COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF PFEIFER AND PLANKL v. AUSTRIA

(Application no. 10802/84)

JUDGMENT

STRASBOURG

25 February 1992

In the case of Pfeifer and Plankl v. Austria[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr J. CREMONA, *President*,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr B. WALSH,
Mr R. BERNHARDT,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr A.N. LOIZOU,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 September 1991 and 25 January 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 November 1990 and by the Government of the Republic of Austria ("the Government") on 6 February 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10802/84) against Austria lodged with the Commission under Article 25 (art. 25) by two Austrian nationals, Mr Heinrich Pfeifer and Mrs Margit Plankl, on 23 September 1983.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46), and the Government's application to Article 48 (art. 48). The object of the request and the

[*] The case is numbered 54/1990/245/316. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 and Article 8 (art. 6-1, art. 8).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings. They sought leave to be represented by Mr Reinhard Peters, who was not a lawyer but had assisted them before the Austrian courts and the Commission (Rule 30 para. 1).

On 12 February 1991 the President granted this leave; he also authorised the representative to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 22 November 1990 the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr J. Pinheiro Farinha, Mr R. Bernhardt, Mr J. De Meyer, Mr N. Valticos, Mr I. Foighel and Mr A.N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Mr B. Walsh, substitute judge, subsequently replaced Mr Foighel, who was unable to take part in the further consideration of the case (Rule 22 para. 1 and Rule 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Austrian Government, the Delegate of the Commission and counsel for the applicants on the organisation of the proceedings (Rule 37 para. 1 and Rule 38). Pursuant to his orders and instructions, the Registrar received the applicants' claims under Article 50 (art. 50) of the Convention on 17 June 1991 and the Government's memorial on 18 June. The Secretary to the Commission submitted the Delegate's observations on 12 July, and on 4 September 1991 produced various documents which had been requested by the Registrar.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 September 1991. The Chamber was presided over by Mr J. Cremona, the Vice-President of the Court, replacing Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 para. 5, second sub-paragraph). The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr W. OKRESEK, Federal Chancellery, *Agent*,
  Mr F. HAUG, Ministry of Foreign Affairs,
  Mrs I. GARTNER, Federal Ministry of Justice, *Counsel*;
- for the Commission
  Mr F. ERMACORA, *Delegate*;
- for the applicants

Mr R. PETERS, *Counsel*,
Mrs A. SCHWARZ, Assistant.

The Court heard addresses by Mr Okresek, Mr Haug and Mrs Gartner for the Government, Mr Ermacora for the Commission and Mr Peters for the applicants, as well as their replies to its questions. Various documents were produced by the Agent of the Government and the representative of the applicants.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Heinrich Pfeifer and Mrs Margit Plankl, both Austrian citizens, were detained on remand in 1982 in connection with separate criminal proceedings brought against them before the Klagenfurt Regional Court (Landesgericht, "the Regional Court"). The present case is not concerned with the proceedings against the second applicant.

A. The criminal proceedings against Mr Pfeifer

1. Before the Klagenfurt Regional Court

(a) The investigation

7. On 12 November 1982 Judge Kaiser, an investigating judge at the said court, issued a warrant for Mr Pfeifer's arrest.

He was suspected of having committed various offences, including aggravated fraud, professional burglary, forgery and suppression of documents, receiving stolen goods and unlawful possession of firearms. The reasons cited by the judge in support of his detention were the danger of his absconding and the risks of collusion and repetition of offences (Article 175 (1), sub-paragraphs 2 to 4, of the Code of Criminal Procedure).

8. Mr Pfeifer was arrested in Klagenfurt on 20 November 1982. On the next day he was brought before Judge Arnold, the duty judge (Journalrichter, Article 179 (1) of the Code of Criminal Procedure), who informed him of the reasons for his arrest. On being questioned in the absence of his lawyer, he admitted unlawful possession of firearms, but denied having committed any other offence. The judge remanded him in custody.

9. Also on 21 November 1982 Judge Kaiser ordered the applicant's transfer to Vienna, where the Regional Criminal Court (Landesgericht für

Strafsachen) had on 20 November issued a warrant for his arrest on suspicion of having taken part in an armed robbery in Vienna. The Klagenfurt proceedings were joined to those instituted in Vienna, and Mr Pfeifer remained in the Vienna remand prison from 22 November 1982 to 24 February 1983.

10. The proceedings were severed on 20 January 1983 and the Klagenfurt Regional Court recovered jurisdiction over the proceedings which are the subject of the present case.

The case was assigned to Judge Startinig, who on 25 February 1983 opened a judicial investigation (Voruntersuchung) and ordered the applicant's detention to be continued (Article 180 (1) and (2), sub-paragraphs 1 to 3, of the Code of Criminal Procedure). The Graz Court of Appeal (Oberlandesgericht) twice authorised the extension of his detention on remand, for a maximum period of ten months in all.

11. On 23 May 1983 Mr Pfeifer challenged the investigating judge, alleging bias, but on 26 May the challenge was held to be unsubstantiated by the President of the Regional Court. On 30 June the applicant brought a criminal complaint against Mr Startinig for abuse of public powers, on the ground that he had refused to allow a visit by Mr Peters (see paragraphs 2 and 5 above). As the public prosecutor's office had decided not to bring a prosecution, Mr Pfeifer brought an alternative private prosecution himself (Subsidiaranklage, see paragraph 14 below).

12. In the main proceedings, counsel for Mr Pfeifer had submitted a memorial on 21 June 1983. On 19 July the public prosecutor filed an indictment, in which the only charges were receiving stolen goods and illegal possession of firearms. An objection (Einspruch) by the applicant against this indictment was dismissed by the Graz Court of Appeal on 18 August 1983.

b) The trial

13. Mr Pfeifer was sent for trial before the Regional Court, composed of two professional judges, Mr Kaiser (the presiding judge) and Mr Arnold, and two lay assessors (Schöffen).

On 31 August 1983, Judge Kaiser summoned him to inform him that he had acted as investigating judge in the case until 31 December 1982 (see paragraphs 7 and 9 above) and was accordingly prevented from sitting in the trial under Article 68 (2) of the Code of Criminal Procedure. In the course of the interview Mr Pfeifer waived his right to lodge a plea of nullity on this ground (Article 281 (1), first sentence, of the Code; see paragraphs 22 and 24 below).

On 1 September 1983, the presiding judge informed him that Judge Arnold was also disqualified under Article 68 (2), since he had, as duty judge, questioned him on 21 November 1982 (see paragraph 8 above). Mr Pfeifer likewise waived his right to lodge a plea of nullity on this point.

In both cases, the relevant records were signed by him in the absence of his counsel, who had not been summoned on that occasion; the applicant had stated that he did not think it necessary to consult him.

14. The hearings took place on 16 September and 7 October 1983 with the participation of the two above-mentioned judges.

Defence counsel did not object to the composition of the Regional Court or challenge Judges Kaiser and Arnold.

Neither did he draw the court's attention, at the hearing of 7 October 1983, to the fact that, in the criminal proceedings instituted against Judge Startinig, the third investigating judge (see paragraph 11 above), the applicant had on 23 September 1983 challenged all the judges of the Klagenfurt Regional Court, including Judges Kaiser and Arnold. This challenge was eventually allowed by the Graz Court of Appeal on 10 November 1983, the judges concerned having declared themselves disqualified. The case was therefore referred to the Leoben Regional Court and later discontinued.

15. Also on 7 October 1983, the court convicted Mr Pfeifer of aggravated receiving of stolen goods (Article 164 (3) of the Criminal Code) and unlawful possession of firearms (section 36 of the Firearms Law, Waffengesetz) and sentenced him to three years' imprisonment.

2. Before the Supreme Court

16. The applicant lodged a plea of nullity (Nichtigkeitsbeschwerde) and an appeal against sentence (Berufung), which were dismissed by the Supreme Court (Oberster Gerichtshof) on 29 February 1984.

On the plea of nullity, the court observed that the defence had not raised at the proper time the issue of the participation of Judges Kaiser and Arnold, who had been challenged in earlier proceedings, otherwise the Regional Court would have been obliged to give an interlocutory decision. The fact that the challenge relating to the other case was subsequently allowed (see paragraph 14 above) did not justify the conclusion that the two professional judges were also biased in the criminal proceedings against Mr Pfeifer. Furthermore, the latter could no longer argue that Judges Kaiser and Arnold should in principle have withdrawn under Article 68 (2) of the Code of Criminal Procedure (see paragraph 22 below), because prior to the trial he had expressly waived his right to challenge them on this ground.

The Supreme Court also confirmed the sentence.

B. The censorship of correspondence between the two applicants

1. The censorship measure

17. During their detention on remand the applicants corresponded with each other. In the early summer of 1983, the investigating judge censored a letter from Mrs Plankl to Mr Pfeifer by crossing out and making illegible certain passages. They were not reconstructed in the national proceedings, but their content was said to have been as follows (translation):

> "I wonder whether there is anybody left in this monkey house who is still normal ... In life they are nobodies, here they think they are gods. Some of the officers are guests like us. They are always spying on the women, these monkeys are proper peeping toms! I hate it!"

2. Mrs Plankl's complaint to the Review Chamber of the Regional Court

18. Mrs Plankl complained to the Review Chamber (Ratskammer) of the Regional Court. She claimed that the form of censorship used was unlawful, since Article 187 (2) of the Code of Criminal Procedure authorised the stopping of letters, but not making them illegible. Besides, it allowed censorship only in respect of letters likely to interfere with the purpose of detention, or giving rise to the suspicion of a criminal offence where the offender could be prosecuted ex officio, with or without the victim's authorisation. The relevant passages contained remarks critical of prison officers but were not, in her opinion, such as to fall within the scope of the above rules.

19. The complaint was considered in camera in the absence of the applicant and her counsel. After hearing the prosecution and studying a report by the investigating judge, the Review Chamber rejected her complaint on 26 July 1983.

The crossing out of part of a letter was in its opinion a less severe measure than stopping the letter. It was therefore within the investigating judge's powers under Article 187 (2) of the Code of Criminal Procedure (see paragraph 25 below), and did not infringe Mrs Plankl's rights. It had moreover been justified, because the passages in question, described in the report as "jokes of an insulting nature against prison officers", had constituted defamation (üble Nachrede) of officials in the exercise of their duty (Article 111 (1) in conjunction with Article 117 (2) of the Criminal Code), an offence capable of justifying a censorship measure under Article 187 (2).

3. The plea of nullity for the preservation of the law before the Supreme Court

20. After the Commission had communicated the application to the Austrian Government, the Attorney-General's Office (Generalprokuratur) brought a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) before the Supreme Court. Two grounds of appeal were submitted.

It was argued, firstly, that the rendering illegible (Unleserlichmachen) of certain passages and the Review Chamber's decision thereon were not covered by Article 187 (2). Under that provision all letters from a person detained on remand to a private individual had to be stopped if they gave rise to the suspicion of a criminal offence subject to public prosecution ex officio (von Amts wegen). This was not the case with the passages in question. If they were to be regarded as an offence under Articles 111 (1) or 115 (1) of the Criminal Code, in principle only the victim could act, and public prosecution (with the victim's authorisation and that of his superior authority) under Article 117 (2) of the Criminal Code was possible only if the insults were made "person to person" and not if they were in a letter.

Secondly, Article 187 (2) authorised only the stopping of letters, not the deletion of specific passages.

21. On 20 October 1987, after a public hearing, the Supreme Court dismissed the first ground of appeal but upheld the second.

(a) On the assumption that the passages in issue contained "jokes of an insulting nature against prison officers", the court considered that there were grounds for suspecting the applicant of insulting behaviour (Beleidigung - Article 115 of the Criminal Code) rather than defamation (Article 111). Such an offence, if committed against an official in the exercise of his duty, required public prosecution with the victim's authorisation (Article 117 (2) of the Criminal Code, see paragraph 26 below). In the present case, the offence resulted from the handing over by Mrs Plankl of an unsealed letter to a prison officer for the purpose of transmitting it to the investigating judge. It had thus been possible for the letter's content to become known to several prison or court officers in the exercise of their duty. Article 117 (2) of the Criminal Code being applicable, the measure in question was covered by Article 187 (2) of the Code of Criminal Procedure.

(b) The investigating judge and the Review Chamber had, however, misapplied this provision, which authorised the stopping of letters but not the deletion of passages from them. The investigating judge had in fact not taken a "less severe measure" under an implied power, but a different measure which interfered with the interests of the prosecution authorities and the prison officers concerned, as they had the possibility of bringing criminal proceedings against Mrs Plankl on account of her remarks in the letter. The law had been violated in this latter respect, but Mrs Plankl had

not been injured thereby and could therefore not complain of the dismissal of her complaint by the Review Chamber.

II. THE RELEVANT DOMESTIC LAW

A. Rules concerning disqualification of or challenge to a judge

22. According to Article 68 (2) of the Code of Criminal Procedure:

> "A person shall be disqualified from participating or deciding in the trial proceedings if he has acted as investigating judge in the same case ..."

23. The following provisions of the Code of Criminal Procedure govern the disqualification (Ausschliessung) of judges:

Article 70 (1)

> "A judge is obliged to bring circumstances which disqualify him to the immediate attention of the president of the court of which he is a member ..."

Article 71 (1)

> "From the moment when grounds for his disqualification come to his knowledge, every judicial officer (Gerichtsperson) shall refrain from all judicial acts, on pain of nullity of such acts. The judicial officer concerned may carry out judicial acts which are urgent, but only where there is danger in delay and if another judge or registrar cannot be appointed immediately ..."

24. Furthermore, under Article 72 the parties to the proceedings may challenge (ablehnen) a judge if they can show that there are reasons for doubting his complete impartiality. Although Article 72 refers expressly to grounds other than disqualification, it is the practice of the courts to apply Article 72 also in cases where a party raises an issue relating to a judge's disqualification. In fact, the disqualification of a first-instance judge cannot subsequently be pleaded in nullity proceedings unless he was challenged before or at the trial or immediately after the ground for disqualification became known to the party (Article 281 (1), sub-paragraph 1, of the Code of Criminal Procedure). The procedure applicable in this respect is the following:

Article 73

> "An application by a party to challenge a judge shall be submitted to the court of which the person challenged is a member or declared orally before the registrar, at any time but not later than twenty-four hours before the start of the hearing in the case of a challenge to a member of the trial court, and not later than three days after service of the summons to appear at the hearing in the case of a challenge to the whole court. In

the application the grounds of challenge must be stated precisely and, as far as possible, supported by evidence."

B. Rules concerning surveillance of correspondence

25. The control of correspondence of remand prisoners is governed by Article 187 of the Code of Criminal Procedure, which provides:

"(1) Remand prisoners may ... correspond in writing with all persons, provided that there is no danger that such persons may interfere with the purpose of the detention ...

(2) ... Letters from detainees which give rise to the suspicion that an offence, not being an offence which can be prosecuted only at the request of a person concerned, is being committed by means of them, are always to be stopped, unless they are addressed to a national general representative body, a national court or other national authority, or to the European Commission of Human Rights.

(3) ..."

Decisions concerning the persons with whom the detainee may correspond and the surveillance of correspondence are the responsibility of the investigating judge. A complaint against such a decision lies with the Review Chamber of the Regional Court (Article 188 of the Code of Criminal Procedure).

26. For the purposes of Article 187 (2), public prosecution offences (Offizyialdelikte) may justify the stopping of a letter, whereas private prosecution offences (Privatanklagedelikte) may not. In addition, it follows from the Supreme Court judgment of 20 October 1987 (see paragraph 21 above) that such measures may also be justified in the case of offences qualifying for public prosecution with the authorisation of the injured party (Ermächtigungsdelikte), for instance offences committed against officials in the exercise of their duty. In this latter respect Article 117 (2) of the Criminal Code provides:

"Where an offence against honour is committed against an official ... during the exercise of his duties ..., the public prosecutor shall, with the authorisation of the injured party and his superior authority, institute proceedings within the time-limit which would otherwise be available to the injured party for the lodging of a request for prosecution. The same shall apply where such an offence against [an official] in connection with one of his professional activities is committed in a printed publication, in a broadcast, or in some other manner whereby it becomes accessible to the general public."

PROCEEDINGS BEFORE THE COMMISSION

27. In their application (no. 10802/84) lodged with the Commission on 23 September 1983, Mr Pfeifer and Mrs Plankl alleged various violations of Articles 3, 5, 6, 7, 8 and 13 of the Convention (art. 3, art. 5, art. 6, art. 7, art. 8, art. 13). In particular, Mr Pfeifer maintained that his right to have his case examined by an independent and impartial tribunal established by law within the meaning of Article 6 para. 1 (art. 6-1) had been violated. Furthermore, both applicants claimed that the censorship of a letter from Mrs Plankl to Mr Pfeifer constituted an unjustified interference with their right to respect for their correspondence under Article 8 (art. 8).

28. The Commission, by decisions of 13 May 1987, 15 December 1988 and 8 May 1989, declared the application inadmissible, apart from two complaints which it found admissible on the last of these dates. In its report of 11 October 1990 (Article 31) (art. 31), it expressed the opinion that there had been violations of Article 6 para. 1 (art. 6-1) (unanimously) and of Article 8 ((art. 8) ten votes to one).

The full text of the Commission's opinion is reproduced as an annex to this judgment[*].

GOVERNMENT'S FINAL SUBMISSIONS TO THE COURT

29. At the hearing on 24 September 1991, the Agent of the Government asked the Court

> "to hold that because of the failure to exhaust domestic remedies it [had] no jurisdiction to consider the merits of the application as regards Mr Pfeifer and, in the alternative, to hold that there [had] not been a violation of Article 8 (art. 8) of the Convention with respect to either of the two applicants or of Article 6 (art. 6) with respect to the criminal proceedings against Mr Pfeifer".

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 227 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 (art. 6)

30. Mr Pfeifer claimed to have suffered a violation of his right to be tried by an "impartial tribunal established by law" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, which reads as follows:

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

The Government disputed this argument, but the Commission agreed with it.

A. The Government's preliminary objection

31. The Government argued that Mr Pfeifer had not exhausted all domestic remedies, as the defence had neither challenged the two judges in question before the Regional Court nor raised the question of their disqualification in the plea of nullity to the Supreme Court, and had even undisputably waived the right to do so (see paragraphs 13, 14, 16, 22 and 24 above).

32. The Commission asked the Court to declare the objection inadmissible and referred to the dissenting opinions in certain recent cases (see, inter alia, the Cardot v. France judgment of 19 March 1991, Series A no. 200, pp. 22-24, opinions of Judges Martens and Morenilla). In the alternative, it argued that the applicant's waiver would in all probability have made the remedies mentioned by the Government ineffective.

Mr Pfeifer explained that his failure to react at the beginning of the hearing was due to the fact that he was unaware that he could still withdraw his declaration. As for his lawyer, he had not known that grounds for disqualification existed.

33. With reference to its jurisdiction to consider the objection, the Court refers to its well-established case-law (as first stated in the De Wilde, Ooms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 14, pp. 27-30, paras. 44-52); for the reasons given in the Pine Valley Developments Ltd and Others v. Ireland judgment of 29 November 1991 (Series A no. 222, p. 19, para. 39), it does not consider it should depart therefrom. It further notes that the Government previously put forward a similar plea before the Commission, so that there is no estoppel.

34. As to the merits of the objection, the Court takes note of a passage in the judgment of 29 February 1984, in which the Supreme Court stated that Mr Pfeifer could no longer claim that there had been an infringement of Article 68 (2) of the Code of Criminal Procedure, as he had waived doing so

before the start of the trial (see paragraph 16 above). As the Commission rightly pointed out, such a statement clearly shows that the question is inextricably linked with that of the validity of the waiver.

Because of its effect on the right recognised in Article 6 para. 1 (art. 6-1) of the Convention, the question of the waiver relates to the merits of the case, and the Government's objection must therefore be joined to the merits.

B. The merits of the complaint

35. Mr Pfeifer claimed that the two professional judges who sat as members of the Klagenfurt Regional Court in his case should have withdrawn under Article 68 (2) of the Code of Criminal Procedure, as they had acted as investigating judges in the case (see paragraph 22 above).

The Commission agreed with this argument. The Government, on the other hand, considered that this provision was more rigorous than Article 6 para. 1 (art. 6-1) of the Convention, so that the failure to apply the former did not necessarily mean that there had been a violation of the latter.

36. In the Court's opinion, the complaint of the lack of an "impartial" tribunal and that of the lack of a tribunal "established by law" coincide in substance in the present case.

Article 68 (2), under which a judge is disqualified from hearing a case if he has already had to deal with it as investigating judge, manifests the legislature's concern to remove all reasonable doubt as to the impartiality of trial courts. Its non-observance means that Mr Pfeifer was tried by a court whose impartiality was recognised by national law itself to be open to doubt (see, mutatis mutandis, the Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 23, para. 50). In this respect, it is unnecessary to define the precise role played by the judges in question during the investigative stage (see, mutatis mutandis, the Piersack v. Belgium judgment of 1 October 1982, Series A no. 53, p. 16, para. 31).

37. The Government argued that the applicant had waived his right under Article 6 para. 1 (art. 6-1), not only implicitly in failing to challenge the composition of the Regional Court at the appropriate time (see paragraph 32 above) but also expressly before the opening of the hearing (see paragraph 13 above).

According to the Court's case-law, the waiver of a right guaranteed by the Convention - insofar as it is permissible - must be established in an unequivocal manner (see, as the most recent authority, the Oberschlick judgment cited above, Series A no. 204, p. 23, para. 51). Moreover, the Court agrees with the Commission that in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance.

38. Under Articles 70 (1) and 71 (1) of the Code of Criminal Procedure (see paragraph 23 above) Judges Kaiser and Arnold were obliged firstly to

inform the President of the Regional Court of the circumstances entailing their disqualification; they were also obliged, on pain of nullity, to refrain from carrying out any judicial act, even before the applicant was summoned by Judge Kaiser on 31 August and 1 September 1983 in order to be informed of the situation (see paragraph 13 above). In addition, as the Government conceded, there is no provision of Austrian law which allows for a defendant expressly to waive his right to be tried by a court whose composition is in accordance with the law, nor consequently is there any provision which defines the procedure to be followed for this purpose. But such a right is of essential importance and its exercise cannot depend on the parties alone.

In the instant case it is sufficient to note that Judge Kaiser on his own initiative approached Mr Pfeifer in the absence of his lawyer, the latter not having been summoned despite his having previously taken part in the proceedings (see paragraphs 12-13 above). He put to him a question which was essentially one of law, whose implications Mr Pfeifer as a layman was not in a position to appreciate completely. A waiver of rights expressed there and then in such circumstances appears questionable, to say the least. The fact that the applicant stated that he did not think it necessary for his lawyer to be present makes no difference.

39. Thus even supposing that the rights in question can be waived by a defendant, the circumstances surrounding the applicant's decision deprived it of any validity from the point of view of the Convention.

In conclusion, the Court rejects the Government's preliminary objection and considers that there has been a violation of Article 6 para. 1 (art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

40. Both applicants claimed to be victims of a violation of Article 8 (art. 8) of the Convention, according to which:

> "1. Everyone has the right to respect for ... his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission agreed with this argument, but the Government did not.

A. The Government's preliminary objection

41. The Government claimed that only Mrs Plankl had exhausted domestic remedies with respect to the complaint based on the deletion of

part of her letter to Mr Pfeifer (see paragraphs 17-18 above), as the latter had not complained of this to the Review Chamber of the Regional Court.

42. The Court observes, as did the Commission, that the measure in issue affected both applicants at the same time. It therefore appears pointless to enquire whether one of them exhausted domestic remedies with reference thereto, given that the other undeniably did so without success.

B. The merits of the complaint

43. According to the applicants, the alleged violation of Article 8 (art. 8) followed from the deletion by the investigating judge of certain passages in Mrs Plankl's letter to Mr Pfeifer (see paragraph 17 above).

It is not disputed that there was an interference with the exercise of the applicants' right to respect for their correspondence, as guaranteed by Article 8 para. 1 (art. 8-1).

44. The Court agrees that, as stated by the Government and notwithstanding the doubts expressed by the Commission, the disputed measure was based on Article 187 (2) of the Code of Criminal Procedure (see paragraph 25 above).

The Court also considers, in agreement with the Commission and the Government, that the partial crossing out of the letter in question was aimed at ensuring "the protection of the rights ... of others" and "the prevention of ... crime".

45. As to whether the interference was "necessary in a democratic society", it is in the Government's opinion essential to take into account the contents of the letter, as reported by the investigating judge (see paragraph 19 above). That judge considered that the crossing out was necessary as the passages complained of consisted of remarks which were likely to undermine the authority of the prison officers and prejudice the proper working of the prison. Further, it was proportionate, as the letter had been sent on afterwards.

46. The Court recognises that some measure of control over prisoners' correspondence is not of itself incompatible with the Convention, but the resulting interference must not exceed what is required by the legitimate aim pursued.

47. According to the investigating judge, the deleted passages contained "jokes of an insulting nature against prison officers" (see paragraph 19 above). Their text was not, however, reconstructed before the Austrian courts.

The Commission rightly concluded from the account given by Mrs Plankl that the letter consisted rather of criticisms of prison conditions and in particular the behaviour of certain prison officers. Although some of the expressions used were doubtless rather strong ones (see paragraph 17 above), they were part of a private letter which under the relevant legislation

(Article 188 of the Code of Criminal Procedure, see paragraph 25 above) should have been read by Mr Pfeifer and the investigating judge only.

In the case of Silver and Others v. the United Kingdom, the Court held that it was not "necessary in a democratic society" to stop private letters "calculated to hold the authorities up to contempt" or containing "material deliberately calculated to hold the prison authorities up to contempt" (judgment of 25 March 1983, Series A no. 61, pp. 26 and 38, paras. 64 and 99 (c)). The deletion of passages is admittedly a less serious interference, but in the circumstances of the case this too appears disproportionate.

48. There has therefore been a violation of Article 8 (art. 8).

III. APPLICATION OF ARTICLE 50 (art. 50)

49. According to Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicants claimed compensation for non-pecuniary damage and reimbursement of costs and expenses.

A. Non-pecuniary damage

50. Mr Pfeifer claimed 45,000 Austrian schillings as compensation for his detention, which he said had been three months longer than the sentences passed.

The Court dismisses the claim, as there is no causal link between the violation of Article 6 (art. 6) which has been found in the present judgment and the length of the detention (see paragraph 39 above).

51. Mrs Plankl’s claim for 10,000 schillings in respect of the psychological consequences of her conditions of imprisonment should also be refused, as there is no direct link between them and the censorship of the letter.

B. Costs and expenses

52. Mr Pfeifer claimed a total of 69,490 schillings in respect of his costs and expenses before the Supreme Court, covering both his appeals (see paragraph 16 above). The Government correctly pointed out that that court had heard them together. The Court, deciding on an equitable basis, awards the applicant 20,000 schillings under this head.

Mrs Plankl drew up her complaint to the Review Chamber herself. Only the 1,500 schillings it cost her to submit her application to the Ministry of Justice can be taken into account.

53. The applicants sought reimbursement of 90,480 schillings in respect of the proceedings before the Commission and Court. Having regard to the circumstances of the case, the Court, on an equitable basis, awards them 60,000 schillings jointly.

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that it has jurisdiction to examine the Government's preliminary objections;

2. By unanimous votes, joins to the merits the objection relating to Mr Pfeifer's complaint based on Article 6 para. 1 (art. 6-1), but dismisses it after examining the merits;

3. Holds unanimously that there has been a violation of Article 6 para. 1 (art. 6-1);

4. Holds unanimously that there is no need to examine the objection relating to the alleged violation of Article 8 (art. 8) in the case of Mr Pfeifer;

5. Holds unanimously that there has been a violation of Article 8 (art. 8) with respect to both applicants;

6. Holds unanimously that the respondent State is within three months to pay 20,000 (twenty thousand) Austrian schillings to Mr Pfeifer and 1,500 (one thousand five hundred) schillings to Mrs Plankl, and 60,000 (sixty thousand) schillings to the two applicants jointly, in respect of costs and expenses;

7. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in French and in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 February 1992.

John CREMONA
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the separate opinion of Mr Bernhardt is annexed to this judgment.

J.C.
M.-A.E.

SEPARATE OPINION OF JUDGE BERNHARDT

I have voted against point 1 of the operative provisions of the judgment, since in my view the Court should no longer consider preliminary objections which have been rejected by the Commission.