these issues by the Austrian reservation to Article 6 (Art. 6) of the Convention.

44. The Government consider that the applicant's complaint regarding the lack of a public hearing, including 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."

45. 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.

46. 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."

47. 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."

48. 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).

49. 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)."

50. The Commission therefore considers that the Austrian reservation cannot prevent it from examining the complaints concerning the lack of a public hearing and public pronouncement of the decisions given.

bb. The absence of a public hearing

51. The applicant submits that in the proceedings regarding his compensation claim for detention on remand the Austrian courts should have held public hearings. In proceedings under the Criminal Proceedings Compensation Act not merely legal questions have to be resolved, in which case a court may exceptionally decide without a public hearing, but facts also have to be established. Moreover, no public hearing was held in the criminal proceedings because they had been discontinued. His failure to request a public hearing cannot be considered as a waiver of this right because the relevant provisions do not provide for an oral hearing.

52. The Government submit that according to the Convention organs' case-law a public hearing is only necessary when a court is concerned with establishing the facts, which is primarily the task of a first instance court, while no hearing is necessary before a second instance court deciding merely on issues of law. For the purpose of the compensation claim the underlying criminal proceedings must be considered as first instance proceedings, while the compensation proceedings themselves must be conceived as second instance proceedings in which only questions of law are determined. Moreover, since the applicant in the compensation proceedings did not explicitly ask for a public hearing he must be deemed to have waived his right to such a hearing.

53. The Commission observes that the Judges' Chamber and the Court of Appeal took their decisions in camera, in accordance with the relevant domestic provisions of procedural law. It must therefore examine whether the lack of a public hearing before these courts was compatible with Article 6 para. 1 (Art. 6-1) of the Convention in the present case.

54. The applicant was in principle entitled to a public hearing on his compensation claim, as none of the exceptions laid down in the second sentence of Article 6 para. 1 (Art. 6-1) applied (cf. Eur. Court HR, Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171, p. 20, para. 64).

55. The Commission observes that the applicant did not expressly request a public hearing on his compensation claim. In the Government's view he must therefore be deemed to have waived his right to such a hearing. However, the Commission shares the applicant's opinion that, since the relevant provisions did not provide for a public hearing, he could not be deemed to have waived this 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). Moreover, although the applicant did not expressly request a public hearing in the proceedings before the Court of Appeal, he, nevertheless, asked to be heard and to be confronted with witnesses.

56. The Government also argue that a public hearing was not necessary as for the purpose of the compensation claim the underlying criminal proceedings must be considered as first instance proceedings, while the compensation proceedings themselves must be conceived as second instance proceedings in which only questions of law are determined. 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).

57. The Commission considers, however, that the issue of criminal responsibility is quite distinct from the question of compensation for detention, so that 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.

58. The Commission concludes that there were no exceptional circumstances which could justify the absence of a public hearing. The failure of the Austrian courts to hold such hearings in the applicants' cases therefore amounted to a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

CONCLUSION

59. The Commission concludes, by 25 votes to 4, that there has been a violation of the applicant's right under Article 6 para. 1 (Art. 6-1) of the Convention to a public hearing in the proceedings regarding his compensation claim for detention on remand.

cc. The absence of a public pronouncement of the courts' decisions

60. The applicant also complains that, contrary to what is required by Article 6 para. 1 (Art. 6-1) of the Convention, the Judges' Chamber and the Court of Appeal did not pronounce publicly their decisions taken in the compensation proceedings.

61. The Government, referring to the Sutter judgment of the Court (Eur. Court HR, Sutter v. Switzerland judgment of 22 February 1984, Series A no. 74), find 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 prove a legitimate interest. Moreover, the lack of a public pronouncement of decisions on compensation claims under the Criminal Proceedings Compensation Act would be justified since such a decision could contain the statement that a suspicion against a person continued to exist, which, in the light of the presumption of innocence, is inappropriate.

62. 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).

63. 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 "decision" (Beschluß) as opposed to "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).

64. The Commission observes that in Austria there is a possibility to obtain the full text of judgments from the court registry only with regard to judgments of the Supreme Court, the Administrative Court and the Constitutional Court. No such possibility exists with regard to judgments and decisions of the Courts of Appeal or of courts of first instance.

65. 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. However, the Commission, having regard to the provision of Section 82 of the Code of Criminal Procedure, which regulates this right, finds 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.

66. The Government also argue that the lack of a public pronouncement of decisions on compensation claims under the Criminal Proceedings Compensation Act is justified since such decisions could contain the statement that a suspicion against a person continued to exist, which, in the light of the presumption of innocence, is inappropriate. However, the Commission cannot see that it is necessary in proceedings under the Criminal Proceedings Compensation Act to make statements which would infringe the presumption of innocence as guaranteed by Article 6 para. 2 (Art. 6-2) of the Convention.

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 none of the courts' decisions had been pronounced publicly nor had publicity of the judgments rendered otherwise been sufficiently secured.

CONCLUSION

68. The Commission concludes, by 27 votes to 2, that there has been

a violation of the applicant's right under Article 6 para. 1 (Art. 6-1) of the Convention to a public pronouncement of the decisions taken by the Austrian courts in the proceedings regarding his compensation claim for detention on remand.

d. Fair hearing before a tribunal

69. The applicant submits that in the proceedings before the Court of Appeal he could not reply to the submissions of the Senior Public Prosecutor because he was not aware of them. The principle of equality of arms required that he could see for himself whether the submissions of the Senior Public Prosecutor did not contain any new arguments and whether it was necessary for him to reply thereto.

70. The Government submit that this principle has not been infringed in the proceedings before the Court of Appeal as no representative of the Senior Public Prosecutor's Office attended the deliberations of the court. The written observations of the Senior Public Prosecutor were not served on the applicant. However, it was not necessary to let the applicant comment on the Senior Public Prosecutor's statement as it contained no new arguments.

71. The Commission recalls that the requirement of "equality of arms", in the sense of a fair balance between the parties, applies in principle to proceedings concerning civil rights and obligations (see Eur. Court HR, *Dombo Beheer B.V. v. the Netherlands* judgment of 27 October 1993, Series A no. 274, p. 19, para. 33; *Stran Greek Refineries S.A. and Stratis Andreadis v. Greece* judgment of 9 December 1994, Series A no. 301-B, p. 81, para. 46). In the context of civil proceedings, the concept of a fair trial should be regarded as including an equal opportunity of each party to have knowledge of and comment upon the observations made by the other party (see Eur. Court HR, *Ruiz-Mateos v. Spain* judgment of 23 June 1993, Series A no. 262, p. 25, para. 63). In the context of criminal proceedings, the principle of equality of arms does not depend on further, quantifiable unfairness flowing from procedural inequality. It is therefore unfair for the prosecution to make submissions to a court without knowledge of the defence (Eur. Court HR, *Bulut v. Austria* judgment of 22 February 1996, para. 49, to be published in *Judgments and Decisions for 1996*).

72. In the proceedings before the Court of Appeal the applicant was not aware of and did not have a possibility to comment on the observations which the Senior Public Prosecutor's Office, appearing as the representative of the State as defendant, submitted to the Court of Appeal.

73. The Commission is not persuaded by the Government's argument that the Senior Public Prosecutor's submissions did not contain any new argument. It notes in particular that the Senior Public Prosecutor's Office in its submissions had for the first time reacted to the applicant's request for the taking of further evidence. In any event, it was a matter for the applicant to assess whether the submissions deserved a reaction (see *mutatis mutandis Bulut v. Austria* judgment, loc. cit., para. 49). The Commission therefore finds that in the proceedings before the Court of Appeal the principle of equality of arms has not been respected.

CONCLUSION

74. The Commission concludes, by 26 votes to 3, that there has been a violation of the applicant's right to a fair hearing by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention

in the proceedings before the Court of Appeal.

□D. Recapitulation

75. The Commission concludes, by 25 votes to 4, that there has been a violation of the applicant's right under Article 6 para. 1 (Art. 6-1) of the Convention to a public hearing in the proceedings regarding his compensation claim for detention on remand (cf. para. 59).

76. The Commission concludes, by 27 votes to 2, that there has been a violation of the applicant's right under Article 6 para. 1 (Art. 6-1) of the Convention to a public pronouncement of the decisions taken by the Austrian courts in the proceedings regarding his compensation claim for detention on remand (cf. para. 68).

77. The Commission concludes, by 26 votes to 3, that there has been a violation of the applicant's right to a fair hearing by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention in the proceedings before the Court of Appeal (cf. para. 74).

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

CONCURRING OPINION OF MR. M. PELLONPÄÄ

I have voted for the finding of a violation on all the three points at issue. Insofar as the question of "a fair hearing before a tribunal" is concerned my reasons for this finding, however, differ from those adopted in paras. 69-73 of the Report.

The opinion of the Commission appears to proceed from the view that the relevant requirements of Article 6 para. 1 apply in the same way regardless of whether one is concerned with a "criminal charge" or with the "determination of civil rights and obligations".

The principle of "equality of arms" is certainly not confined to criminal proceedings. There may, however, be differences between "criminal" and "civil" cases as to the concrete application of the principle. As the Court has stated, "[t]he requirements inherent in the concept of 'fair hearing' are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge" (Dombo Beheer B.V. v. the Netherlands judgment, loc. cit., p. 19, para. 32). It is possible, for example, that in a civil case the submission by the Senior Public Prosecutor to the Court of a statement comparable to the one at issue in the Bulut case (see paras. 71 and 73 of the present Report), without the other party being able to comment on it, would not be sufficient for the finding of a violation of Article 6, although in a criminal case such a conduct would be regarded as inherently unjust. It is recalled that in the Bulut case the Procurator General's Office in its brief note merely stated that the applicant's plea of nullity should be rejected according to the relevant provisions of the Code of Criminal Procedure (see Bulut v. Austria judgment, loc. cit., para. 14).

However, in the present case, which concerns the determination of civil rights, the observations by the Senior Public Prosecutor's

Office were much more lengthy and also more substantive than those at issue in the Bulut case. The principle of equality of arms, in the sense of a fair balance between the parties, would have required an opportunity for the applicant to comment thereon. Therefore I concur with the conclusion that Article 6 para. 1 had been violated also in this respect.

(Or. English)

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

Unfortunately we have been unable to find any violation of Article 6 para. 1 as regards the applicant's complaints about the lack of an oral hearing and public pronouncement of the decisions given.

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).

As regards the applicant's complaint concerning the lack of an oral hearing, we would point to the approach taken by the Court in the Schuler-Zgraggen case, where it accepted that Article 6 para. 1 must be interpreted with some flexibility, having regard to the type of proceedings one is faced with (see Eur. Court HR, Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 20, para. 58). The Court considered that the dispute in the said case did not raise issues of particular public importance, but on the contrary, involved matters of a highly personal nature which better could be dealt with by the domestic court without a public hearing during an oral hearing. We submit that similar considerations can be applied to the present case.

This approach is supported by the concurring opinion of Judge Martens to the Court's judgment in the Masson and Van Zon case which concerned proceedings identical to those in the present case (Eur. Court HR, Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327-A). As the only member of the Court who considered Article 6 para. 1 to be applicable, Judge Martens took the view that Article 6 para. 1 did not require an oral hearing having regard to the particular nature of the proceedings. This seems to be a logical and reasonable interpretation of the principles laid down in the Schuler-Zgraggen case.

As regards the applicant's complaint about the lack of public pronouncement of the decisions given, we find that, having regard to the particular nature of these proceedings, public access to judgment by means of access to the file of the case upon request must be considered sufficient in order to provide the necessary public scrutiny which is the main purpose of the publicity requirement under Article 6 para. 1. We here refer to our dissenting opinion in the Report of the Commission in the case of Szücs v. Austria.

(Or. français)

OPINION DISSIDENTE DE M. I. CABRAL BARRETO
A LAQUELLE DECLARENT SE RALLIER MM. S. TRECHSEL ET I. BÉKÉS

A mon très grand regret, je ne puis partager l'avis de la majorité de la Commission pour ce qui est de l'équité de la procédure.

La procédure en cause était, comme l'établit le Rapport, par. 37 à 40, une procédure déterminant un droit de caractère civil du requérant, soit une demande d'indemnisation pour détention provisoire illégale.

Dans une procédure civile, le droit au contradictoire constitue un élément de la notion plus large de procès équitable, ce qui implique, pour une partie, la faculté de prendre connaissance des observations ou pièces produites par l'autre, ainsi que de les discuter.

Mais, sous peine de laisser la procédure s'éterniser, il faut choisir la partie qui aura la "parole", en dernier lieu. Dans la procédure pénale, le dernier mot appartient à l'accusé. Dans une procédure civile, ou il y a un demandeur et un défendeur, il me semble que le dernier mot doit appartenir au défendeur. Et, si une partie a interjeté appel, ce sera la partie intimée (le défendeur en appel) qui doit être entendu le dernier.

Le requérant et une autre personne ont interjeté appel devant la cour d'appel de Vienne contre la décision des juges qui ont refusé la demande d'indemnisation. Le ministère public a répondu au mémoire du requérant en sa qualité de représentant du défenseur, l'Etat.

Effectivement, si la procédure civile en cause exige une partie demanderesse et une partie défenderesse, je considère que, le ministère public, en tant que partie défenderesse, a rempli son rôle en répondant au demandeur. La représentation au civil de l'Etat par le ministère public, système qui existe dans certains pays, notamment au Portugal, peut paraître quelque peu étrange, et d'autres formes sont envisageables. Mais je ne vois aucune raison de censurer ce système, dès lors que, après la réponse écrite du ministère public, la cour d'appel a tranché toute seule l'appel du requérant.

(Or. English)

DISSENTING OPINION OF MR. K. HERNDL
JOINED BY MR.F. MARTINEZ

While I agree with the majority that Article 6 para. 1 of the Convention is applicable to the proceedings at issue (para. 42) and that the Commission is not prevented by the Austrian reservation from examining the complaint concerning the lack of a public hearing and a public pronouncement of the decisions given (para. 50), I voted against the finding of a violation of Article 6 para. 1 as regards the lack of a public hearing.

As stated in para. 29 of the Report no public hearings are normally conducted before the Judges' Chamber and before the Court of Appeal in proceedings concerning appeals against decisions of the Judges' Chamber. The Code of Criminal Procedure neither explicitly requires a public hearing in such proceedings nor does it explicitly prohibit such hearings. It may very well be that it is not the usual practice before Austrian criminal courts to hold hearings on claims like the one asserted by the applicant or that the parties request such hearings. However, since the applicant attached such importance to a public hearing and taking into account that the holding of public hearings is not explicitly ruled out by the Code of Criminal Procedure, he would have been well advised to ask for a public hearing. On the basis of the Austrian law as it stands the Austrian courts might have considered such a request by the applicant as somewhat unusual, but to my mind there is nothing to show that it would have stood no chances

of success.

In fact, as the relevant Austrian law is silent on this issue the applicant could (and should) in any formal request for a public hearing have invoked Article 6 para. 1 of the Convention (which is part of the Austrian legal order at the level of the Constitution), either alone or in conjunction with Article 90 of the Federal Constitution which unequivocally establishes the principle of public hearings to be held in civil and criminal cases. A formal request for a public hearing by the applicant based on such grounds would have resulted in an appropriate evaluation of this pertinent argument by the Court. The Court, however, was apparently never confronted with the argument and, therefore, followed the usual practice of not holding a public hearing in such a case.

Accordingly, following the constant case-law of the Court on this matter (see, e.g., Eur. Court HR, Håkansson and Stureson v. Sweden judgment of 21 February 1990, Series A no. 171-A, p. 20, para. 67; Zumbel v. Austria judgment of 21 September 1993, Series A no. 268-A, p. 14, para. 34) I find that the applicant must be deemed to have waived his right to a public hearing and that accordingly there was no violation of his right under Article 6 para. 1 of the Convention to such a hearing.