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

COURT (CHAMBER)

CASE OF BRANDSTETTER v. AUSTRIA

(Application no. 11170/84; 12876/87; 13468/87)

JUDGMENT

STRASBOURG

28 August 1991

In the case of Brandstetter 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 R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr S.K. MARTENS,

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

Having deliberated in private on 21 February and 27 June 1991,

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") and by the Government of the Republic of Austria ("the Government") on 11 July and 1 October 1990 respectively, 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 three applications (nos. 11170/84, 12876/87 and 13468/87) against Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Karl Brandstetter, on 6 September 1984, 13 March 1987 and 21 October 1987.

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); the Government's application

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[*] The case is numbered 37/1990/228/292-294. 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.

[***] The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and the 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 paras. 1, 2 and 3 (c) and (d) (art. 6-1, art. 6-2, art. 6-3-c, art. 6-3-d).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

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 27 August 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr R. Macdonald, Mr C. Russo, Mr A. Spielmann and Mr S.K. Martens (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the need for a written procedure (Rule 37 para. 1). In accordance with the orders made in consequence, the Registrar received, on 10 December 1990, the Government's memorial and, on 14 and 17 December 1990 and 8 February 1991, Mr Brandstetter's claims under Article 50 (art. 50) of the Convention. On the latter date the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had set down, on 9 October 1990, the hearing for 18 February 1991 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr H. TÜRK, Legal Adviser,
  Ministry of Foreign Affairs, *Agent*,
  Mrs S. BERNEGGER, Federal Chancellery,
  Mrs I. GARTNER, Federal Ministry of Justice, *Advisers*;
- for the Commission
  Mr F. ERMACORA, *Delegate*;
- for the applicant
  Mr W. SPORN, Rechtsanwalt, *Counsel*.

The Court heard addresses by the above-mentioned representatives as well as their replies to its questions. The Government and the applicant submitted various documents.

7. On 5 March 1991, at the request of the Registrar acting on the instructions of the President, the applicant filed further observations on the application of Article 50 (art. 50) and the Commission several documents.

8. By a letter of 17 May 1991, the Agent of the Government informed the Registrar that the Vienna Senior Public Prosecutor (Oberstaatsanwalt) had issued instructions in order to change the practice in relation to the filing of his observations in cases pending before the Court of Appeal. As from that date they were to be established in several copies, one of which was to be sent to the defendant together with the summons to appear at the hearing.

AS TO THE FACTS

9. Mr Karl Brandstetter is an Austrian wine merchant residing at Hadres (Lower Austria).

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The background to the case

10. On 16 May 1983 a Federal Inspector of Cellars (Bundeskellereiinspektor) visited the applicant's undertaking to carry out an inspection under section 27 of the 1961 Wine Act, as amended (Weingesetz no. 187/1961, "the Wine Act"). He took three types of samples from two tanks of 1982 white wine. The tanks were sealed and officially seized (section 28, see paragraph 35 below).

After having left the two counter-samples (Gegenproben) with the applicant, he sent the two official samples (Anzeigeproben) to the Federal Agricultural Chemical Research Institute (Landwirtschaftlich-chemische Bundesversuchsanstalt, "the Agricultural Institute") to be examined (section 30 of the Wine Act). Each sample consisted of two bottles. In addition, he drew from each of the tanks a reserve sample (Reserveprobe), for use should a further analysis prove necessary.

11. On 9 June 1983 the Agricultural Institute drew up a report containing the results of a chemical analysis of the samples, which revealed an abnormally low level of natural extracts and mineral substances. It also set out the conclusions reached by an official wine quality control panel (amtliche Weinkostkommission, see paragraph 35 below). This panel had found on 25 May 1983 that the wine in the samples had been diluted with water.

As the levels were below those required by the Wine Ordinance (Weinverordnung), the Agricultural Institute suspected Mr Brandstetter of

contravening section 45(1) (a) and (b) of the Wine Act in conjunction with section 44(1) (f) and section 43(3) (relating, inter alia, to the offering for sale to the public of "imitation wine" and adulterated wine).

B. The proceedings concerning the quality of the wine

1. In the Haugsdorf District Court

12. On 8 June 1983 the Agricultural Institute had informed the Haugsdorf District Court (Bezirksgericht) of its suspicions in accordance with section 30(9) of the Wine Act (see paragraph 35 below), whereupon the District Prosecutor (Bezirksanwalt) instituted proceedings against Mr Brandstetter under section 45 of the Wine Act.

13. In order to prepare his defence, the applicant had the counter-samples analysed in Vienna by Mr Niessner of the Federal Food Control and Research Institute (Bundesanstalt für Lebensmitteluntersuchung und -forschung, "the Food Institute"). On 9 August 1983 Mr Niessner reported that the level of natural extracts and mineral substances was not below the required minimum. However, the tasting of the samples by a quality control panel on 14 July 1983 had confirmed that water had been added to at least one of them (by six votes out of seven), but had been unable to establish with certainty whether this was so for the other (five votes out of seven).

14. At a first hearing on 4 October 1983 Mr Brandstetter pleaded not guilty and requested the District Court to take expert evidence with a view to establishing that his wine was not "imitation wine" and had not been adulterated.

Accordingly, the District Court instructed Mr Bandion of the Agricultural Institute to carry out an expert examination. Mr Bandion had not been involved in the first analysis of the official samples by the Agricultural Institute, or in the drawing up of its report.

15. On 22 November 1983, at the second hearing, the court took evidence from Mr Bandion. According to him, the difference between the results of that examination and the results obtained by Mr Niessner showed that in at least one of the analyses a grave error had been committed; he recommended that the reserve samples should be analysed in order to clarify the position. The court directed him to draw up a report on this matter.

Mr Brandstetter maintained that the difference in the findings could also be explained by a circumstance to which he had already drawn the attention of the police on 22 July 1983. This was that the Inspector of Cellars had used a dirty bucket to draw the samples and had poured them into bottles in which there had been a residue of water. The Inspector had emptied the remaining bottles only after the applicant had protested. The applicant’s wife and two sons, who were called as witnesses, confirmed his statements.

The Inspector and his assistant, who were also heard as witnesses, claimed on the other hand that the bucket had been clean and that the liquid which remained in the bottles had been wine used to rinse them. The Inspector had explained this to Mr Brandstetter when the latter had complained and, moreover, he had subsequently emptied the bottles in question.

16. The analysis of the reserve samples was carried out at the Agricultural Institute on 21 December 1983 under the supervision of Mr Bandion. It resulted in similar conclusions to those concerning the first samples, but there was no tasting by a quality control panel.

In his report of 17 January 1984 Mr Bandion stated that the new analysis had corroborated the first examination carried out by the Agricultural Institute and therefore raised serious doubts with regard to the examination effected by Mr Niessner, of the Food Institute. The scientific findings corresponded to the conclusions of the quality control panels which had identified the addition of water in all the samples except one. As with the results of the tasting, they revealed the prohibited addition of water and sugar, and a level of natural extracts and substances below that required by the Wine Ordinance. The applicant's products could not, however, be classified as "imitation wine". Various statements by Mr Brandstetter and members of his family during the hearing (see paragraph 15 above) must have been wrong in view of the results of the chemical analysis, in particular statements concerning the use of a dirty bucket by the Inspector of Cellars. Furthermore it was impossible to determine from the outside whether the liquid residue in the green bottles was wine or water.

17. A new hearing was held on 14 February 1984. The applicant's lawyer criticised Mr Bandion's opinion because the latter's close links with the Agricultural Institute deprived him of the necessary objectivity in relation to the first analysis and could have led him to defend the results of that examination against those reported by Mr Niessner. In addition, the expert had exceeded his duties by expressing a view on questions of fact and of law instead of merely carrying out a chemical analysis. Consequently, the defence requested further investigative measures, namely the drawing of new samples from the two tanks which had been seized, the taking of evidence from several other experts, including Mr Niessner, and the consultation of the minutes of the quality control panel. The defence also alleged that the rules laid down for a tasting had not been complied with. Again, the court-appointed expert had not explained the differences between the conclusions of the two institutes. He had merely expressed his view that those of the Food Institute were erroneous and that those of his own Institute were correct.

18. On the same day the District Court convicted Mr Brandstetter of adulterating wine (section 45(1) (a) of the Wine Act) and fined him 5,600 schillings. It also ordered the forfeiture of the wine contained in the two

tanks seized - a total of 27,000 litres - (section 46(1)) and the publication of the judgment (section 45(3)).

Its judgment was based for the main part on Mr Bandion's opinion. It cited long passages from that opinion which were in its view conclusive because they revealed a convincing, detailed, precise and exhaustive examination of the differences in analysis of the two institutes. However, the court refused to take into account certain of the expert's statements which improperly dealt with questions of law and the assessment of evidence.

In determining sentence, the court regarded the fact that Mr Brandstetter had made false allegations as to the manner in which the Inspector had carried out his duties as an aggravating circumstance.

19. In addition, the District Court rejected the application for further investigative measures. The court did not consider it to be relevant in so far as it concerned the tasting procedure, because the results of this procedure did not constitute conclusive evidence. The drawing of new samples would in its view be superfluous, in particular as it could not be ruled out that the wine, which in the meantime had remained in the sealed tanks, had undergone an alteration with regard to its composition. The same was true of the request to hear new experts, because no doubts existed as to the reliability of the Agricultural Institute's conclusions, which had in part been confirmed by those of the Food Institute, or as to Mr Bandion's objectivity.

2. In the Korneuburg Regional Court

20. Mr Brandstetter appealed. He repeated his request for further investigative measures and argued that by dismissing it the District Court had disregarded the rights of the defence.

21. On 7 May 1984 the Korneuburg Regional Court (Kreisgericht) upheld the contested decision.

It noted that the applicant had not raised objections to the expert when he had first been appointed, but only on seeing his report. Mr Bandion's objectivity was not in doubt. He was especially experienced and conscientious and had in no way been involved in the analysis of the first samples, had criticised the conclusions not only of the Food Institute but also, in certain respects, those of his own Institute, and had explained in detail the differences between the two reports. The citation of extracts from the expert's opinion in the judgment could not be criticised. As it was a conclusive opinion, it was not necessary to seek new evidence (see paragraphs 17 and 19 above). Nor was it necessary to inspect the minutes of the quality control panel's meeting since the Food Institute's report contained a summary of the tasting procedure, which moreover could provide only indicative evidence of a subsidiary nature in relation to the evidence resulting from the chemical analysis.

C. The proceedings concerning the charge of tampering with the evidence

1. In the Haugsdorf District Court

22. On his conviction becoming final, Mr Brandstetter had intended to bring an action for damages against the Republic of Austria alleging its liability for the unacceptable procedural errors (Verfahrensfehler) which had been made by the courts in the proceedings concerning the quality of the wine.

In order to ensure that the evidence was preserved (Beweissicherungsantrag, Article 384 of the Code of Civil Procedure), he requested that additional samples be taken from the sealed tanks. His request was dismissed by the Haugsdorf District Court on 22 May 1984, but on his appeal the Korneuburg Regional Court reversed this decision on 12 June.

23. The District Court appointed as expert Mr Flack, who was a member of the staff of the Agricultural Institute's branch in Burgenland and who had not been involved in the proceedings concerning the quality of the wine. It instructed him to supervise, on 16 August 1984, the drawing of new samples from the tanks, and then to analyse them.

In his report of 27 September, Mr Flack found differences between the results of his analysis of these new samples and the results of the analyses by the Agricultural Institute of the official samples and the reserve samples obtained on 16 May 1983 (see paragraph 10 above). These differences could, in his opinion, not be explained by alterations in the composition of the wine with the passing of time, or by the effects of measures to preserve the wine authorised by the court. They were in his view due to the addition of substances capable of increasing the natural extract content (alcohol, glycerine, minerals).

24. On 25 September 1984, two days before officially submitting his report, Mr Flack had informed the District Court of his conclusions. The court, of its own motion, instituted criminal proceedings against Mr Brandstetter on a charge of tampering with evidence (Article 293 of the Criminal Code).

Mr Flack was appointed as expert by the court and submitted his report on 23 October 1984. He confirmed the earlier findings and noted that the composition of the new samples was similar to that of the counter-samples drawn on 16 May 1983 and analysed by the Food Institute (see paragraph 13 above).

2. In the Korneuburg Regional Court

25. On the basis of this expert opinion, the public prosecutor's office sought Mr Brandstetter's conviction for tampering with evidence under Article 293 of the Criminal Code.

26. Hearings were held before the Korneuburg Regional Court on 4 July and 12 September 1985.

The accused contended that it had been physically impossible for him to interfere with the counter-samples taken on 16 May 1983, because he had been absent from his business premises before they had been sent to the Food Institute. He stated that all the measures taken to preserve the wine in question had been carried out in the presence of and had been monitored by the Inspector of Cellars who had drawn the first samples.

Mr Brandstetter affirmed that some of the bottles containing the counter-samples, which he had sent to the Regional Agricultural Chemical Research Institute (Landwirtschaftlich-chemische Landesversuchs-und Untersuchungsanstalt) at Graz, had been broken during transport, but the bottleneck, which had remained intact, of one of them showed clearly that the seals had not been disturbed.

He maintained that Mr Niessner, the expert who had analysed the counter-samples (see paragraph 13 above), could attest to this. He asked that Mr Niessner be called as a witness in order to prove that the seals fixed by the Federal Inspector of Cellars on the counter-samples had been undisturbed when these samples had been given to the Food Institute and that the wine examined by Mr Niessner was identical to the wine examined by the Agricultural Institute. The latter's first findings were therefore not correct and the quality of the wine at the time when the first samples were drawn in May 1983 had been identical to that of the wine analysed by Mr Flack in the course of the proceedings for securing evidence. The defence further requested that Mr Niessner be appointed as a second expert in order to report on the quality of the wine he had analysed.

The court granted the first request, but refused the second. Accordingly, at the second hearing, Mr Niessner was called as a witness. He confirmed that the seals had been intact in so far as he had been able to judge at the time, but stated that the possibility of interference could not be completely ruled out because it was not the usual practice to carry out a detailed forensic examination. However, no question was put to the witness either by the prosecution or by the defence concerning the quality of the applicant's wine, or in respect of another possible explanation for the above-mentioned differences.

27. On 12 September 1985 the Regional Court found the applicant guilty and sentenced him to three months' imprisonment.

The court accepted Mr Flack's opinion that only the subsequent addition of substances could explain the significant differences in the analyses. It considered the latter's opinion to be logical and convincing, in particular

because it was consistent with Mr Bandion's conclusions in the proceedings conducted under the Wine Act (see paragraphs 15 and 16 above). As regards the physical impossibility alleged by the applicant, the court referred to "notorious methods" (gerichtsbekannte Methoden) which consisted of replacing the contents of a sealed bottle by heating the container and carefully removing the seal and the cork or by injecting substances with a syringe through the cork. The fact that one of the bottles had been broken might indeed have been due to the failure of such attempted interference.

The court ruled that there was no need to appoint Mr Niessner as a second expert, because he had already submitted a report on the quality of the wine, which he had analysed as a private expert, and because the results of his analysis had already been thoroughly discussed in Mr Bandion's report.

3. In the Vienna Court of Appeal

28. On 24 September 1986 the Vienna Court of Appeal (Oberlandesgericht) dismissed Mr Brandstetter's appeal (Berufung) against that judgment.

In its view, the Regional Court had not disregarded the evidence submitted by the applicant, namely the broken bottle neck of one of the counter-samples, whose seal was intact; moreover the sample in question could not be used as evidence because it had not been analysed. The results of the examination of the counter-samples by the Food Institute were contradicted by those of the analysis of the official samples by the Agricultural Institute and, according to the convincing opinion of Mr Flack, this discrepancy could be explained only by the fact that substances had been added to the counter-samples.

The Regional Court had also taken into account the identical conclusions which Mr Bandion had reached in the earlier proceedings, and the testimony of the witness Mr Niessner on the possibility of interfering with a sealed bottle. It had also described the notorious methods for carrying out such operations. It had therefore based its conclusion on sufficient reasons.

Consequently, the Court of Appeal did not consider it necessary to consult a new expert as the accused had requested, since the conditions laid down in Article 126 of the Code of Criminal Procedure were not satisfied (see paragraph 36 below).

29. Mr Brandstetter served 31 days of his sentence. The remaining term was suspended following a pardon granted by the President of the Republic.

D. The defamation proceedings

1. In the Korneuburg Regional Court

30. On 20 August 1984 criminal proceedings had been instituted at the request of the public prosecutor against Mr Brandstetter for defamation. According to the public prosecutor's office he had wrongly accused the Inspector of Cellars of irregularities in taking the first samples on 16 May 1983 (see paragraph 15 above). In so doing he had exposed the latter to the risk of disciplinary sanctions.

31. On 29 October 1984 the Korneuburg Regional Court sentenced the applicant to a suspended term of three months imprisonment for defamation on account of the following statement made by him to the police on 22 July 1983 (see paragraph 15 above) and taken down at his express request:

> "[The Inspector of Cellars] also used for this purpose [for drawing the wine samples] a bucket which was rather dirty. When the bottles were being filled up, I noticed that they contained water, which presumably had been left over after rinsing. However, he told me that this was of no importance."

These assertions, which were false and which he knew to be false, could have led to the opening of disciplinary proceedings against the Inspector, because they gave the impression that he had not emptied the bottles when the applicant had asked him to do so; in fact the contrary had been established.

The court based its findings on the evidence adduced in the proceedings concerning the quality of the wine and in particular on the expert opinion and testimony of Mr Bandion, the statements of the Inspector and his assistant, the statements of the applicant and the members of his family and the judgment of 14 February 1984 (see paragraphs 15 and 18 above).

2. In the Vienna Court of Appeal

(a) First set of proceedings

32. On 23 April 1985 the Vienna Court of Appeal dismissed the applicant's appeal and upheld the Regional Court's judgment in its entirety.

In so far as Mr Brandstetter had claimed that the impugned statement (see paragraph 31 above) was justified in the exercise of the rights of the defence (Articles 199 and 202 of the Code of Criminal Procedure) and could not therefore constitute criminal defamation, the court referred to well-established case-law and academic opinion, according to which such rights could not extend to conduct which did not merely serve an accused's defence, but also adversely affected the rights of another person through allegations of such a nature as to amount to a new criminal offence. As the

applicant had consciously aroused false suspicions in respect of the Inspector, Article 297 of the Criminal Code was applicable.

The court also took the view that the public prosecutor's office had not tacitly waived its right to institute proceedings, even though it had not acted immediately. Finally, it found no procedural defect in the way in which the Regional Court had assessed the evidence. The latter court had examined the findings of the proceedings in detail, in a logical and coherent manner in relation to the evidence, and had drawn plausible conclusions concerning the subjective element. The appeal court regarded it as decisive that the bottles, irrespective of whether they had been rinsed with water or wine, could not contain a significant quantity of liquid once they had been emptied in the way described in a credible and convincing manner by the Inspector of Cellars.

(b) Second set of proceedings

33. On an application by Mr Brandstetter, the Attorney-General (Generalprokurator) lodged a plea for a declaration of nullity in the interests of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) directed against the composition of the Court of Appeal. The Supreme Court (Oberster Gerichtshof) allowed the appeal on 28 January 1987 and remitted the case to the Court of Appeal.

At the hearing on 24 March 1987 the defence alleged that one of the judges present had already participated in the first appeal proceedings and should therefore withdraw. The court adjourned the hearing until 28 April 1987 when it sat in a composition that was in conformity with the law; it confirmed the judgment of 23 April 1985 in its entirety (see paragraph 32 above).

34. The applicant subsequently asked the Attorney-General to lodge a further application for a declaration of nullity in the interests of the law, but unsuccessfully.

At this time he discovered that the judgments of 23 April 1985 and 28 April 1987 reproduced almost word for word the observations (the "croquis") of the Vienna Senior Public Prosecutor (Oberstaatsanwalt) filed with the Court of Appeal on 29 March 1985, which had not been served on him and of which he himself had had no knowledge at the time.

II. THE RELEVANT AUSTRIAN LEGISLATION

35. According to the Wine Act, a Federal Inspector of Cellars may draw samples from wine tanks of the firm inspected and send them for analysis to the Agricultural Institute. A sealed counter-sample must be left with the firm in question. Furthermore, a reserve sample must be drawn, for use should a further analysis be necessary. The tanks may subsequently be sealed (sections 27 and 28).

The Agricultural Institute analyses the official samples and draws up a report setting out its findings, as well as the results of a tasting by the official wine quality control panel (section 30(3)). The panel is composed of a Chairman (the Director of the Agricultural Institute) and at least five expert tasters appointed by the Federal Ministry of Agriculture and Forestry. It decides, by a qualified majority (five out of five or six, six out of seven, etc), whether the quality of the wine corresponds to its designation. The tasting, the conditions of which are laid down in internal rules, is not conducted in public. The identity of its members - who are under a duty of confidentiality - is not disclosed (section 30(4) to (8)).

If the results of the analysis provide grounds for suspecting that a criminal offence has been committed, the Agricultural Institute must report this to the competent public prosecutor or court (section 30(9)).

36. As regards expert evidence in court, section 30(10) stated at the time:

> "If the court has doubts concerning the findings or the opinion of the Agricultural Institute, or if it considers that the findings or the opinion require elaboration, or if reasonable objections are raised against them, it must take expert evidence from an official of the Institute who has been involved in the preparation of the analysis or the opinion in question so that he may explain or discuss in greater detail the conclusions or opinion of that Institute".

In all other aspects the provisions of the Code of Criminal Procedure are applicable. In particular if any doubts persist or if the findings of an expert "are unclear, vague, contradictory", etc. (Articles 125 and 126 of the Code of Criminal Procedure), the court may call another expert.

Under the terms of Article 149 of the same Code, only the prosecutor and the defence counsel or the accused are entitled to put questions to witnesses and experts. Nevertheless, the court may authorise experts to examine witnesses and the accused. Witnesses, on the contrary, do not have this possibility.

PROCEEDINGS BEFORE THE COMMISSION

37. In his applications of 6 September 1984 (11170/84), 13 March 1987 (12876/87) and 21 October 1987 (13468/87), Mr Brandstetter made the following complaints: that in the proceedings concerning the quality of the wine and those relating to the charge of tampering with evidence, he had not had a fair trial as required by Article 6 para. 1 (art. 6-1), nor had he had the benefit of the right secured under Article 6 para. 3 (d) (art. 6-3-d), on account of the position which the experts of the Agricultural Institute had occupied in relation to other expert witnesses; in addition, in the first proceedings, there had been a breach of Article 6 para. 3 (c) (art. 6-3-c) by reason of the applicant’s subsequent conviction for defamation on the basis of statements that he had made in his defence, during the investigation; in

the second proceedings, there had been a breach of the principle of the presumption of innocence guaranteed under Article 6 para. 2 (art. 6-2); finally, in the defamation proceedings, the Court of Appeal had failed to satisfy the requirement of a fair trial by basing its decision on observations made by the prosecution which had not been communicated to the defence.

38. On 14 July 1987 the Commission declared the first application manifestly ill-founded on two points and admissible for the rest. On 10 July 1989 it declared the two other applications admissible and ordered their joinder with the remaining claims of the first application.

In its report of 8 May 1990 (Article 31) (art. 31), the Commission expressed the opinion:

(a) that, in the case concerning the quality of the wine, there had been a violation of Article 6 para. 1 (art. 6-1) taken in conjunction with Article 6 para. 3 (d) (art. 6-3-d) of the Convention inasmuch as the expert evidence for the prosecution and that for the defence had not been treated on an equal footing (unanimously);

(b) that the same was true in the proceedings concerning the charge of tampering with evidence (unanimously);

(c) that the applicant's conviction for defamation had infringed Article 6 para. 3 (c) (art. 6-3-c) (nine votes to three);

(d) that no separate issue arose concerning the question whether, in the proceedings concerning the charge of tampering with evidence, there had been in other respects an infringement of the applicant's right to a fair trial (Article 6 para. 1) (art. 6-1) or a breach of the principle of the presumption of innocence (Article 6 para. 2) (art. 6-2) (unanimously);

(e) that, in the defamation proceedings, there had not been, on appeal, a breach of the principle of equality of arms guaranteed in Article 6 para. 1 (art. 6-1) (eleven votes to one).

The full text of the Commission's opinion and the two separate opinions contained in the report is reproduced as an annex to this judgment[*].

AS TO THE LAW

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

39. Mr Brandstetter alleged that he had been the victim of breaches of paragraphs 1, 2 and 3 (c) and (d) of Article 6 (art. 6-1, art. 6-2, art. 6-3-c, art. 6-3-d) which, in so far as they are relevant, provide:

[*] Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 211 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

"1. In the determination ... 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. ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

... ."

According to the applicant, these provisions were violated in three different sets of proceedings concerning, respectively, the quality of his wine, a charge of tampering with evidence and his prosecution for defamation. The Court will examine each set of proceedings in turn.

A. The proceedings concerning the quality of the wine (see paragraphs 12-21 above)

40. Mr Brandstetter's complaints in respect of the proceedings concerning the quality of the wine raise three distinct issues, namely:

(1) the principle of equality of arms, inherent in Article 6 para. 1 (art. 6-1) and the specific provisions of Article 6 para. 3 (d) (art. 6-3-d), with regard to expert evidence;

(2) the right to a fair trial and the right to obtain the attendance and examination of witnesses (Article 6 para. 1, in conjunction with Article 6 para. 3 (d)) (art. 6-1, art. 6-3-d) in relation to the evidence resulting from a wine-tasting procedure;

(3) the rights of defence set forth in Article 6 para. 3 (c) (art. 6-3-c), in connection with the applicant's subsequent conviction for defamation on account of statements made by him in his defence during these proceedings.

1. The principle of equality of arms with regard to expert evidence

41. Mr Brandstetter first complained that the Haugsdorf District Court, applying section 30(10) of the Wine Act (see paragraphs 14 and 36 above) had appointed, as official expert, Mr Bandion, a member of the staff of the Agricultural Institute which had reported the initial suspicions concerning

him, and that, in breach of the principle of equality of arms, it had refused to hear any other expert, and even to call Mr Niessner, the expert commissioned by the applicant, as a witness.

The Government argued that the expert in question had not been appointed in pursuance of the above-mentioned section but, under the general rules of Articles 125 and 126 of the Code of Criminal Procedure (see paragraph 36 above), to analyse a third set of samples (the reserve samples) and to compare the results with those of the analyses of the official samples and the counter-samples. As an "expert", he was, according to Austrian law, a neutral and objective auxiliary of the court.

The Commission did not find it necessary to ascertain whether the appointment of Mr Bandion was based on section 30 of Wine Act, because what, in its opinion, was decisive for this issue was the fact that he belonged to the staff of the Agricultural Institute.

42. The Court considers it appropriate to examine the applicant's complaint under the general rule of paragraph 1 of Article 6 (art. 6-1) of the Convention, whilst having due regard to the guarantees of paragraph 3 (art. 6-3) (see, inter alia, the Bönisch judgment of 6 May 1985, Series A no. 92, pp. 14-15, para. 29). The Court notes that, read literally, sub-paragraph (d) of paragraph 3 (art. 6-3-d) relates to witnesses and not experts. It points out that in any event the guarantees contained in paragraph 3 (art. 6-3) are constituent elements, amongst others, of the concept of a fair trial set forth in paragraph 1 (art. 6-1) (ibid.).

In this context, it will take into consideration the position occupied by the expert throughout the proceedings and the manner in which he performed his functions (ibid., p. 15, para. 31).

43. First of all, the Court does not find it established that the District Court, when appointing Mr Bandion did so under section 30(10) of the Wine Act. At its first hearing, on 4 October 1983, the District Court had before it two contradictory reports, one supporting the prosecution's views and the other those of the defence; as a result the defence requested the appointment of another expert (see paragraphs 12-14 above). The court allowed this request and appointed Mr Bandion who was not - as he should have been under the aforementioned provision - the "official" who either had carried out the analysis of the official samples or had drawn up the report thereon.

44. Admittedly, the fact that Mr Bandion was a member of the staff of the Agricultural Institute which had set in motion the prosecution may have given rise to apprehensions on the part of Mr Brandstetter. Such apprehensions may have a certain importance, but are not decisive. What is decisive is whether the doubts raised by appearances can be held objectively justified (see, mutatis mutandis, in respect of judges, the Hauschildt judgment of 24 May 1989, Series A no. 154, p. 21, para. 48).

Such an objective justification is lacking here: in the Court's opinion, the fact that an expert is employed by the same institute or laboratory as the expert on whose opinion the indictment is based, does not in itself justify fears that he will be unable to act with proper neutrality. To hold otherwise would in many cases place unacceptable limits on the possibility for courts to obtain expert advice. The Court notes, moreover, that it does not appear from the file that the defence raised any objection, either at the first hearing of 4 October 1983 when the District Court appointed Mr Bandion, or at the second hearing of 22 November 1983 when Mr Bandion made an oral statement and was asked to draw up a report; it was not until 14 February 1984, after Mr Bandion had filed his report, which was unfavourable to Mr Brandstetter, that the latter's lawyer criticized the expert for his close links with the Agricultural Institute (see paragraphs 14-17 above).

45. The mere fact that Mr Bandion belonged to the staff of the Agricultural Institute does not justify his being regarded - as was the case with the expert in the Bönisch case (see the judgment cited above, Series A no. 92) - as a witness for the prosecution. Nor does the file disclose other grounds for so considering him. It is true that to a certain extent Mr Bandion stepped outside the duties attaching to his function by dealing in his report with matters relating to the assessment of evidence, but this does not warrant the conclusion that the position which he occupied in the proceedings under review was that of a witness for the prosecution either.

Accordingly, the District Court's refusal of the defence's request to appoint other experts (see paragraph 17 above) cannot be seen as a breach of the principle of equality of arms.

46. Nor can it be said that because of this refusal or of the refusal to call Mr Niessner as a witness the proceedings were unfair. The right to a fair trial does not require that a national court should appoint, at the request of the defence, further experts when the opinion of the court- appointed expert supports the prosecution case.

47. Accordingly, there was no violation of Article 6 para. 1 (art. 6-1), read in conjunction with Article 6 para. 3 (d) (art. 6-3-d) of the Convention, under this head.

2. Right to a fair trial and right to obtain the attendance and examination of witnesses

48. Mr Brandstetter also complained that, contrary to Article 6 para. 1 (art. 6-1), taken in conjunction with Article 6 para. 3 (d) (art. 6-3-d), the Haugsdorf District Court relied on the evidence of anonymous witnesses, the members of the wine-tasting panel, who did not give evidence in court and whose identity was not disclosed.

The Government argued that the panel's evidence was only of secondary importance; the Commission observed that it had in fact been of some

relevance, because it supported the argument of the official expert and provided an additional reason for refusing to call a second expert.

49. The Court notes in the first place that in the proceedings concerning the quality of the wine the applicant never sought the attendance and examination of the members of the Agricultural Institute's panel: in fact, what he requested was the examination of the minutes of their wine-tasting session (see paragraphs 17 and 19 above).

Furthermore, the results of the wine-tasting procedures, for both the official samples and the counter-samples, were included in the respective reports of 9 June and 9 August 1983 by the two Institutes (see paragraphs 11 and 13 above). They thus formed only part of the written expert opinions. In addition, the reserve samples, which were the subject of Mr Bandion's analysis and report, and indeed the main evidence before the District Court, were not tasted at all by a panel (see paragraph 16 above).

The expert did indeed note in his report that the results of his chemical analysis could not be considered to be contrary to the findings of the Agricultural Institute's panel, and this view was accepted by the District Court in its judgment of 14 February 1984 (see paragraphs 16 and 18 above). However, when rejecting the defence's request to examine the minutes of the wine-tasting session, the District Court stated that these findings were not relevant, because they did not constitute conclusive evidence (see paragraphs 17 and 19 above).

On appeal, the Regional Court similarly held that these findings were, at best, an indication, since the results of the analyses already amounted to conclusive evidence (see paragraph 21 above).

There has thus been no violation of Article 6 para. 1 (art. 6-1), taken in conjunction with Article 6 para. 3 (d) (art. 6-3-d), under this head either.

3. Rights of the defence

50. Again in connection with the proceedings concerning the quality of the wine, Mr Brandstetter complained finally that he had been convicted of defamation in subsequent proceedings, because he had alleged that the Inspector, when drawing the first wine samples on 16 May 1983, had acted irregularly (see paragraphs 15 and 30 above). This, in his view, constituted a violation of Article 6 para. 3 (c) (art. 6-3-c), inasmuch as an accused's ability to make statements in his defence must not be limited or inhibited by a fear of facing charges at a later stage of wilfully making false allegations.

51. The Court understands the substance of this complaint to be as follows: first, that the applicant's conviction in the defamation proceedings was incompatible with the rights of the defence set forth in Article 6 para. 3 (c) (art. 6-3-c) because it was based on statements made as a defence in the proceedings concerning the quality of the wine; and secondly, that it follows from this conviction that in the latter proceedings the applicant's rights of defence were interfered with.

52. As to the first limb (which, although it concerns the defamation proceedings, for the sake of coherence will be discussed here), the Court observes in the first place that Article 6 para. 3 (c) (art. 6-3-c) does not provide for an unlimited right to use any defence arguments.

Mr Brandstetter claimed in his appeal in the defamation proceedings that, since he had made the impugned statements in the exercise of his rights of defence, they could not constitute punishable defamation. According to the Vienna Court of Appeal, however, the rights of defence could not extend to an accused's conduct where it amounted to a criminal offence such as, in the present case, that of consciously arousing false suspicions concerning the Inspector (see paragraph 32 above).

The Court agrees in principle with this ruling. It would be overstraining the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally arouse false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings.

It is, however, not for the Court to determine whether Mr Brandstetter was rightly found guilty of having done so. According to its case-law, it is, as a rule, for the national courts to assess the evidence before them (see, mutatis mutandis, the Delta judgment of 19 December 1990, Series A no. 191-A, p. 15, para. 35).

53. As to the second limb, which is related to the proceedings concerning the quality of the wine, it follows from the above considerations that the mere possibility of an accused being subsequently prosecuted on account of allegations made in his defence cannot be deemed to infringe his rights under Article 6 para. 3 (c) (art. 6-3-c). The position might be different if it were established that, as a consequence of national law or practice in this respect being unduly severe, the risk of subsequent prosecution is such that the defendant is genuinely inhibited from freely exercising these rights. Mr Brandstetter has not, however, alleged that this is the case in Austria.

Moreover, Mr Brandstetter might have been indirectly inhibited if, when he made his allegations, he had been threatened with the possibility of prosecution for defamation. It is true that the Regional Court took these statements into account as an aggravating circumstance when determining sentence (see paragraph 18 above), but it does not appear that, during the proceedings leading to this judgment, any warning was given to the applicant in this respect. In fact Mr Brandstetter made the impugned allegations first before the police on 22 July 1983, and then before the Haugsdorf District Court on 22 November 1983 (see paragraph 15 above). There is no evidence to show that, at the time, he was stopped from making them or in any way restrained from airing the views which he expressed.

54. Having regard to all these circumstances, the Court concludes that there has been no violation of Article 6 para. 3 (c) (art. 6-3-c).

B. The proceedings concerning the charge of tampering with evidence (see paragraphs 22-29 above)

55. In respect of the proceedings concerning the charge of tampering with evidence, Mr Brandstetter complained that the principle of equality of arms in relation to expert evidence had been disregarded, in breach of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

Before the Commission he had also alleged that there had been a violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) (right to a fair trial and right to be presumed innocent), as a result of various specific findings made by the Korneuburg Regional Court in its judgment of 12 September 1985 (see paragraph 27 above). The Commission, having regard to its conclusion that there had been a violation of the principle of equality of arms, considered that there was no need to deal with these complaints. They were not pursued before the Court which, accordingly, does not find it necessary to examine them.

1. Preliminary objection

56. The Government submitted, as they had already done before the Commission, that Mr Brandstetter had failed to exhaust domestic remedies as is required under Article 26 (art. 26) of the Convention, since he had not challenged in due time Mr Flack, the official expert appointed by the Haugsdorf District Court (see paragraph 23 above).

57. The Court observes that the applicant's complaint is not that Mr Flack was appointed as the official expert; what he is complaining about is that the Regional Court refused his request for Mr Niessner, his privately commissioned expert, to be appointed as second court expert (see paragraph 27 above). In his appeal to the Vienna Court of Appeal the applicant raised this point at least in substance, but it was rejected (see paragraph 28 above).

This being so, the domestic remedies were exhausted.

2. The merits of the complaint

58. The applicant complained that the Haugsdorf District Court had designated, as official expert, Mr Flack, who had raised the initial suspicion against him and who, moreover, was on the staff of the Agricultural Institute, whose experts had been consulted in the previous proceedings (see paragraphs 11 and 14 above), while it heard the expert commissioned by the applicant to analyse the counter-samples only as a witness, and thus not "under the same conditions". He alleged that this constituted a violation of Article 6 para. 1 taken together with Article 6 para. 3 (d) (art. 6-1, art. 6-3-d).

59. In examining this complaint, the Court will adopt the same approach as it did in considering the issue of expert evidence in the previous proceedings. To determine whether the principle of equality of arms has

been complied with in this case, it is necessary to take into consideration both the position occupied by the expert throughout the proceedings and the manner in which he performed his functions (see paragraph 42 above).

60. As to the first point, it should be noted that the charge of tampering with evidence originated in a report prepared by Mr Flack. In the context of the proceedings for securing evidence instituted by Mr Brandstetter, Mr Flack had been instructed to supervise the drawing of new samples from Mr Brandstetter's tanks and to analyse them (see paragraphs 22 and 23 above). When Mr Flack did so, he found differences between the results of his analysis of the new samples and the results of the analyses by the Agricultural Institute of the official samples and the reserve samples obtained on 16 May 1983. These differences could, in his opinion, only be explained by assuming that substances capable of increasing the natural extract content had been added to the wine in the tanks (see paragraph 23 above). This opinion was imparted by Mr Flack to the District Court, whereupon that court, of its own motion, instituted criminal proceedings against the applicant for tampering with evidence.

The Court agrees with the Commission that, in substance, the criminal suspicion emanated from Mr Flack. Notwithstanding this fact, he was later appointed as official expert by the court in the above-mentioned proceedings (see paragraph 24 above).

61. In these circumstances the applicant's apprehensions with regard to the neutrality and objectivity of the expert in question can be held to have been justified (see paragraph 44 above), the situation here being closer to that obtaining in the Bönisch case (see the judgment cited above, Series A no. 92, p. 15, paras. 31-32) than the position in the case concerning the quality of the wine (see paragraph 45 above).

This does not mean that it was contrary to the Convention to examine Mr Flack at the hearing of 4 July 1985 (see paragraph 26 above); however, under the principle of equality of arms persons who were or could be called, in whatever capacity, by the defence in order to refute the views professed by Mr Flack, should have been examined under the same conditions as he was (see, mutatis mutandis, ibid., p. 15, para. 32).

62. In this respect the Court notes first that Mr Flack was present at the hearings of 4 July and 12 September 1985, but did not play a dominant role: in particular he did not put questions to the applicant or Mr Niessner, the "expert witness" called by the applicant; nor did he comment on the evidence given by Mr Niessner. In this regard the present case differs from the Bönisch case.

Furthermore, at the first hearing of the Reginal Court Mr Flack was given the opportunity to summarise his written report and to explain why, in his opinion, the only possible explanation of: (1) the differences between the results of his analyses and the results of the analyses of the official and the reserve samples and (2) the similarities between his results and those of the

analysis of the counter-samples by Mr Niessner, was that, after the official samples had been taken, substances had been added both to the tanks and the counter-samples.

At that first hearing the defence did not dispute the results of Mr Flack's analyses, or his opinion that the differences between these results and those of the analyses of the official and the reserve samples could not be explained as being the effect of the passing of time on the composition of the wine. The defence stressed the similarities between the results of Mr Flack and those of Mr Niessner. Taking them as its starting point, the defence followed the line of reasoning that (1) it could be proved that the seals on the bottles containing the counter-samples were untouched when Mr Niessner started their analysis; (2) accordingly, the counter-samples could not have been tampered with; and (3) it followed that Mr Niessner had analysed the same wine as the Agricultural Institute and that the analyses of that Institute must have been wrong. In order to prove these allegations the defence requested that Mr Niessner should be heard, both as a witness and as an expert (paragraph 26 above).

The first request was granted but the second rejected, and, at the second hearing, Mr Niessner was heard merely as a witness (see paragraph 26 above). As such he could only answer questions put to him by the judge, the public prosecutor and the defence. The questions that were actually put to him concerned solely the question whether it could indeed be ruled out that the counter-samples had been tampered with before he started his analysis. No one, not even the defence, asked questions with regard to the methods he had employed or the results that he had obtained.

It is true that Mr Niessner was not heard "under the same conditions" as Mr Flack, yet in the light of the way argument was presented it cannot be said that the refusal to appoint Mr Niessner as an expert amounted to a breach of the principle of equality of arms. The line taken by the defence implied that the results of Mr Niessner's analysis were only relevant if it could be proved that the counter-samples had not, and could not have been, tampered with. On the latter issue Mr Flack had not written or said anything, while the defence had been able to put all the questions it wished to the only witness it had called on this point. Since the court found that it had not been established that tampering with the counter-samples could be excluded, the ground for the request to appoint Mr Niessner as a second expert ceased to exist.

63. Having regard to the particular circumstances of the case concerning the charge of tampering with evidence, the Court concludes that, here also, there has been no violation of Article 6 para. 1 (art. 6-1), taken in conjunction with Article 6 para. 3 (d) (art. 6-3-d).

C. The defamation proceedings (see paragraphs 30-34 above).

64. Finally, the applicant complained, in respect of the defamation proceedings, that the Vienna Court of Appeal, in its judgments of 23 April 1985 and 28 April 1987, had relied on submissions by the Senior Public Prosecutor which had not been communicated to the accused and the existence of which was not known to him (see paragraph 34 above). Here again he alleged a breach of the principle of equality of arms (Article 6 para. 1). (art. 6-1)

65. Whilst admitting that these submissions had not been served on the applicant, the Government observed that, according to a well-established practice, defence counsel could have requested access to the file and could have inspected such submissions. He had not however availed himself of this possibility.

The applicant's lawyer denied that such a practice existed and referred to certain cases - without however identifying them - where access had been refused on the ground that the submissions belonged to the "Attorney-General's file".

66. The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial (see, mutatis mutandis, in respect of the examination of witnesses, the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, pp. 33-34, para. 78). The Court will thus examine the matter in the light of the whole of paragraph 1 of Article 6 (art. 6-1) (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 28).

67. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.

Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon. This is henceforth the case, as far as the Vienna Court of Appeal is concerned (see paragraph 8 above).

In the present case it is common ground that no copy of the submissions of the Senior Public Prosecutor was sent to the applicant and that he was not informed of their having been filed either. The Government's argument is not that these submissions are prescribed by law so that the applicant should have known that they were to be filed; their argument seems to be that the submissions - the so-called "croquis" (see paragraph 34 above) - were filed according to a standing practice which enables the Senior Public Prosecutor to file such a croquis in such cases as he deems appropriate. They suggest that this practice must have been known to the applicant's lawyer who,

accordingly, could have enquired whether in the applicant's case a croquis had been filed. If so, he could have requested leave to inspect the file under section 82 of the Code of Criminal Procedure and thus could have commented on it. Section 82, as it is formulated, however, does not seem to grant an unconditional right to inspect the complete file but only the possibility to ask for leave to do so, and the parties differ as to whether, with regard to the croquis, such leave would have been granted at the relevant time. The Commission left that question unsettled and so will the Court.

The Court notes that the croquis apparently has considerable importance and that the alleged practice requires vigilance and efforts on the part of the defence; against this background, the Court is not satisfied that this practice sufficiently ensures that appellants in whose cases the Senior Public Prosecutor has filed a croquis on which they should comment are aware of such filing.

68. The Commission established that, after the Court of Appeal's judgment of 23 April 1985 had been quashed by the Supreme Court on 28 January 1987 (see paragraphs 33-34 above), no new submissions were filed by the Senior Public Prosecutor. It considered therefore that, in so far as the Court of Appeal's judgment "reproduced almost literally" the text of the observations in question, the applicant had had the opportunity to deal with the arguments contained therein in the second set of proceedings.

The Court does not share this view. An indirect and purely hypothetical possibility for an accused to comment on prosecution arguments included in the text of a judgment can scarcely be regarded as a proper substitute for the right to examine and reply directly to submissions made by the prosecution.

Furthermore, the Supreme Court did not remedy this situation by quashing the first judgment since its decision was based on a ground entirely unrelated to the matter in issue.

69. The Court therefore concludes that, in the appeal proceedings concerning the defamation case, there was a violation of Article 6 para. 1 (art. 6-1) of the Convention.

II. APPLICATION OF ARTICLE 50 (art. 50)

70. Article 50 (art. 50) of the Convention provides:

> "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."

Mr Brandstetter claimed compensation for pecuniary and non-pecuniary damage, as well as the reimbursement of his costs and expenses. He also sought interest at 10% per annum on the relevant amounts.

71. The Court first notes that it has found a violation of Article 6 para. 1 (art. 6-1) of the Convention only in relation to the appeal proceedings in the defamation case (see paragraph 69 above). Accordingly, in so far as the applicant's claims are related to the proceedings concerning the quality of the wine and the charge of tampering with evidence, they must be dismissed.

72. As regards the proceedings in the defamation case the applicant claimed only his costs and expenses, namely 2,000 schillings for court costs and 43,609.35 schillings for his lawyer's fees. These costs cannot, however, be considered to be a consequence of the violation found by the Court.

It follows that this claim must also be dismissed.

73. With regard to the proceedings before the Convention institutions, the applicant claimed the reimbursement of his costs and expenses. The Court notes that he received legal aid for the proceedings before the Commission and the Court, but this does not exclude that he incurred additional costs.

74. For his lawyer's fees before the Commission and the Court, Mr Brandstetter sought an overall sum of 547,595.90 schillings. The Court has had regard to the fact that, of the applicant's complaints made in his three different applications, only one has been found to be justified. Taking also into account the sums already paid to him by way of legal aid and making an assessment on an equitable basis, it awards to the applicant 60,000 schillings, including interest.

FOR THESE REASONS, THE COURT

1. Holds unanimously that, in the proceedings concerning the quality of the wine, there was no violation of Article 6 para. 1 (art. 6-1), taken in conjunction with Article 6 para. 3 (d) (art. 6-3-d);

2. Holds unanimously that, in the same proceedings, there was no violation of Article 6 para. 3 (c) (art. 6-3-c);

3. Rejects unanimously the preliminary objection which the Government raised as regards expert evidence in the proceedings concerning the charge of tampering with evidence;

4. Holds unanimously that, in those proceedings, there was no violation of Article 6 para. 1 (art. 6-1), taken in conjunction with Article 6 para. 3 (d) (art. 6-3-d);

5. Holds unanimously that, as regards those proceedings, it is not necessary to examine the other complaints under Article 6 paras. 1 and 2 (art. 6-1, art. 6-2);

6. Holds unanimously that, in the defamation proceedings, there was no violation of Article 6 para. 3 (c) (art. 6-3-c);

7. Holds by six votes to three that, in those proceedings, there was a violation of Article 6 para. 1 (art. 6-1) on appeal;

8. Holds unanimously that the respondent State is to pay to the applicant, for costs and expenses, 60,000 (sixty thousand) Austrian schillings;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 August 1991.

Rolv RYSSDAL
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 following separate opinions are annexed to this judgment:

a) partly dissenting opinion of Mr Matscher, joined by Mr Thór Vilhjálmsson and Mrs Bindschedler-Robert.

b) concurring opinion of Mr Martens.

R.R.
M.-A.E.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER, JOINED BY JUDGES THÓR VILHJÁLMSSON AND BINDSCHEDLER-ROBERT

(Translation)

Contrary to the bare assertions of counsel for the applicant, I regard it as established that Austrian lawyers are well aware of the practice on the part of the public prosecutors at the Austrian Courts of Appeal and Supreme Court of submitting written observations (croquis) which are included in the court's case-file and that, despite the no doubt unsatisfactory wording of Article 82 of the Code of Criminal Procedure, any person who can show a legitimate interest is guaranteed access to the file; it is certain that a defendant (or his lawyer) has such an interest and is consequently always allowed the right of access.

This practice is in my opinion entirely in accordance with the requirements of Article 6 (art. 6) of the Convention, as the Commission moreover recognised in its decision on admissibility given in the Peschke case concerning Austria (no. 8289/78 of 5.3.80, Decisions and Reports, vol. 18, p. 160).

Its conformity with the requirements of the Convention might be questionable if the public prosecutor's observations were submitted to the court at a very late date, too close to the hearing of the appeal, or if access to the file involved a substantial burden for defence counsel.

None of that is the case. In particular, in the present case, the Senior Public Prosecutor's observations were submitted over three weeks before the date of the appeal hearing (see paragraph 34 of the judgment) and the applicant's lawyer could have found about them very easily, simply by telephoning the registry of the Court of Appeal and, if appropriate, asking it to supply a copy.

In these circumstances, it seems clear to me that the principle of equality of arms was respected. Of course it is possible to imagine a better system than that in force in Austria at the time of the instant case (see paragraphs 8 and 67 of the judgment), but that does not mean that the Convention has thereby been violated.

If the majority of the Chamber consider that a defendant must always be informed by the court of the submission of observations by the public prosecutor, or at least that the right of access to the file ought to be guaranteed more explicitly in the law itself, that in my opinion goes beyond the requirements of Article 6 (art. 6).

CONCURRING OPINION OF JUDGE MARTENS

I agree with the Court’s reasoning in paragraph 57, sed ceterum censeo ... (see my concurring opinion in the Brozicek case, judgment of 19 December 1989, Series A no. 167, pp. 23-28).