COURT (CHAMBER)

CASE OF HERCZEGFALVY v. AUSTRIA

(Application no. 10533/83)

JUDGMENT

STRASBOURG

24 September 1992

In the case of Herczegfalvy 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 R. BERNHARDT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr S.K. MARTENS,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,

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

Having deliberated in private on 23 April and 31 August 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 19 April 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. 10533/83) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by Mr Istvan Herczegfalvy, a Hungarian national, on 27 November 1978.

2. 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 object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 5 (paras. 1, 3 and 4), 8, 10 and 13 (art. 3, art. 5-1, art. 5-3, art. 5-4, art. 8, art. 10, art. 13).

3. 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).

4. 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 23 April 1991, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr C. Russo, Mr R. Macdonald, Mr S.K. Martens, Mr R. Pekkanen and Mr A.N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Mr R. Bernhardt and Mr J.M. Morenilla, substitute judges, subsequently replaced Mr Russo and Mr Macdonald, who were unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

5. 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 Government"), the Delegate of the Commission and the lawyer for the applicant on the organisation of the procedure (Rule 37 para. 1 and Rule 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial, which incorporated his claims for just satisfaction (Article 50 of the Convention) (art. 50), on 16 October and 20 December. On 20 June the Government informed him that they would not be submitting a memorial.

6. On 22 October 1991 Mr Ryssdal gave the applicant leave to use the German language (Rule 27 para. 3).

7. In accordance with the President's decision, the hearing took place in public in the Human Rights

Building, Strasbourg, on 21 April 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr H. TÜRK, Ambassador,
Legal Adviser, Ministry of Foreign Affairs, *Agent*,
Mr W. OKRESEK, Federal Chancellery,
Mrs E. SCHINDLER, Federal Ministry of Justice, *Advisers*;

- for the Commission

Mr J.-C. SOYER, *Delegate*;

- for the applicant

Mr H. HOFFMAN, Rechtsanwalt, *Counsel*.

The Court heard addresses by them.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Istvan Herczegfalvy is a Hungarian citizen who has lived in Austria since 1964. He currently resides in Vienna.

A. The proceedings

9. From 13 May 1972 to 13 May 1977 he served two prison sentences in succession, following convictions pronounced by the Vienna Regional Criminal Court (Landesgericht für Strafsachen) and confirmed in part by the Supreme Court (Oberster Gerichtshof), inter alia for assaults on his wife, clients of his television repair business and public officials.

10. The Inner Vienna District Court (Bezirksgericht Wien Innere Stadt) on 23 December 1975 and the Vienna Regional Civil Court (Landesgericht für Zivilrechtssachen), acting as guardianship court (Pflegschaftsgericht), on 3 November 1977 declared the applicant partly incapacitated (beschränkt entmündigt) and appointed an adviser (Beistand) for him. They did so on the basis of a psychiatrist's report which had been drawn up following numerous complaints by him about prison conditions.

On 9 August 1983 the District Court appointed a new adviser, who has acted as such since then. According to a ruling of the guardianship court of 19 July 1984, his position was equivalent as from 1 July 1984 to that of a curator (Sachwalter) within the meaning of Article 273 (3), sub-paragraph 3, of the Civil Code (see paragraph 54 below).

11. In the meantime, further prosecutions were brought against Mr Herczegfalvy for assaults on warders and fellow prisoners and for serious threats against judges.

On 10 May 1977 the Regional Court ordered that once he had finished serving his sentence on 13 May (see paragraph 9 above) the applicant should remain in detention under Article 180 (2), sub-paragraphs 1 and 3, of the Code of Criminal Procedure (see paragraph 40 below), as there was reason to fear that he might attempt to abscond and might commit other offences. The applicant unsuccessfully appealed to the Review Chamber (Ratskammer) of the Regional Court and to the Vienna Court of Appeal (Oberlandesgericht), whose rulings were given on 18 May and 21 June respectively. The pre-trial detention (Untersuchungshaft) was confirmed by the presiding judge of the Regional Court on 2 November 1977.

12. In accordance with the opinions of several experts, the presiding judge on 9 January 1978 ordered Mr Herczegfalvy's provisional placement (vorläufige Unterbringung) in an institution for mentally ill offenders (Article 438 of the Code of Criminal Procedure; see paragraph 44 below). The order was confirmed by the Review Chamber on 6 March and the Court of Appeal on 19 April 1978, and the applicant was transferred to the special prison at Mittersteig, Vienna.

13. According to the psychiatrists who examined him, he was suffering from paranoia querulans, which was equivalent to a mental illness and meant that he was not responsible for his acts; he was extremely aggressive and incapable of understanding that his behaviour was unlawful, and there was a risk that attendance at the trial could harm his health.

Following these reports, the public prosecutor's office amended the indictment on 15 June 1978 and now sought Mr Herczegfalvy's detention rather than conviction. From that date the detention in issue was based on Article 429 (4) of the Code of Criminal Procedure (see paragraph 44 below). The applicant's appeal against the amended indictment was dismissed by the Court of Appeal on 30 August 1978.

14. The hearing before the Regional Court took place on 9 and 10 January 1979. It had previously been necessary to adjourn a hearing arranged for 14 December 1976 because the case-file had been lost, to adjourn a hearing of 3 May 1977 because of the applicant's request for further witnesses to be called, a hearing of 25 October 1977 because the presiding judge was absent, one of 2 November 1977 because fresh evidence had been produced, one of 6 March 1978 because of mistakes in sending out summonses, and one of 5 April 1978 because the applicant had spat in the presiding judge's face, which had led to the indictment being amended (see paragraph 13 above).

On 10 January 1979 the court found that the charges against Mr Herczegfalvy had been proved and ordered him to be detained under Article 21 (1) of the Criminal Code (see paragraph 45 below), on the grounds that he was dangerous and not criminally responsible for his acts. The court relied on the opinions of three psychiatrists who had each diagnosed paranoia querulans which from 1975 at least had been equivalent to a mental illness.

15. The applicant brought an application for a declaration of nullity (Nichtigkeitsbeschwerde) to the Supreme Court. The Regional Court decided, however, that pending the decision he should remain provisionally detained under Article 429 (4) of the Code of Criminal Procedure, but in prison, on the psychiatrist's recommendation.

16. On 28 June 1979 the Regional Court, relying on section 50 of the Hospitals Law, ordered that the detention should be continued and that the applicant should be transferred as a matter of urgency to a psychiatric hospital, so that the treatment he required could be carried out. Mr Herczegfalvy stayed there from 29 June to 23 July 1979 and was then returned to the prison.

The Vienna Court of Appeal, to which the applicant had appealed, held on 29 August 1979 that it had no jurisdiction: as Article 429 (4) of the Code of Criminal Procedure was the only provision which could apply, it was for the Review Chamber of the Regional Court to hear the appeal.

17. On 5 September 1979 the Review Chamber upheld the detention in issue. Applying Article 429 (4) of the Code of Criminal Procedure, it ordered Mr Herczegfalvy to be sent to the Vienna psychiatric hospital so that he could receive urgent medical and socio- and psycho-therapeutic treatment there, which was essential inter alia because of the hunger strike he had carried on since 2 August 1979. On 10 September 1979 he was admitted to ward 23 of that hospital, and stayed there until his release on 28 November 1984.

The applicant's appeal against this decision was dismissed by the Vienna Court of Appeal on 8 October 1979.

18. In the meantime the Supreme Court had on 3 October 1979 varied the judgment of 10 January 1979 in part (see paragraphs 14-15 above), quashed the detention order and remitted the case to the Regional Court.

19. On 4 December 1979 Mr Herczegfalvy requested his release. On 14 December the investigating judge informed him that he continued to be detained in accordance with Article 429 (4) of the Code of Criminal Procedure.

At that judge's request, the psychiatric hospital submitted a report dated 17 January 1980 expressing the opinion that it was not possible to place the applicant in ordinary pre-trial detention, as his aggressive behaviour was still causing danger to those around him.

Pursuant to Article 429 (4), the Review Chamber and the Court of Appeal extended the detention in question in 1980.

20. After hearings on 20 March and 9 April 1980 the Regional Court, to which the case had been remitted (see paragraph 18 above), found that the charges against Mr Herczegfalvy - which included further serious threats against a judge on 24 December 1979 - had been proved and ordered him to be detained in an

institution for mentally ill offenders under Article 21 (1) of the Criminal Code. It based its decision on the judgment of 10 January 1979, the three psychiatric reports on which it had been based (see paragraph 14 above), and the opinions of the authors of the reports, who had appeared at the hearing and stated that despite certain improvements there had been no fundamental change in the situation.

As the applicant had withdrawn his appeal and application for a declaration of nullity in writing on 30 October 1980 and at a hearing on 6 November, the judgment was on the latter date declared binding by a final order (Endverfügung), which set the date of 1 October 1981 for the next judicial review of the detention (Article 25 (3) of the Criminal Code; see paragraph 46 below).

The applicant subsequently challenged the validity of his declarations. He said that he had made them only with a view to his repatriation to Hungary, which was discussed on 6 November 1980 but did not come about.

21. On 8 February 1982 the Regional Court, acting under Article 21 (1) of the Criminal Code, extended Mr Herczegfalvy's detention, as a psychiatric report produced at the request of that court stated that he was a dangerous person. The court took its decision under Article 25 (3) of the Criminal Code, after an official of the psychiatric hospital had stated to the court that the annual review of the lawfulness of the detention should have taken place on 1 October 1981 at the latest (see paragraph 20 above).

22. On 13 July, 19 September and a date in October 1983 the applicant requested his release, pointing out that the period for carrying out the annual review had expired on 8 February 1983. On receiving the first of these applications, the court consulted a psychiatrist, who submitted a report on 22 October recommending the applicant's release subject to supervision (see paragraph 33 below).

An application to exercise its supervisory jurisdiction (Dienstaufsichtsbeschwerde) was made to the Court of Appeal, which ordered the Regional Court to reach a decision speedily; on 16 February 1984 the latter court ordered a further extension of the detention in issue. Taking into account the opinions of the psychiatric expert and the director of the hospital, filed on 25 January 1984, it considered that there had been no fundamental change in Mr Herczegfalvy's mental state. He was still suffering from paranoia querulans, and if released would undoubtedly refuse to follow the necessary course of treatment; he would consequently be likely to bring numerous complaints or even carry out the threats he had made, in particular those against the prison staff (see paragraph 33 below).

On 4 April 1984 the Court of Appeal dismissed the applicant's appeal and confirmed that the requirements for his release under Article 47 (2) of the Criminal Code were not satisfied.

23. Mr Herczegfalvy made further applications for release on 6 June and 23 September 1984. He was conditionally released on 28 November in accordance with the court's decision of 14 November, itself based on a psychiatric report dated 14 September (see paragraph 34 below). The court found that the applicant's paranoia had admittedly worsened, but that it was primarily due to his detention (Haftquerulanz); the vexatious complaints and petitions (Rechtsquerulanz) did not constitute a danger within the meaning of Article 21 of the Criminal Code; since being detained the applicant had behaved with genuine aggressiveness on a few occasions only; although the possibility could not be excluded of his becoming aggressive in the event of frustration, his psychiatric history did not permit the conclusion that his abnormal personality would induce him to commit criminal offences; moreover, continued psychiatric treatment or treatment by drugs was not considered necessary by the expert, although it was recommended.

B. The medical treatment

24. On being returned to prison after his stay in the Vienna psychiatric hospital from 29 June to 23 July 1979 (see paragraph 16 above), Mr Herczegfalvy had begun a hunger strike on 2 August 1979 as a protest against his detention and the refusal to give him his files. He collapsed on 28 August and was transferred to a clinic where he received intensive medical care. On 10 September 1979 he was transferred back to the Vienna psychiatric hospital, where he remained until his release on 28 November 1984 (see paragraph 23 above).

25. As the applicant was in an extremely weak state when returned there, the director of the hospital ordered him to be force fed, pursuant to section 8 (3) of the Hospitals Law (see paragraph 51 below). The applicant refused all contact and refused to have any medical examination or treatment, and was also given sedatives against his will (three doses of 30mg each of Taractan IM); on 14 and 15 September 1979 he was

attached to a security bed, the net and straps of which he succeeded in cutting through. On 17 September he was given a different neuroleptic (Sordinol IM), as infiltrations had appeared. He stopped refusing food on 27 September 1979, after being allocated a single room and being given some of his files.

26. Mr Herczegfalvy again went on hunger strike from 26 November to 13 December 1979, on which date he allegedly eventually agreed to be fed through a tube (Sondenernährung) once daily. However, he later denied that his consent had been validly given.

27. In view of the deterioration of his physical and mental state, he was injected by force with 90mg of Taractan on 15 January 1980, in order to bring about a state of somnolence (Dämmerschlaf) in which it would be possible to treat him by means of perfusions. Since he had resisted this with violence, the emergency team had had to overpower him. On 18 January he was transferred to the intensive care unit, as he showed symptoms of pneumonia and nephritis; he stayed there until 30 January 1980.

28. He had not made a complete recovery when he left, and he still needed treatment with antibiotics and neuroleptics. On his return to the closed unit he was handcuffed and a belt placed around his ankles because of the danger of aggression and the death threats he was making; the restraints were not removed until 14 February 1980. According to the Government, their position was changed regularly, in order to avoid nervous paralysis, and on 12 February he had agreed to be fed by a woman doctor. The applicant stated, however, that other belts had been put around his thighs and stomach and had been untied for the first time only on 2 February; in order to obtain his files and writing materials with which to write his complaints, he had continued his hunger strike without interruption, and had been artificially fed throughout this period.

29. From 19 February 1980 the applicant calmed down and behaved in a more co-operative manner. Although he continued to insult the staff from time to time, he agreed to communicate with those around him and consented to being fed through a tube by a female doctor twice weekly. On 22 February he was given paper and a ballpoint pen.

30. Following a dispute about his correspondence, Mr Herczegfalvy was forbidden on 27 December 1980 to watch television. As his physical resistance to the forced administration of neuroleptics had frequently been in vain and had even led to injuries (loss of teeth, broken ribs and bruises), he brought a complaint of assault on each occasion that he was given medicaments. These letters, which he claimed had not been communicated to the relevant authorities, filled six binders; they were given to him on his discharge.

31. During this period he continued to refuse, at least in part, to take nourishment other than through a tube, but on 12 November 1982 he stated that he no longer needed to be fed artificially, as a doctor had persuaded him to end his hunger strike by explaining to him that it was endangering his life. Hospital reports had, however, stated that he appeared to be adequately nourished.

32. In an opinion of 5 March 1983 an expert considered that conditional release of the applicant would be possible if certain accompanying psychiatric and social measures were taken. In his view, Mr Herczegfalvy's behaviour was much improved, so that there was now virtually no danger.

33. After a further series of complaints which were regarded as vexatious, the Regional Court consulted the hospital on 28 July 1983 as to the applicant's possible release.

On 22 October 1983 an expert noted the progress which the applicant had made and expressed the opinion that troublesome behaviour did not constitute a risk within the meaning of Article 21 of the Criminal Code.

However, in a letter of 25 January 1984, the director of the hospital advised the court not to terminate Mr Herczegfalvy's detention; as the treatment carried out, based on medication, had only a sedative effect, the possibility could not be excluded that if he were released, he would again become aggressive and dangerous.

The Regional Court thereupon on 16 February 1984 refused to release the applicant (see paragraph 22 above).

34. He eventually recovered his liberty on 28 November 1984, after a further expert report dated 14 September 1984 (see paragraph 23 above).

C. The control of correspondence

35. While in detention Mr Herczegfalvy addressed an extremely large number of petitions and complaints to various authorities, relating inter alia to his medical treatment and the proceedings brought by him. As he

considered that he did not have the necessary money, he refused on several occasions to put stamps on his letters, or sent them to the Ministry of Justice for that purpose. In order to stem this flow of correspondence, he was deprived from time to time of writing materials, and his unstamped letters were frequently returned to him, with the exception of those addressed to the public authorities, in particular the courts.

36. With respect to the letters written at the psychiatric hospital, the hospital management had agreed with the applicant's curator that they would be transmitted to him regularly and it would be for him to decide whether it was necessary to send them on; this system would apply to all letters other than those to his lawyer, his adviser and the guardianship court. Mr Herczegfalvy has complained that even those letters were not all sent on.

37. When he left the hospital the applicant was given six binders containing the originals of these letters and also about fifty sealed letters; the postal register showed that the latter had never been sent to their addressees, namely the police, the public prosecutor's office and the courts.

D. The restrictions on access to information

38. Mr Herczegfalvy also claimed that he had been deprived of reading matter, radio and television for long periods during his detention, in particular from 15 January 1980 to the end of February of that year and from 27 December 1980; from 15 June 1981 there had been no television set in his cell or in the ward. He alleged that these measures had been taken for disciplinary purposes only.

39. According to the Government, these measures were based on section 51 (1) of the Hospitals Law (see paragraph 51 below), had been justified for therapeutic reasons, and had lasted for a short time only on each occasion.

II. RELEVANT DOMESTIC LAW

A. Deprivation of liberty

1. Pre-trial detention

40. Article 180 (1) and (2) of the Code of Criminal Procedure, in the version in force at the time, permits the pre-trial detention of a person (where there are serious reasons for suspecting him of having committed a criminal offence) if there is a danger of absconding, collusion or repetition of offences.

41. The risk of absconding cannot be presumed if the accused is liable to a penalty of not more than five years' imprisonment, is living in normal conditions and has a permanent address in Austria, unless he has already attempted to abscond (Article 180 (3)).

42. The accused can bring an application for release at any time (Article 194 (2)). Under Articles 194 and 195 the request is examined by the Review Chamber of the Regional Court at a hearing in private, in the presence of the accused or his lawyer. If the accused or the public prosecutor's office appeals to the Court of Appeal, the hearing also takes place in private, in the presence of a member of the principal public prosecutor's office, but in the absence of the accused and his lawyer.

If no such application is made by the accused, the Review Chamber of its own motion reviews the detention when it has lasted for two months or where three months have passed since the last hearing and the accused has no lawyer (Article 194 (3)).

After the definitive indictment or the fixing of the hearing date for the trial, these review hearings cease. Decisions on the continuation of the detention are now taken by the trial court during the hearing and by the Review Chamber, sitting in private, at other times (Article 194 (4)).

43. Detention on remand is terminated at the latest at the time when a person who has been convicted begins to serve his sentence; the time spent in detention on remand is automatically deducted from the sentence (Article 38 of the Criminal Code).

2. Provisional placement in an institution for mentally ill offenders

44. In two cases specified in Articles 429 (4) and 438 of the Code of Criminal Procedure, pre-trial detention may take the form of placement in an institution for mentally ill offenders:

Article 429 (4)

"If one of the reasons for detention specified in Article 180 (2) or (7) exists, or if the person concerned cannot remain at liberty without there being a danger for himself or other persons, or if medical observation of him is necessary, an order shall be made for his provisional detention in an institution for mentally ill offenders or for his admission to a public hospital for mental illnesses ..."

Article 438

"If there are sufficient reasons for presuming that the conditions in [Article] 21 (2) ... of the Criminal Code are fulfilled, and if reasons for detention (Article 180 (2) and (7)) exist, but the accused cannot without difficulty be detained in the prison of a court, an order shall be made that detention on remand is to take the form of provisional placement in an institution for mentally ill offenders ..."

3. Placement in an institution for mentally ill offenders (preventive measures)

45. Under Article 21 of the Criminal Code:

"(1) If a person commits an offence punishable with a term of imprisonment exceeding one year, and if he cannot be punished for the sole reason that he committed the offence under the influence of a state of mind excluding responsibility (Article 11) resulting from a serious mental or emotional abnormality, the court shall order him to be placed in an institution for mentally ill offenders, if in view of his person, his condition and the nature of the offence it is to be feared that he will otherwise, under the influence of his mental or emotional abnormality, commit a criminal offence with serious consequences.

(2) If such a fear exists, an order for placement in an institution for mentally ill offenders shall also be made in respect of a person who, while not lacking responsibility, commits an offence punishable with a term of imprisonment exceeding one year under the influence of his severe mental or emotional abnormality. In such a case the placement is to be ordered at the same time as the sentence is passed."

46. The duration of these preventive measures is governed by Article 25 of the Criminal Code, which states that:

"(1) Preventive measures are to be ordered for an indefinite period. They are to be implemented for as long as is required by their purpose ...

(2) The termination of preventive measures shall be decided by the court.

(3) The court must of its own motion examine at least once yearly whether the placement in an institution for mentally ill offenders ... is still necessary.

..."

B. Conditions of detention

1. Rules governing pre-trial detention

47. Article 184 of the Code of Criminal Procedure provides that:

"Pre-trial detention is intended to counteract the dangers specified in Article 180 (2). In accordance with the statutory provisions and the regulations based thereon, persons in pre-trial detention may be subjected to restrictions only if they serve the purposes of detention or the maintenance of security or order in the institutions. Prisoners in pre-trial detention are to be treated with calm, seriousness and firmness, in a just manner and with respect for their sense of honour, human dignity and with as little as possible interference with their personality."

48. Articles 187 and 188 of the Code of Criminal Procedure govern the correspondence of prisoners in pre-trial detention:

Article 187

"(1) Prisoners in pre-trial detention may, without prejudice to Article 45 of this Code and sections 85 and 88 of the Law on Enforcement of Sentences, correspond in writing with all persons who are not likely to prejudice the purpose of the pre-trial detention, and to receive visits from such persons.

(2) Correspondence shall not be subject to any restrictions, unless surveillance is prejudiced by the exceptional volume of the correspondence of a prisoner in pre-trial detention. In such a case the restrictions which are necessary for proper surveillance shall be ordered. Letters which are likely to prejudice the purpose of the detention are to be withheld, unless provided otherwise by sections 88 and 90 (4) of the Law on Enforcement of Sentences, relating to written correspondence with official bodies and legal advisers. Letters from prisoners in pre-trial detention which give rise to 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 another national authority, or to the European Commission of Human Rights.

..."

Article 188 (1)

"Decisions as to which persons prisoners in pre-trial detention may correspond in writing with and which visits they may receive, surveillance of correspondence and visits, and all other orders and decisions relating to contacts between prisoners in pre-trial detention and the outside world (sections 86-100 of the Law on Enforcement of Sentences) are to be taken by the investigating judge, with the exception of surveillance of parcels. Surveillance of correspondence can be waived only in so far as no prejudice of the purpose of detention is to be feared as a result thereof."

2. Rules relating to institutions for mentally ill offenders

49. Unless provided otherwise, the provisions of the Law on Enforcement of Sentences (Strafvollzugsgesetz) applicable to persons in prison also apply by analogy to persons placed in institutions for mentally ill offenders (section 167 (1) of that law). They lay down detailed regulations, for example, with respect to:

- the right to necessary medical treatment (sections 66 et seq.), and compulsory medical treatment and force-feeding (section 69);
- the right of access to information by means of books, magazines, newspapers, radio and television (sections 58 et seq.);
- the right of correspondence, in particular with close relatives and other persons, lawyers, courts and other authorities, representative bodies, the ombudsman, the European Commission of Human Rights and, in the case of a foreign national, his consulate (sections 86 et seq.);
- the right to bring petitions and complaints (sections 119 et seq.). Prisoners may submit petitions concerning their conditions of imprisonment (section 119) and complain of actions of the prison staff which in their opinion infringe their rights (section 120). Complaints are to be addressed to the governor of the prison or, where the complaint is brought against the governor, to the Federal Ministry of Justice (section 121); this remains subject to review by the Administrative Court and the Constitutional Court (Articles 130 and 144 of the Federal Constitution).

Prisoners may submit petitions and requests, other than those relating to their medical treatment, by means of an application to a higher official, but this does not give the right to an administrative decision (section 120 (1), second sentence, and section 122).

50. Section 165 (1) authorises restrictions on the rights of mentally ill offenders only to the extent necessary for the attainment of the purpose of the detention, and prohibits all interferences with their human dignity and with the rights guaranteed them by sections 119 to 122. It also provides that complaints which have obviously been brought solely because of the detainee’s mental or emotional disturbance and which are not based on an infringement of his rights shall be rejected without any formal procedure.

3. Rules relating to the closed units of psychiatric hospitals

51. Before the establishment of special institutions for mentally ill offenders, they were placed in closed units of public psychiatric hospitals, regulated by the Hospitals Law (Krankenanstaltengesetz). That law provides inter alia:

Section 8

"(1) The medical service must be organised in such a way that medical assistance is always immediately available in the hospital.

(2) Hospital patients may be medically treated only in accordance with the principles and recognised methods of medical science.

(3) Special curative treatments including surgical operations may be carried out on a patient only with his consent, but if the patient has not yet reached the age of eighteen or if because he lacks mental maturity or health he cannot assess the necessity or usefulness of the treatment, only with the consent of his legal representative. Consent is not required if the treatment is so urgently necessary that the delay involved in obtaining the consent of the patient or his legal representative or in appointing a legal representative would endanger his life or would entail the danger of serious harm to his health. The medical director of the hospital or the doctor responsible for the management of the hospital department concerned shall decide on the necessity and urgency of treatment."

Section 51 (1)

"Patients who are compulsorily detained ... may be subjected to restrictions with respect to freedom of movement or contact with the outside world."

C. Lack of legal capacity

52. The applicant's partial legal incapacitation, which was pronounced in 1975 (see paragraph 10 above), was based on sections 1 (2) and 4 of the Incapacitation Regulations (Entmündigungsordnung) of 1916:

Section 1 (2)

"Adults who are unable to look after their own affairs and, because of a mental illness or a handicap, need the assistance of an adviser (Beistand) to look after their affairs appropriately, may be declared partially incapacitated."

Section 4

"(1) A person who is partially incapacitated shall be treated as a minor over fourteen years (mündiger Minderjähriger) and shall be given an adviser.

...

(3) The adviser shall have the rights and duties of a guardian (Vormund), but the guardianship court may reserve to the adviser the right to dispose over what the incapacitated person acquires by his work."

53. The functions of a guardian are defined in Article 188, first sentence, of the Civil Code (Allgemeines Bürgerliches Gesetzbuch), which reads as follows:

"A guardian must primarily take care of the person of the minor, but also administer his property."

Article 216 (1) states that if care for the person and education of a minor is not the responsibility of a person having parental authority, the guardian shall have responsibility therefor.

54. Under the Law of 1983 on the appointment of curators of handicapped persons (Sachwaltergesetz), persons who have been declared totally or partly legally incapacitated are to be regarded from 1 July 1984 as having the assistance of a curator (Sachwalter), empowered under Article 273 (3), sub-paragraph 3, of the Civil Code to look after all their affairs.

Under Article 282 of the Civil Code a curator has the same rights and obligations as a guardian, but must also care for the person of a handicapped person, in particular his medical and social treatment, unless a court decides otherwise.

D. Applications to the Administrative Court and the Constitutional Court

55. Any administrative act, including the exercise of direct administrative compulsion against a particular person, may in principle be challenged as to its lawfulness before the Administrative Court (Verwaltungsgerichtshof, Article 130 of the Federal Constitution) and as to its constitutionality before the Constitutional Court (Verfassungsgerichtshof, Article 144).

However, there does not appear to be any example in the case-law of such an application against the acts of a psychiatric hospital of the type of those in issue in the present case.

PROCEEDINGS BEFORE THE COMMISSION

56. In his application of 27 November 1978 to the Commission (no. 10533/83) Mr Herczegfalvy brought a series of complaints relating to the lawfulness, length and conditions of his detention and the medical treatment carried out during it.

57. On 10 March 1988 the Commission inter alia declared inadmissible as out of time (Article 26 in fine of the Convention) (art. 26) the complaints relating to facts prior to 27 May 1978. On 4 October 1989 it declared certain of the other complaints admissible and the remainder of the application inadmissible. In its report of 1 March 1991 (made under Article 31) (art. 31) it expressed the opinion that there had been violations of Article 3 (art. 3) (unanimously), Article 5 para. 1 (e) (art. 5-1-e) for the periods from 11 December 1981 to 8 February 1982 and from 8 February 1983 to 16 February 1984 (unanimously), Article 5 para. 4 (art. 5-4) (unanimously), Article 8 (art. 8) (unanimously), Article 10 (art. 10) (unanimously) and Article 13 (art. 13) (eighteen votes to two), but not of Article 5 para. 1 (c) (art. 5-1-c) (eleven votes to nine), Article 5 para. 1 (e) (art. 5-1-e) for the other periods (eleven votes to nine) or Article 5 para. 3 (art. 5-3) (unanimously). The full text of the Commission's opinion is reproduced as an annex to this judgment[*].

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 PARA. 1 (art. 5-1)

A. Introduction

58. The applicant claimed there had been a violation of Article 5 para. 1 (art. 5-1), according to which:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> ..."

59. In view of the Commission's decisions on admissibility (see paragraphs 56-57 above), the detention to be taken into consideration commenced on 27 May 1978. As its legal basis changed over the years, it is necessary to distinguish between various periods.

B. 27 May 1978 to 10 January 1979

60. From 27 May 1978 to 10 January 1979 the detention in issue, based in turn on Article 438 and Article 429 (4) of the Code of Criminal Procedure (see paragraph 44 above), had as its purpose to ensure that Mr Herczegfalvy would appear before the Regional Court (see paragraphs 11-12 above). It therefore came under paragraph 1 (c) of Article 5 (art. 5-1-c) of the Convention, and this was indeed not disputed by any of those appearing before the Court.

61. The case-file does not reveal any shortcomings at this stage. Thus there is nothing to show that the judicial authorities failed to observe the procedures of national law when ordering Mr Herczegfalvy's pre-trial

detention and subsequent placement or when confirming these two measures (see paragraphs 11-13 above). As for the reasons put forward in support - the suspicion against him and the risks of repetition of offences and absconding - the Court sees nothing to suggest that they were not well-founded, especially in the light of the applicant's aggressive behaviour and the nature of the offences he was charged with.

C. 10 January to 3 October 1979

62. The second period consists of the time during which the application for the declaration of nullity directed against the first detention order was before the Supreme Court, namely from 10 January to 3 October 1979. Although under Austrian law the detention was still pre-trial detention (see paragraph 15 above), it now came under paragraph 1 (e) alone of Article 5 (art. 5-1-e), as the Regional Court had not convicted or sentenced Mr Herczegfalvy in view of his lack of criminal responsibility (see paragraph 14 above; and see inter alia the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, pp. 17-18, para. 39, and the B. v. Austria judgment of 28 March 1990, Series A no. 175, pp. 14-15, paras. 36 and 38).

63. In order to comply with paragraph 1 (e) (art. 5-1-e), the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness (see inter alia the van der Leer v. the Netherlands judgment of 21 February 1990, Series A no. 170-A, p. 12, para. 22, and the Wassink v. the Netherlands judgment of 27 September 1990, Series A no. 185-A, p. 11, para. 24). Consequently, in order to justify detention, the fact that a person is "of unsound mind" must be established conclusively, except in case of emergency. To this end an objective medical report must demonstrate to the competent national authority the existence of genuine mental disturbance whose nature or extent is such as to justify such deprivation of liberty, which cannot be extended unless the mental disturbance continues.

It must, however, be acknowledged that the national authorities have a certain discretion when deciding whether a person is to be detained as "of unsound mind", as it is for them in the first place to evaluate the evidence put before them in a particular case; the Court's task is to review their decisions from the point of view of the Convention (see the Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, p. 18, paras. 39-40, and the Wassink judgment cited above, Series A no. 185-A, p. 11, para. 25).

64. In the present case the Court does not consider that the Austrian courts failed to comply with the relevant national law, in particular Article 429 (4) of the Code of Criminal Procedure, which continued to serve as a basis for the detention in question (see paragraphs 15-17 above). Nor does the detention appear to have been tainted by arbitrariness, as when the Regional Court took its decision on 10 January 1979 it had before it three expert reports which concluded unanimously that the applicant was suffering from paranoia querulans which was serious enough to be equivalent to a mental illness and dangerous for those around him (see paragraphs 14-15 above), this also being confirmed by the applicant's previous convictions (see paragraph 9 above).

No violation of paragraph 1 (e) (art. 5-1-e) has thus been shown to exist at this stage.

D. 3 October 1979 to 9 April 1980

65. On 3 October 1979, following the Supreme Court's judgment quashing the detention order (see paragraph 18 above), the impugned deprivation of liberty once more came under paragraph 1 (c), until the Regional Court's decision of 9 April 1980 (see paragraph 20 above).

During this period the detention remained based on Article 429 (4) of the Code of Criminal Procedure, compliance with which is not in dispute. The risk of repetition of offences was still capable of justifying Mr Herczegfalvy's detention, having regard in particular to the further verbal attacks made by him (see paragraph 20 above). Accordingly, there was no violation of paragraph 1 (c) (art. 5-1-c).

E. 9 April 1980 to 28 November 1984

66. The judgment of 9 April 1980 ordering the applicant to be detained in hospital again (see paragraph 20 above) opened a new period of his detention, which lasted until his release on 28 November 1984 (see paragraph 23 above). It came under Article 5 para. 1 (e) (art. 5-1-e) alone, as the court had not found the applicant guilty (see paragraphs 20 and 62 above).

It was initially governed by Article 429 (4) of the Code of Criminal Procedure, and then by Article 25 (1) of the Criminal Code (see paragraph 46 above) once the final order of 6 November 1980 had been made (see paragraph 20 above). Mr Herczegfalvy's subsequent repudiation of his declarations which gave rise to the order makes no difference; the order in itself gave final and binding effect to the said judgment of 9 April 1980; moreover, it was not challenged (see paragraph 20 above).

67. The applicant alleged that there had been various breaches of Article 5 para. 1 (art. 5-1) during this period. Firstly, there had on two occasions been a failure to carry out the annual review by the court of its own motion, as required by Article 25 (3) of the Criminal Code (see paragraphs 21-22 and 46 above). Secondly, he claimed that his state of health had improved to the extent that it no longer justified his detention; the last act of physical aggression recorded was on 9 July 1981, and one of the psychiatrists consulted by the court had recommended his release in March 1983.

68. The Court notes that before extending the detention in issue on 8 February 1982 and 16 February 1984 the Regional Court had consulted several experts. One of them had on 22 October 1983 recommended that the applicant should be released under psychiatric supervision, but all the others had been of the opinion that his aggressive tendencies still justified his detention, especially as it was to be feared that if released he would refuse to accept treatment even though it was necessary (see paragraphs 21-22 above).

Furthermore, there is nothing in the case-file to support Mr Herczegfalvy's claim that his querulous behaviour was the sole reason for the measures complained of. Consequently, the Court cannot regard them as arbitrary.

The complaints based on the failure to comply with Article 25 (3) of the Criminal Code will be examined by the Court from the point of view of paragraph 4 of Article 5 (art. 5-4) of the Convention. There is therefore no need to examine them from the point of view of paragraph 1 (art. 5-1) as well.

F. Conclusion

69. In conclusion, no violation of Article 5 para. 1 (art. 5-1) has been established.

II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 3 (art. 5-3)

70. Mr Herczegfalvy also relied on Article 5 para. 3 (art. 5-3), according to which:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

He claimed that the length of his pre-trial detention had exceeded the limits laid down in this paragraph.

71. The periods to be taken into consideration are those from 27 May 1978 to 10 January 1979 and from 3 October 1979 to 9 April 1980. The Court refers to its observations relating to Article 5 para. 1 (c) (art. 5-1-c) (see paragraphs 59-61 and 65 above).

The Court has already stated that the reasons which the Austrian courts regarded as justifying the detention in question were "relevant" and "sufficient"; it therefore remains to be ascertained whether the authorities displayed "special diligence" in the conduct of the proceedings (see, as the most recent authority, the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 35, para. 84).

72. The first period lasted for seven months and fifteen days, but at its commencement on 27 May 1978 the applicant had already been deprived of his liberty from 13 May 1977, in other words for over one year (see paragraph 11 above).

He did not dispute the Commission's findings relating to this period of detention (see paragraphs 33-50 of

the report). Nor does the Court find any negligence on the part of the authorities between 27 May 1978 and 10 January 1979 such as to delay the proceedings to the point of violating the Convention. Moreover, the applicant himself contributed to the prolongation of the proceedings, in particular by the incident caused by him and involving the President of the Regional Court (see paragraphs 13-14 above).

As for the period from 3 October 1979 to 9 April 1980, this does not appear excessive, bearing in mind inter alia the different composition of the court to which the case had been remitted by the Supreme Court (see paragraphs 18 and 20 above).

73. In short, there was no violation of Article 5 para. 3 (art. 5-3).

III. ALLEGED VIOLATION OF ARTICLE 5 PARA. 4 (art. 5-4)

74. The applicant further complained of a violation of Article 5 para. 4 (art. 5-4), which provides that:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

He claimed that the decisions of the Austrian courts under Article 25 (3) of the Criminal Code (see paragraph 46 above) had not been given "speedily".

The Government disputed this argument; the Commission agreed with it in essence.

75. The procedure provided for in Article 25 (3) of the Criminal Code amounts to an automatic periodic review of a judicial character (see inter alia the X v. the United Kingdom judgment cited above, Series A no. 46, p. 23, para. 52).

According to the Court's case-law on the scope of paragraphs 1 and 4 of Article 5 (art. 5-1, art. 5-4) of the Convention, in order to satisfy the requirements of the Convention such a review must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5 (art. 5), namely to protect the individual against arbitrariness. The latter condition implies not only that the competent courts must decide "speedily" (see the Koendjbiharie v. the Netherlands judgment of 25 October 1990, Series A no. 185-B, p. 40, para. 27), but also that their decisions must follow at reasonable intervals. The latter point should be considered first, bearing in mind that the intention of the Austrian legislature was that the interval should not exceed one year.

76. The only complaints under Article 5 para. 4 (art. 5-4) which are admissible are those relating to the period after 9 April 1980, as the Commission on 4 October 1989 declared the other complaints manifestly ill-founded within the meaning of Article 27 para. 2 (art. 27-2).

77. In this case the three decisions taken under Article 25 (3) of the Criminal Code were taken at intervals of fifteen months (6 November 1980 - 8 February 1982), two years (8 February 1982 - 16 February 1984) and nine months (16 February 1984 - 14 November 1984) respectively. The first two decisions cannot be regarded as having been taken at reasonable intervals, especially as the numerous requests for release submitted at that time by Mr Herczegfalvy brought no response (see paragraphs 20-23 above).

These conclusions mean that there is no need for the Court to examine whether the decisions in issue complied with national law.

78. In short, there was a violation of Article 5 para. 4 (art. 5-4).

IV. ALLEGED VIOLATION OF ARTICLE 3 (art. 3)

79. Mr Herczegfalvy also complained of his medical treatment. In that he had been forcibly administered food and neuroleptics, isolated and attached with handcuffs to a security bed during the weeks following the incident of 15 January 1980 (see paragraphs 24-28 above), he had been subjected to brutal treatment incompatible with Article 3 (art. 3), according to which:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

80. The Commission considered that the manner in which the treatment was administered had not complied with the requirements of Article 3 (art. 3): the various measures complained of had been violent and

excessively prolonged, and taken together had amounted to inhuman and degrading treatment, and even contributed to the worsening of the patient's condition.

81. In the Government's opinion, on the other hand, the measures were essentially the consequence of the applicant's behaviour, as he had refused medical treatment which was urgent in view of the deterioration in his physical and mental health.

Thus when Mr Herczegfalvy returned to the hospital on 10 September 1979 it proved to be necessary to feed him artificially, in view of his extremely weak state caused by his refusal to take any food (see paragraphs 24-25 above). Later on, it was partly at his own request that he was fed through a tube, while continuing - at least ostensibly - with his hunger strike.

Similarly, it was only his resistance to all treatment, his extreme aggressiveness and the threats and acts of violence on his part against the hospital staff which explained why the staff had used coercive measures including the intramuscular injection of sedatives and the use of handcuffs and the security bed. These measures had been agreed to by Mr Herczegfalvy's curator, their sole aim had always been therapeutic, and they had been terminated as soon as the state of the patient permitted this.

Finally, the Government claimed that the isolation complained of had in fact consisted of being placed in an individual cell, in accordance with Mr Herczegfalvy's wishes. He had had contact with doctors and nurses, and had been able to receive visits and even walk in the garden.

82. The Court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3 (art. 3), whose requirements permit of no derogation.

The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.

83. In this case it is above all the length of time during which the handcuffs and security bed were used (see paragraphs 27-28 above) which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government's argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue. Moreover, certain of the applicant's allegations are not supported by the evidence. This is the case in particular with those relating to what happened on 15 January 1980 (see paragraph 27 above) and the extent of the isolation.

84. No violation of Article 3 (art. 3) has thus been shown.

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

85. Mr Herczegfalvy further alleged that by administering food to him by force, imposing on him the treatment complained of and refusing to send on his correspondence, the hospital authorities had also violated Article 8 (art. 8), which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and 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."

86. The first two complaints relate to facts already complained of from the point of view of Article 3 (art. 3). Reference should therefore first be made to paragraph 83 above. In addition, the Court attaches decisive weight here to the lack of specific information capable of disproving the Government's opinion that the hospital authorities were entitled to regard the applicant's psychiatric illness as rendering him entirely incapable of taking decisions for himself. Consequently, no violation of Article 8 (art. 8) has been shown in

this respect.

87. The third and last complaint is directed in particular against the psychiatric hospital's practice of sending all the applicant's letters to the curator for him to select which ones to pass on (see paragraph 36 above).

The Government conceded that this was an interference with the exercise of Mr Herczegfalvy's right to respect for his correspondence, but maintained that it had been justified under paragraph 2 of Article 8 (art. 8-2), as its essential purpose had been to protect his health.

88. This interference constituted a breach of Article 8 (art. 8), unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2 (art. 8-2), and was moreover "necessary in a democratic society" for achieving those aims.

The Court recalls that the expression "in accordance with the law" requires firstly that the impugned measure should have some basis in national law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law (see, inter alia, the Kruslin and Huvig v. France judgments of 24 April 1990, Series A no. 176-A, p. 20, paras. 26-27, and no. 176-B, p. 52, paras. 25-26).

89. While there can be no doubt as to the existence of a legal basis and the accessibility of the law in this case, this is not true of the requirement of foreseeability of the law as to the meaning and nature of the applicable measures.

Compatibility with the rule of law implies that there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded by paragraph 1 (art. 8-1). If a law confers a discretion on a public authority, it must indicate the scope of that discretion, although the degree of precision required will depend upon the particular subject matter (see, inter alia, the Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 33, para. 88; the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, pp. 32-33, paras. 67-68; and the Kruslin and Huvig judgments cited above, Series A no. 176-A, pp. 22-23, para. 30, and no. 176-B, pp. 54-55, para. 29).

90. The Government argued that the impugned decisions were based directly on section 51 (1) of the Hospitals Law and Articles 216 and 282 of the Civil Code, to which should be added section 8 (2) of the Hospitals Law and sections 3 and 4 of the Incapacitation Regulations (see paragraphs 51-54 above).

91. These very vaguely worded provisions do not specify the scope or conditions of exercise of the discretionary power which was at the origin of the measures complained of. But such specifications appear all the more necessary in the field of detention in psychiatric institutions in that the persons concerned are frequently at the mercy of the medical authorities, so that their correspondence is their only contact with the outside world.

Admittedly, as the Court has previously stated, it would scarcely be possible to formulate a law to cover every eventuality (see, inter alia, the Silver and Others judgment cited above, Series A no. 61, p. 33, para. 88). For all that, in the absence of any detail at all as to the kind of restrictions permitted or their purpose, duration and extent or the arrangements for their review, the above provisions do not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society. According to the information provided to the Court, there has been no case-law to remedy this state of affairs. There has therefore been a violation of Article 8 (art. 8) of the Convention.

92. This being so, the Court does not consider it necessary to examine in this case whether the other requirements of paragraph 2 of Article 8 (art. 8-2) were complied with.

VI. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

93. The applicant maintained that the restrictions on his access to information (see paragraph 38 above) had breached Article 10 (art. 10).

The Government conceded that there had been interferences, but argued that they had been based on section 51 (1) of the Hospitals Law and had come under paragraph 2 of Article 10 (art. 10-2) of the Convention.

94. The Court has already stated the reasons for which it is unable to regard section 51 (1) of that law as

"law" within the meaning of paragraph 2 of Article 8 (art. 8-2) (see paragraph 91 above). As there are no grounds for a different conclusion here, there has also been a violation of Article 10 (art. 10). Consequently, it is not necessary to examine the other requirements of paragraph 2 of that Article (art. 10-2).

VII. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

95. Mr Herczegfalvy complained, finally, that there had been a breach of Article 13 (art. 13), in that he had not had an effective national remedy in respect of the violations of the Convention complained of.

96. The Court does not consider it necessary to rule on this point, in view of its decision with respect to Articles 8 and 10 (art. 8, art. 10) (see paragraphs 91 and 94 above).

VIII. APPLICATION OF ARTICLE 50 (art. 50)

97. Under Article 50 (art. 50) of the Convention,

> "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 applicant put forward claims under this Article (art. 50) for the award of pecuniary compensation and reimbursement of costs and expenses.

98. Mr Herczegfalvy left it to the Court to assess the non-pecuniary damage suffered. As a guide, he estimated it at 2,737,753,802 Austrian schillings and 45 groschen for the period from 15 May 1972 to 1 December 1979, and produced a calculation in support of this.

In respect of his costs of representation before the Convention institutions, he sought DEM 8,000 and ATS 12,000, for lawyer’s fees and travelling expenses respectively.

99. The Government described the amounts claimed in respect of damage as exorbitant and unrealistic; the Commission expressed no opinion.

100. Taking a decision on an equitable basis, the Court assesses the damage resulting from the violations found at ATS 100,000. It orders the costs to be reimbursed in full, less FRF 22,971 already paid by the Council of Europe as legal aid.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has not been a violation of Article 5 paras. 1 and 3 (art. 5-1, art. 5-3);

2. Holds that there has been a violation of Article 5 para. 4 (art. 5-4);

3. Holds that there has not been a violation of Article 3 (art. 3);

4. Holds that there has been a violation of Article 8 (art. 8) with respect to the applicant’s correspondence, but not with respect to the medical treatment undergone by him;

5. Holds that there has been a violation of Article 10 (art. 10);

6. Holds that it is not necessary also to examine the case from the point of view of Article 13 (art. 13);

7. Holds that the respondent State is to pay the applicant, within the next three months, ATS 112,000 (one hundred and twelve thousand Austrian schillings) and DEM 8,000 (eight thousand German marks), less FRF 22,971 (twenty-two thousand nine hundred and seventy-one French francs);

8. Dismisses 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 24 September 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

* The case is numbered 48/1991/300/371. 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.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 244 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

CHAPPELL v. THE UNITED KINGDOM JUDGMENT

HERCZEGFALVY v. AUSTRIA JUDGMENT