



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

FIRST SECTION

CASE OF PENIAS AND ORTMAIR v. AUSTRIA

(Applications nos. 35109/06 and 38112/06)

JUDGMENT

STRASBOURG

18 October 2011

FINAL

18/01/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Penias and Ortmaier v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President*,
Elisabeth Steiner,
Khanlar Hajiyeu,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 27 September 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 35109/06 and 38112/06) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Austrian nationals, Mr Jochen Penias and Mr Walter Ortmaier (“the applicants”), on 8 August 2006 and on 21 August 2006 respectively.

2. The applicants were represented by Mr J. Postlmayr, a lawyer practising in Mattighofen. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicants alleged in particular that the quashing of their convictions by the Independent Administrative Panel upon an official complaint by the relevant Federal Minister violated Article 6 of the Convention and Article 4 of Protocol No. 7. They also complained under Articles 6 and 13 about the length of the proceedings and lack of an effective remedy in that respect.

4. On 18 June 2007 and 28 August 2008 respectively, the President of the First Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1979 and lives in St Peter am Hart. The second applicant was born in 1955 and lives in Maria Schmolln.

A. Mr Penias (application no. 35109/06)

6. On 14 February 2002 the Braunau District Administrative Authority (*Bezirkshauptmannschaft*) informed the applicant that he was suspected of having driven a motor vehicle under the influence of alcohol contrary to sections 5(1) and 99(1)(a) of the Road Traffic Act (*Strassenverkehrsordnung*) on 10 February 2002. The breathalyser test had shown an alcohol level of 0.63 mg/l in his breath.

7. In his submissions of 1 March 2002 the applicant argued that allowance should be made for 5% inaccuracy in the result of the breathalyser test. This would lead to an established alcohol level of less than 0.60 mg/l and his conduct would therefore constitute a less serious offence under Sections 5(1) and 99(1)(b) of the Road Traffic Act.

8. On 8 April 2002 the Braunau District Administrative Authority found the applicant guilty of the offence of drunk driving under sections 5(1) and 99(1)(a) of the Road Traffic Act, which provides for a fine of between 872 and 4,360 euros (EUR). It imposed a fine of EUR 1,162 on him with seventeen days' imprisonment in the event of default. Having regard to the evidence before it, the District Authority noted that the breathalyser at issue had been duly checked by the Office of Weights and Measurements (*Bundesamt für Eich-und Vermessungswesen*) and the test had been carried out correctly. Referring to the Administrative Court's case-law, it noted that in such circumstances there was no need to make any allowance for inaccuracy.

9. The applicant appealed, repeating his argument as regards the alleged imprecision of the breathalyser test.

10. After holding a hearing, the Upper Austria Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) allowed the applicant's appeal in part. In its decision of 17 June 2002 it found that an alcohol level in the applicant's breath of 0.59 mg/l could be considered to have been confirmed, since allowance had to be made for a possible inaccuracy in the result of the breathalyser test. Consequently, it convicted the applicant under sections 5(1) and 99(1)(b) of the Road Traffic Act, which provides for a fine of between EUR 581 and EUR 3,633, and reduced the fine to EUR 1,000 with fourteen days' imprisonment in the event of default.

11. The Independent Administrative Panel considered that the question about possible inaccuracy of the breathalyser test was not a matter of law but a matter of fact. There was documentary evidence, and also evidence from an expert on weights and measurements, that for this particular type of breathalyser 5% inaccuracy could not be ruled out.

12. The decision was served on the applicant on 24 July 2002. He did not lodge a complaint with the Constitutional Court (*Verfassungsgerichtshof*) or the Administrative Court (*Verwaltungsgerichtshof*) within the statutory six-week time-limit. There was no other party to the proceedings who could lodge a complaint.

13. On 7 August 2002 the Independent Administrative Panel's decision of 17 June 2002 was served on the Federal Minister for Traffic, Innovation and Technology.

14. On 18 September 2002 the Federal Minister for Traffic, Innovation and Technology lodged an official complaint (*Amtsbeschwerde*) under Article 131 (1) subparagraph (2) of the Federal Constitution (*Bundes-Verfassungsgesetz*) against that decision, on the ground that it contained an error of law. According to the Administrative Court's case-law the authority was obliged to base its finding in respect of the blood alcohol level of the accused on the result of the breathalyser test. In the present case, the breathalyser had been duly examined by the Office for Weights and Measurements and no doubts had been raised as to its correct functioning.

15. On 18 February 2005 the Administrative Court, following the official complaint, quashed the Independent Administrative Panel's decision of 17 June 2002 and referred the case back to it. It found that the decision had applied the law incorrectly, since there was no ground to make allowance for inaccuracy in the breathalyser test.

16. In his submissions of 15 March 2005 the applicant asserted that it would violate the requirements of a fair trial if the quashing of the Independent Administrative Panel's decision following the Federal Minister's official complaint had any negative consequences for him.

17. On 21 March 2005 the Independent Administrative Panel, noting that it was bound by the Administrative Court's legal view, dismissed the applicant's appeal against the Braunau District Authority's decision of 8 April 2002. Consequently, his conviction under section 99(1)(a) of the Road Traffic Act was upheld.

18. As regards the sentence, the Independent Administrative Panel noted that section 99(1)(a) provided for a fine of between EUR 872 and EUR 4,360. It found that the minimum fine of EUR 872 with ten days' imprisonment in the event of default was appropriate. It noted that the applicant had no prior convictions, and also had regard to the Constitutional Court's case-law, according to which unreasonably lengthy proceedings could lead to a reduction of the sentence.

19. The applicant lodged a complaint with the Constitutional Court, claiming several violations of Article 6 of the Convention. He submitted, in particular, that the proceedings had been unreasonably lengthy and that he had no remedy in this respect; that the Administrative Court and subsequently the Independent Administrative Panel had disregarded the expert opinion and documentary evidence on the reliability of the breathalyser test and that his conviction had thus been based on a mere presumption.

20. Moreover, the applicant alleged that the proceedings were unfair, and violated the *ne bis in idem* principle, since the proceedings had been reopened following the Federal Minister's official complaint, although the Independent Administrative Panel's decision had already become final. However the reopening was not justified by any of the reasons mentioned in Article 4 § 2 of Protocol No. 7, and the new proceedings had produced a result which was unfavourable to him.

21. The applicant also complained that he did not have a review by a higher tribunal as required by Article 2 of Protocol No. 7, since the scope of the Administrative Court review was limited. Finally, relying on Article 1 of Protocol No. 1, he complained that the fixing of sentences in administrative criminal law did not take offenders' financial situations into account.

22. On 13 June 2005 the Constitutional Court dismissed the applicant's complaint for lack of prospects of success. On a request by the applicant on 21 July 2005 it transferred the case to the Administrative Court.

23. On 23 May 2006 the Administrative Court dismissed the applicant's complaint as being unfounded. This decision was served on the applicant's counsel on 21 June 2006.

B. Mr Ortmaier (application no. 38112/06)

24. On 1 December 2001 the applicant was stopped by a traffic patrol and asked to undergo a breathalyser test. The test showed an alcohol level of 0.60 mg/l in his breath.

25. On 5 December 2001 the Braunau District Administrative Authority informed the applicant that he was suspected of the offence of driving under the influence of alcohol under sections 5(1) and 99(1)(a) of the Road Traffic Act, with a breath alcohol level of 0.60 mg/l. The authority requested the applicant to submit his defence.

26. By a penal order of 17 January 2002 the District Administrative Authority found the applicant guilty of drunk driving under sections 5(1) and 99(1)(a) of the Road Traffic Act and sentenced him to a fine of EUR 872.07 with 13 days' imprisonment in the event of default. Noting that the breathalyser used had been correctly calibrated, it dismissed the applicant's argument that the result of the breathalyser test could not be deemed to be completely accurate and that allowance had to be made for

possible calibration and measurement errors. As to the fixing of the sentence, the authority noted that despite its request the applicant had not submitted evidence of his income. Thus, it based itself on his unsupported submission that he had a net income of EUR 1,100 per month and no maintenance obligations.

27. The applicant appealed on 24 January 2002.

28. On 12 March 2002 the Upper Austria Independent Administrative Panel held a hearing. It questioned the applicant and an expert on weights and measurements. In addition it took documentary evidence, including submissions from the Federal Office of Weights and Measurements relating to the calibration of the breathalyser at issue, and an expert opinion which had been published in a professional journal.

29. By a decision of 19 March 2002 the Independent Administrative Panel allowed the applicant's appeal in part. Referring to the evidence before it, the Independent Administrative Panel held that a certain imprecision of the measurement could not be excluded. Even making allowance for possible inaccuracy a breath alcohol level of 0.57 mg/l could be established beyond all doubt. The offence therefore fell under section 99(1)(b) of the Road Traffic Act and the fine was to be reduced to EUR 700, with nine days' imprisonment in the event of default.

30. The Independent Administrative Panel's decision was served on the applicant's counsel on 3 April 2002. The applicant did not lodge a complaint with the Administrative Court or the Constitutional Court within the statutory six-week time-limit. There was no other party to the proceedings who could lodge a complaint.

31. On 10 May 2002 the Independent Administrative Panel's decision of 19 March 2002 was served on the Federal Minister for Traffic, Innovation and Technology.

32. On 19 June 2002 the Federal Minister for Traffic, Innovation and Technology lodged an official complaint under Article 131(1) subparagraph (2) of the Federal Constitution, arguing that the Independent Administrative Panel's decision had applied the law incorrectly in that it had made allowance for a possible inaccuracy in the result of the breathalyser test.

33. The Administrative Court served the official complaint on the applicant, informing him that he could submit observations. The applicant did not make use of this possibility.

34. On 25 January 2005 the Administrative Court, following the official complaint, quashed the Independent Administrative Panel's decision of 19 March 2002 and referred the case back to it. It observed that a driver who was required to undergo a breathalyser test had the right to request that a blood sample be taken to confirm the result, while the law and its own case-law did not provide for a conclusion to be drawn from the result of the breathalyser test.

35. On 7 March 2005 the Independent Administrative Panel asked the applicant to submit his comments and to indicate whether he wished a further hearing to be held. On 8 March 2005 the applicant submitted comments and stated that a further hearing could be dispensed with.

36. On 14 March 2005 the Independent Administrative Panel dismissed an appeal by the applicant against the penal order of 17 January 2002. Applying the Administrative Court's legal view, it held that an alcohol level of 0.60 mg/l in the applicant's breath had been established by the breathalyser test. Therefore the conviction under section 99(1)(a) of the Road Traffic Act stood. However, the Independent Administrative Panel noted that it shared the applicant's concerns as regards a possible violation of Article 6 and Article 4 of Protocol No. 7 by the use of the official complaint procedure. It also noted that it had to set a fine of EUR 872, as this was the minimum fine applicable for the offence at issue. Taking the duration of the proceedings into account the Independent Administrative Panel reduced the default term of imprisonment from thirteen to ten days.

37. The applicant lodged a complaint with the Constitutional Court on 19 May 2005. He raised complaints identical to the ones raised by the first applicant (see paragraphs 19-21 above).

38. On 13 June 2005 the Constitutional Court refused to deal with the applicant's complaint for lack of prospects of success. In respect of the applicant's complaint about the length of the proceedings, it noted that the Independent Administrative Panel had taken the lengthy duration of the proceedings into account. Upon the applicant's request, the Constitutional Court referred the case to the Administrative Court by a decision of 29 July 2005.

39. The applicant made submissions on 5 September 2005 to supplement his complaint to the Administrative Court.

40. The Independent Administrative Panel submitted its observations in reply on 10 October 2005.

41. On 14 July 2006 the Administrative Court, referring to its previous decision, dismissed the applicant's complaint as unfounded. The judgment was served on the applicant's counsel on 14 August 2006.

II. RELEVANT DOMESTIC LAW

A. The Administrative Offences Act

42. By virtue of section 51(1) of the Administrative Offences Act (*Verwaltungsstrafgesetz*), the accused may lodge an appeal against a penal order with the Independent Administrative Panel.

43. The administrative authority which has issued the impugned decision is a party to the proceedings before the Independent Administrative Panel (section 51(d)).

B. The Federal Constitution

44. Pursuant to Article 129 of the Federal Constitution (*Bundes-Verfassungsgesetz*) Independent Administrative Panels are set up in the *Länder*. The function of these panels includes determining both the factual and legal issues arising in cases concerning administrative offences.

45. By virtue of Article 130 of the Federal Constitution the Administrative Court has jurisdiction to examine complaints alleging that a decision by an administrative authority or by an Independent Administrative Panel is unlawful.

46. Article 131 (1) subparagraph (1) entitles a person who alleges that his or her rights have been violated by an administrative decision to lodge a complaint with the Administrative Court following exhaustion of appeals.

47. Article 131 (1) subparagraph (2) of the Federal Constitution entitles the competent Minister, *inter alia*, in matters pertaining to the enforcement of federal laws by the *Länder*, to lodge an official complaint with the Administrative Court against an allegedly unlawful decision of an administrative authority, following exhaustion of appeals by the parties.

C. Administrative Court Act

48. Section 26 of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) deals with time-limits for lodging complaints.

Pursuant to section 26(1) subparagraph (1), a complaint under Article 131(1) subparagraph (1) has to be brought within six weeks of the date of service of the decision or, if the decision was only pronounced orally, from the date of pronouncement.

Pursuant to section 26(1) subparagraph (2) an official complaint has to be brought within six weeks of the point when the decision at issue was served on the Federal Minister, or the Federal Minister becomes aware of the decision at issue.

49. Section 42(1) of the Administrative Court Act states that, except where otherwise provided, the Administrative Court must either dismiss an application as ill-founded or quash the impugned decision. Section 42(2) lists the grounds of unlawfulness of a decision. Section 42(3) provides that if the Administrative Court quashes the impugned decision the proceedings are resumed at the stage they were at before that decision was issued.

50. If the Administrative Court quashes the impugned decision, “the administrative authorities [are] under a duty ... to take immediate steps, using the legal means available to them, to bring about in the specific case

the legal situation which corresponds to the Administrative Court's view of the law" (section 63(1)).

THE LAW

I. JOINDER OF THE APPLICATIONS

51. The Court notes that the two applications raise similar legal issues and therefore decides to join them pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE QUASHING OF THE INDEPENDENT ADMINISTRATIVE PANEL'S DECISIONS

52. The applicants alleged a violation of Article 6 § 1 of the Convention in that the Federal Minister had lodged an official complaint after the decision of the Independent Administrative Panel had become final. Article 6 § 1, so far as relevant in the present case, provides as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

53. The Government contested that argument.

A. Admissibility

54. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

55. The applicants maintained that the quashing of the Independent Administrative Panel's decisions following the Federal Minister's official complaints constituted a breach of the principle of legal certainty, which was incompatible with Article 6 § 1, as the Independent Administrative Panel decisions of 17 June 2002 and 19 March 2002 respectively had become final.

56. In the applicants' view, a complaint to the Administrative Court, be it a complaint lodged by a party under Article 131(1) subparagraph (1) of the Federal Constitution or an official complaint under Article 131(1) subparagraph (2), was an extraordinary remedy. Moreover, an official complaint was available to the competent Minister, who was not a party to the proceedings. By virtue of section 26(1) subparagraph (2) of the Administrative Court Act, an official complaint could be lodged a long time after the issuing of the impugned decision, specifically if that decision had not been served on the competent Minister and he or she had only learned about it after a considerable lapse of time. In that connection the applicants referred to a case, also concerning administrative criminal proceedings for a traffic offence, in which the official complaint had been lodged about a year after the Independent Administrative Panel's decision (see *Zuckerstätter and Reschenhofer v. Austria* (dec.), no. 76718/01, 2 September 2004). Referring to the Court's case-law, the applicants asserted that the official complaint procedure was comparable to supervisory review proceedings under Russian or Ukrainian law.

57. Moreover, in the present case, the reopened proceedings led to a new assessment of their guilt, which was as a result less favourable to them, since they were then convicted of a more serious offence, namely drunk driving with a breath alcohol level of at least 0.60 mg/l pursuant to section 99(1)(a) of the Road Traffic Act, which carried a higher penalty than section 99(1)(b).

58. The Government explained the function of an official complaint under Article 131 (1) subparagraph 2 of the Federal Constitution in the Austrian legal system: It was an instrument allowing the Federal Minister to supervise the implementation of federal laws by the *Länder*. The aim of an official complaint was to rectify an unlawful decision resulting from an incorrect interpretation of the law and to ensure a correct and uniform application of the law in the *Länder*. Pursuant to section 26(1) subparagraph (2) of the Administrative Court Act, the time-limit for lodging the official complaint was six weeks from the date of service of the decision on the competent Federal Minister or, otherwise, from the date on which the competent Minister was informed of or learned about the decision.

59. In the present case the Federal Minister of Transport, Innovation and Technology had submitted the official complaint within that time-limit. He had made use of the official complaint on the ground that the Independent Administrative Panel had not correctly applied the law, as interpreted by the Administrative Court's case-law, when assuming that a calibration error margin had to be deducted from the breath alcohol level measured by the breathalyser. Given the dangerousness of driving under the influence of alcohol, the interest in a uniform application of the law was of considerable importance.

60. In respect of the applicants' specific argument that the use of the official complaint violated the principle of legal certainty, the Government asserted that a breach of that principle could only occur once proceedings had been adjudicated with final effect, namely if the subject of the proceedings had become *res judicata*. This was the case if a decision could no longer be challenged by a legal remedy. They referred to the Court's established case-law, according to which a complaint to the Administrative Court was an effective remedy which had to be used correctly in order to comply with the requirement of exhaustion of domestic remedies. It followed that a decision by the Independent Administrative Panel in administrative criminal proceedings was not a final decision. In proceedings under Article 131 of the Federal Constitution, the Administrative Court acted as a court of appeal on points of law: if it considered a complaint to be well-founded, it quashed the decision and referred the case back to the lower authority. Consequently, the proceedings returned to the status they had had before the challenged decision had been issued. The legal effects of an official complaint were the same as those of a complaint brought by a party before the Administrative Court. In the Government's view administrative criminal proceedings were therefore not adjudicated with final effect, as long as a remedy against the decision of the Independent Administrative Panel could be lodged with the Administrative Court, be it a complaint by a party or an official complaint.

61. Referring to the above explanation of the functioning of official complaints in the Austrian system, the Government contested the applicants' view that the present case could be compared to cases concerning supervisory review proceedings under Russian law of criminal procedure (see for instance, *Nikitin v. Russia*, no. 50178/99, ECHR 2004-VIII). They stressed that challenging decisions of administrative authorities, including the Independent Administrative Panel, before the Administrative Court was an ordinary remedy available in administrative criminal proceedings.

2. The Court's assessment

62. The Court reiterates the importance of one of the fundamental aspects of the rule of law, namely the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue their ruling should not be called into question (see, as leading authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII, and *Ryabykh v. Russia*, no. 52854/99, § 51, ECHR 2003-IX; in the context of criminal proceedings see in particular *Nikitin*, cited above, §§ 54-57, and *Radchikov v. Russia*, no. 65582/01, § 42, 24 May 2007).

63. The Court will first examine whether the Independent Administrative Panel decisions of 17 June and 19 March 2002 respectively

had already become final when the Federal Minister lodged his official complaint with the Administrative Court under Article 131 (1) subparagraph (2) of the Federal Constitution. The Court notes that the parties disagree on this issue.

64. The applicants assert that a complaint to the Administrative Court under Article 131 of the Federal Constitution, be it lodged by a party or by the relevant Federal Minister, is an extraordinary remedy. In their view the Independent Administrative Panel's decisions became final as soon as they were issued. Admittedly, Article 131 of the Federal Constitution allows complaints to the Administrative Court only once the parties have exhausted appeals. However, the Court reiterates that its own case-law considers a complaint to the Administrative Court an ordinary and effective remedy which has to be exhausted in order to comply with Article 35 § 1 of the Convention (see, for instance, *Liedermann v. Austria* (dec.), no. 54272/00, 18 March 2004). The Court therefore finds that the Independent Administrative Panel's decision did not become final before the expiry of the six-week time-limit left to the applicants to lodge a complaint with the Administrative Court. In the first applicant's case the decision was served on 24 July 2002, so the six-week time-limit ran until 4 September 2002. In the second applicant's case the decision was served on 3 April 2002, so the six-week time-limit ran until 15 May 2002.

65. The Government for their part argued that the Independent Administrative Panel's decision did not become final as long as the time-limit for the Federal Minister to lodge an official complaint under Article 131 (1) subparagraph had not expired. The applicants pointed out that the Independent Administrative Panel's decision is not necessarily served on the relevant Federal Minister and that the time-limit runs in that case from the point in time at which he or she becomes aware of the decision.

66. The Court reiterates at the outset that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the specific case before it (see, for instance, *J.B. v. Switzerland*, no. 31827/96, § 63, ECHR 2001-III). In the present case the Independent Administrative Panel's decision was served on the Federal Minister on 7 August 2002 in the first applicant's case and on 10 May 2002 in the second applicant's case, that is at a point in time at which the time-limit for the applicants to complain to the Administrative Court had not yet expired. The service set in motion the six-week time limit for the competent Federal Minister to lodge an official complaint. It may therefore be argued, as the Government do, that the Independent Administrative Panel's decision did not become final before the expiry of the six-week time-limit left to the competent Federal Minister to lodge an official complaint.

67. In making its assessment the Court will have regard to the function of the official complaint in the Austrian system of administrative law, or, more specifically, of administrative criminal law. It notes, as a particular feature of administrative criminal proceedings, that there is no prosecuting authority. In proceedings before the Independent Administrative Panel, the authority issuing the penal order assumes that role (see *Weh and Weh v. Austria* (dec.), no. 38544/97, 4 July 2002). However, that authority does not have the right to lodge a complaint with the Administrative Court against the Independent Administrative Panel's decision under Article 131 of the Federal Constitution. This remedy is only open to the accused. As the Government explained, the official complaint serves to ensure a correct and uniform interpretation of federal laws by the *Länder*. In contrast to the cases of supervisory review to which both parties referred, no situation arises in which the prosecuting authorities may first make use of an ordinary appeal and subsequently submit the same ground for quashing a decision by way of supervisory review (see *Radchikov*, cited above, §51) or to submit a supervisory review on grounds which could and should already have been raised by way of an ordinary appeal. The applicants argue that the result of the proceedings following the Federal Minister's official complaint was to their detriment. However, in the Court's view the applicants' position in the present case was not different from the position of any accused in criminal proceedings in which an appeal is lodged by the prosecuting authority.

68. Having regard to these particular features of administrative criminal proceedings under Austrian criminal law, the Court considers that the Independent Administrative Panel's decisions of 17 June 2002 and 19 March 2002 had not become "final" when the Federal Minister lodged the official complaint within the statutory six-week time-limit. Consequently, the fact that they were subsequently quashed by the Administrative Court on the competent Federal Minister's official complaint does not violate the principle of legal certainty.

69. The Court therefore concludes that there has been no violation of Article 6 § 1 of the Convention on account of the quashing of the Independent Administrative Panel's decisions.

III. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7

70. The applicants complained of a violation of Article 4 of Protocol No. 7, which reads as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is

evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.”

71. The applicants asserted that as a result of the official complaint the criminal proceedings against them had been reopened, although none of the criteria set out in the second paragraph of Article 4 of Protocol No. 7 had been met.

72. For their part, the Government argued that the applicants had not been “finally convicted” by the Independent Administrative Panel’s decisions of 17 June and 19 March 2002 respectively. The proceedings concerning the official complaint and the subsequent proceedings thus still formed part of one and the same set of proceedings.

73. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

74. Having regard to the finding relating to Article 6 (see paragraphs 68-69 above), the Court finds that the applicants’ complaint does not raise a separate issue under Article 4 of Protocol No. 7 (see, among other authorities, *Radchikov*, cited above, § 55, with further references).

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE LENGTH OF THE PROCEEDINGS

75. The applicants complained under Article 6 § 1 about the length of the proceedings.

76. The Government conceded that Article 6 applied to the proceedings at issue, including the proceedings relating to the competent Federal Minister’s official complaint, but did not agree that the proceedings had been unreasonably lengthy.

77. It is not disputed that Article 6 applies to the administrative criminal proceedings at issue (see, as an example of the Court’s established case-law, *Baischer v. Austria*, no. 32381/96, § 22, 20 December 2001). Moreover, the Court has already held in a comparable case that the criminal head of Article 6 § 1 of the Convention applied to proceedings relating to an official complaint, raising the question whether the accused had fulfilled the elements of an administrative offence (see *Zuckerstätter and Reschenhofer* (dec.), cited above). In the present case the official complaint concerned the question whether a calibration error margin should be deducted from the results of the breathalyser test, and consequently whether the applicants were guilty of an offence under sections 5(1) and 99(1)(a) of the Road Traffic Act rather than of an offence under sections 5(1) and 99(1)(b). The proceedings before the Administrative Court in connection with the official

complaint therefore related to the “determination of a criminal charge”. Consequently for the calculation of the length, the proceedings are to be considered as a whole.

78. The proceedings concerning the first applicant started on 14 February 2002 and ended on 21 June 2006. Thus, their duration was four years and four months. They came before four levels of jurisdiction and were remitted once to the Independent Administrative Panel.

79. The proceedings concerning the second applicant started on 5 December 2001 and ended on 14 August 2006. Thus, their duration was four years and eight months. They came before four levels of jurisdiction and were remitted once to the Independent Administrative Panel.

A. Admissibility

1. *The first applicant*

80. The Court observes that in the second set of proceedings the Independent Administrative Panel took the length of proceedings into account and reduced the fine to a minimum level. Although it did not specifically refer to Article 6 of the Convention it acknowledged in essence a breach of that provision, and provided adequate redress by reducing the fine for the offence under sections 5(1) and 99(1)(a) of the Road Traffic Act considerably, namely from EUR 1,162 to the minimum fine of EUR 872. The Court therefore finds that the applicant cannot claim to be a victim of the alleged violations of Article 6 and 13 (see, for instance, *Eckle v. Germany*, 15 July 1982, § 69 et seq., Series A no. 51, and *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X).

81. It follows that the first applicant’s complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. *The second applicant*

82. The situation is different in the second applicant’s case. The Government pointed out that the Independent Administrative Panel, in the second set of proceedings, reduced the fine imposed on the applicant to a minimum level. However, they did not argue that the applicant could no longer claim to be a victim. In that connection the Court observes that the Independent Administrative Panel reduced the fine from EUR 872.07 to EUR 872, the minimum fine for the offence at issue. Clearly, this is not a significant reduction capable of compensating the second applicant for the duration of the proceedings. It is true that the Independent Administrative Panel also reduced the term of imprisonment in the event of default from thirteen days to ten days. However, this reduction, though considerable, had

no direct practical effect, as a default prison term may only be enforced if the fine is irrecoverable and a number of other conditions are met, and after the conduct of a separate set of proceedings (see *Lückhof and Spanner v. Austria*, nos. 58452/00 and 61920/00, §§ 39 and 54, 10 January 2008). The second applicant can therefore still claim to be a victim of the alleged violation.

83. The Court considers, in the light of the criteria established by its case-law on the question of “reasonable time”, and having regard to all the material in its possession, that an examination of the merits of the second applicant’s complaint is required.

B. Merits

84. The second applicant maintains that the duration of the proceedings was unreasonable.

85. The Government noted that the proceedings before the Independent Administrative Panel had been conducted expeditiously in both sets of proceedings. Regarding the proceedings before the Administrative Court, they noted that while the first set of proceedings had taken two years and seven months, the second set of proceedings took only ten months from the time the applicant supplemented his complaint until judgment was given. The Government submitted, as they had already done in similar cases, that the Administrative Court has been burdened for years with an excessive workload, which has resulted in an increasing backlog of cases, even though various measures had been taken to reduce this backlog, such as increasing the number of reporting judges and reducing the subjects falling within the jurisdiction of the Administrative Court. In sum, the duration of the proceedings had not been “unreasonable”.

86. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

87. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, for instance, *Gürsoy v. Austria*, no. 20597/04, § 24, 5 June 2008, *Schutte v. Austria*, no. 18015/03, §§ 28-30, 26 July 2007; *Vitzthum v. Austria*, no. 8140/04, §§ 21-23, 26 July 2007; *Fehr v. Austria*, no. 19247/02, §§ 23-26, 3 February 2005; *Blum v. Austria*, no. 31655/02, §§ 22-24, 3 February 2005; and *Yavuz v. Austria*, no. 46549/99, §§ 36-40, 27 May 2004, all concerning administrative criminal proceedings of comparable duration and with considerable delays before the Administrative Court).

88. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

89. The applicants complained that they did not have an effective remedy in respect of the length of the proceedings. They relied on Article 13 of the Convention, which provides as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

90. Given the finding above concerning the first applicant’s lack of victim status in respect of the length of the proceedings (see paragraphs 80-81), his complaint of lack of an effective remedy must also be declared inadmissible.

91. The second applicant’s complaint of lack of an effective remedy against the length of the proceedings is closely linked to the admissible complaint about the length of the proceedings, and must therefore likewise be declared admissible.

B. Merits

92. The second applicant maintained that no effective remedy was available in respect of excessive length of the proceedings.

93. The Government submitted that, in the second set of proceedings, the second applicant had complained to the Constitutional Court that the proceedings had been excessively lengthy. According to the Constitutional Court’s case-law, of which they cited a number of examples, the administrative authorities have to take unreasonable length of proceedings into consideration when assessing the penalty. In the present case, the Constitutional Court found that the Independent Administrative Panel had complied with this requirement in its decision of 14 March 2005. The second applicant had therefore had an effective remedy at his disposal.

94. The Court reiterates that the remedies available to a litigant at the domestic level for raising a complaint about the length of proceedings are

“effective” within the meaning of Article 13 of the Convention if they “[prevent] the alleged violation or its continuation, or [provide] adequate redress for any violation that [has] already occurred” (see *Kudla v. Poland* [GC], no. 30210/96, § 158, ECHR 2000-XI). Article 13 therefore offers an alternative: a remedy is “effective” if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see *Kudla*, cited above, § 159; see also *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 186-87, ECHR 2006-...).

95. The Court is not required to examine in the abstract whether the case-law of the Constitutional Court, which requires administrative authorities to reduce the sentence if the proceedings have been unreasonably lengthy, may have created an effective remedy. It is sufficient to note that in the present case the fine had already been set at the minimum level. Consequently, there was no room for a reduction of the fine, which would have had a compensatory effect. The Government have not shown either that any remedy with preventive effect was available. In the circumstances of the case the second applicant did not have an effective remedy at his disposal (see *mutatis mutandis*, *Schutte*, cited above, §38; *Vitzthum*, cited above, § 31; and *Hauser-Sporn v. Austria*, no. 37301/03, § 40, 7 December 2006, all concerning the lack of a remedy for excessive length of administrative criminal proceedings).

Consequently, there has been a violation of Article 13 of the Convention.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION AND ITS PROTOCOLS

96. The applicants further complained of violations of Article 6 §§ 1 and 3 (d) of the Convention, alleging that the Administrative Court and, subsequently, the Independent Administrative Panel in the second set of proceedings, had failed to duly consider the results of the evidentiary proceedings and to give sufficient reasons for their decisions. Under Article 6 § 2 they alleged that the Administrative Court’s legal view amounted to a presumption that the result of the breathalyser test was correct unless the accused could adduce evidence to the contrary.

97. Furthermore, the applicants complained under Article 2 of Protocol No. 7 that they had not had a review of their convictions by a higher tribunal, since the Constitutional Court’s and the Administrative Court’s scope of review was limited. Finally, they complained under Article 6 and Article 1 of Protocol No. 1 that in Austrian administrative criminal proceedings the fine imposed did not take the offender’s financial situation into account.

98. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that

there is no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

100. Each applicant claimed 381.90 euros (EUR) in respect of pecuniary damage, explaining that these were the fees the Administrative Court, in its decisions of 23 May 2006 and 14 July 2006, respectively, had ordered them to reimburse to the Independent Administrative Panel. This was a consequence of the admission of the official complaint which was in breach of Article 6 of the Convention. Moreover the first applicant claimed EUR 3,000 in respect of non-pecuniary damage. The second applicant claimed EUR 4,000 in respect of non-pecuniary damage.

101. The Government contested these claims. Regarding non-pecuniary damage, they asserted that the finding of a violation would in itself provide sufficient reparation or, alternatively, that the applicants’ claims were excessive.

102. The Court notes that it has only found violations concerning the second applicant, namely in respect of the length of the proceedings and the lack of an effective remedy. It does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, making an assessment on an equitable basis and having regard to the sums awarded in comparable cases (see, for instance, *Gürsoy*, cited above, § 36; *Schutte*, cited above, § 48; and *Vitzthum*, cited above, § 40) it awards the second applicant EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

103. Each applicant also claimed a total amount of EUR 6,599.16 for costs and expenses. This amount includes EUR 2,500 per applicant for the costs of the proceedings before the Court. The remainder concerns the domestic proceedings.

104. The Government considered that in part the costs claimed in respect of the domestic proceedings had not been incurred with the aim of preventing or redressing the violation at issue. In respect of the Convention proceedings they pointed out that only part of each applicants' complaints had been declared admissible. In sum, they asserted that the applicants' claims were excessive.

105. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court has not found any violation of the Convention in respect of the first applicant. Consequently, it does not award him reimbursement of any costs. Regarding the second applicant, the Court has found violations in respect of the length of the proceedings and the lack of an effective remedy. Regard being had to the documents in its possession and the above criteria, the Court rejects the second applicant's claim for costs and expenses in the domestic proceedings and considers it reasonable to award him the sum of EUR 1,500 for the proceedings before the Court.

C. Default interest

106. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;
2. *Declares* both applicants' complaints concerning the quashing of the Independent Administrative Panel's decisions upon the competent Federal Minister's official complaint and the second applicant's complaint about the length of the proceedings and the lack of an effective remedy in that respect admissible and the remainder of the applications inadmissible;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention in respect of the quashing of the Independent Administrative Panel's decisions upon the competent Federal Minister's official complaint;
4. *Holds* that there is no need to examine the complaint under Article 4 of Protocol No. 7 of the Convention;

5. *Holds* that there has been a violation of Article 6 § 1 of the Convention regarding the length of the second applicant's proceedings;
6. *Holds* that there has been a violation of Article 13 of the Convention regarding the second applicant;
7. *Holds*
 - (a) that the respondent State is to pay the second applicant, within three months of the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, for costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;
8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Vajić and Laffranque is annexed to this judgment.

N.A.V.
S.N.

JOINT CONCURRING OPINION
OF JUDGES VAJIĆ AND LAFFRANQUE

We voted with the majority in finding that there had been no violation of Article 6 § 1 of the Convention on account of the quashing of the Administrative Panel's decisions in the present case. We would, however, like to stress that our conclusion is closely linked to the specific facts of the case, namely the fact that the Administrative Panel's decisions had not become final when the Federal Minister lodged official complaints within the statutory time-limit of six weeks (see paragraph 68 of the judgment).

The decisions of the Administrative Panel in respect of both applicants were served on the Federal Minister within six weeks of being served on the applicants, that is, before the time-limit for the applicants to complain had expired (see paragraph 66). Had this not been the case, we would have had difficulty accepting that there had been no violation of Article 6 § 1.