



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

COURT (CHAMBER)

CASE OF ADOLF v. AUSTRIA

(Application no. 8269/78)

JUDGMENT

STRASBOURG

26 March 1982

In the Adolf case,

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. G. WIARDA, *President*,

Mr. J. CREMONA,

Mr. L. LIESCH,

Mr. F. MATSCHER,

Mr. L.-E. PETTITI,

Mr. B. WALSH,

Sir Vincent EVANS,

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

Having deliberated in private on 25 November 1981 and on 22 and 24 February 1982,

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

PROCEDURE

1. The Adolf case was referred to the Court by the European Commission of Human Rights ("the Commission") and the Government of the Republic of Austria ("the Government"). The case originated in an application against this State lodged with the Commission on 7 June 1978 under Article 25 (art. 25) of the Convention by an Austrian citizen, Mr. Gustav Adolf.

2. The Commission's request and the Government's application were lodged with the registry of the Court, within the period of three months laid down in Articles 32 par. 1 and 47 (art. 32-1, art. 47), on 18 December 1980 and 23 January 1981 respectively. The request refers to Articles 44 and 48 (art. 44, art. 48) and to the declaration by the Republic of Austria recognising the Court's compulsory jurisdiction (Article 46) (art. 46), while the application refers to Article 48 (art. 48). Their purpose is to obtain a decision as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 6 par. 1, 2 and 3 (d) (art. 6-1, art. 6-2, art. 6-3-d) of the Convention; the Government's application asks the Court in particular to find that there has been no such breach in this case.

3. The Chamber of seven judges to be constituted included, as *ex officio* members, Mr. F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 par. 3 (d) of the Rules of Court). On 31 January 1981 in the

presence of the Registrar, the President drew by lot the names of the five other members, namely Mr. J. Cremona, Mr. G. Lagergren, Mr. L. Liesch, Mr. B. Walsh and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21 par. 4 of the Rules of Court) (art. 43). Subsequently, Mr. Lagergren, who was unable to attend, was replaced by the first substitute judge, Mr. L.-E. Pettiti (Rules 22 and 24 par. 1).

4. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 par. 5). He ascertained, through the Registrar, the views of the Agent of the Government and of the Delegate of the Commission regarding the procedure to be followed. On 3 February, he decided that the Agent should have until 15 April 1981 to file a memorial and that the Delegate should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to him by the Registrar.

The Government's memorial was received at the registry on 14 April. On 11 June, the Secretary to the Commission advised the Registrar that the Delegate would submit his observations at the hearings, and forwarded to him the observations of the applicant's lawyer on the Government's memorial.

5. After consulting, through the Deputy Registrar, the Agent of the Government and the Delegate of the Commission, the President directed on 23 July that the oral hearings should open on 24 November 1981.

6. On 9 October, the Government produced a document to the Court.

7. The oral hearings took place in public at the Human Rights Building, Strasbourg, on 24 November. Immediately before their opening, the Court had held a preparatory meeting at which it had authorised the person assisting the Delegate of the Commission to address the Court in German (Rule 27 par. 3).

There appeared before the Court:

- for the Government:

Mr. K. HERNDL, Ambassador,

Ministry of Foreign Affairs, *Agent*,

Mr. R. LINKE, Advocate-General,

Ministry of Justice,

Mr. W. OKRESEK, Oberrat,

Federal Chancellery, Constitutional Department,

Advisers;

- for the Commission:

Mr. M. MELCHIOR,

Delegate,

Mr. L. HOFFMANN, the applicant's lawyer

before the Commission, assisting the Delegate (Rule 29 par. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mr. Herndl, Mr. Linke and Mr. Okresek for the Government and by Mr. Melchior and Mr. Hoffmann for the

Commission, as well as their replies to questions put by the Court. Those appearing before the Court filed several documents during the hearings.

8. On 15 December, acting on the instructions of the President, the Registrar asked the Agent of the Government to produce two documents; those documents were received at the registry on 5 January 1982.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant, an Austrian citizen born in 1918, lives in Innsbruck where he practises the profession of accountant and financial consultant (Wirtschaftsprüfer und Steuerberater).

10. On 15 July 1977, an 85-year-old woman, Mrs. Irmgard Proxauf, acting through a lawyer, reported to the Innsbruck public prosecutor's office that three days earlier during a quarrel Mr. Adolf had thrown at another person, Mrs. Anneliese Schuh, a bunch of keys which had then struck her (Mrs. Proxauf), causing her injury. In her letter headed "request to inquire into a set of facts", she called on the prosecutor's office to take criminal proceedings against the applicant and stated that she would be a civil party claiming damages in any such proceedings (Privatbeteiligte).

11. The federal police at Innsbruck, instructed on 12 August by the public prosecutor's office to investigate whether or not a punishable act had been committed, interrogated several persons cited by Mrs. Proxauf at witnesses and, on 22 September, the applicant himself. He denied the facts alleged against him and denounced the complaint as being knowingly false. After pointing out that the object alleged to have caused the injury was, in fact, an envelope containing a single key, he asserted, amongst other things, that he had not thrown it: he had wanted to give it back to Mrs. Proxauf, but it had slipped out of his hand and touched her arm. Mrs. Schuh, he said, had picked it up and thrown it, just above his head, over a distance of thirteen metres in the direction of his house. Mr. Adolf's wife and two employees had written a note setting out what they remembered of the incident. This note, he stated was available to the court, as an item for inclusion in the case-file. The police accepted the note, but did not question Mrs. Adolf or the employees.

On 28 September, the public prosecutor's office, to which the file had been returned, asked the Innsbruck District Court (Bezirksgericht) to procure a medical report on the seriousness of Mrs. Proxauf's injury. The Court registered the case on 4 October 1977; under the heading "punishable

act" it specified "section 83 of the Penal Code", which is a provision, amongst others, dealing with the infliction of bodily harm.

Following receipt of the doctor's opinion, the District Court assessed the costs of that opinion on 11 November 1977. The district prosecutor (Bezirksanwalt) requested the District Court on 21 November to "decide that the conditions of section 42 of the Penal Code [were] fulfilled" (see paragraph 22 below). The Court acceded to the request on 24 November by inserting in the file a note worded as follows: "B" (Beschluss, decision): "... the proceedings are closed pursuant to section 451 par. 2 of the Code of Criminal Procedure"; in addition, it added to the register, under the heading "date and manner ... of disposal of the matter" (Erledigung): "24. 11. Section 451 par. 2 of the Code of Criminal Procedure".

12. On 3 December, an application was made to the District Court by Mr. Adolf who, after consultation of the file on his case, had come to learn on 22 November of the submissions made by the public prosecutor's office on the previous day; however, like that office, he was not aware of the decision of 24 November. He denied that he had injured Mrs. Proxauf, whether by throwing a bunch of keys or otherwise, and contested the doctor's findings, claiming in particular that the latter had based his opinion on information that was contradicted by the material in the case-file (aktenwidrig). He called on the District Court either to acquit him after trial or to terminate the proceedings pursuant to section 90 par. 1 of the Code of Criminal Procedure (see paragraph 21 below). He requested that, if the District Court should choose the first alternative, fresh medical evidence be taken forthwith.

On 22 December, the District Court notified an associate of the applicant's lawyer that the proceedings had been terminated - on an unspecified date - in pursuance of section 451 2 the Code of Criminal Procedure. Following a request made by Mr. Adolf on 4 January 1978, the Court served on him on 24 January a decision dated 10 January which reads as follows (translation from German):

"Decision

In the criminal case (Strafsache) against Dr. Gustav Adolf for the offence of inflicting bodily harm, within the meaning of section 83 of the Penal Code, the District Court of Innsbruck has decided as follows upon the request of the public prosecutor:

The conditions of section 42 of the Penal Code are met; the proceedings are terminated in accordance with section 451 par. 2 of the Code of Criminal Procedure.

Reasons

By letter of 15 July 1977, the civil party Irma Proxauf informed the public prosecutor of an incident involving herself and the accused (Beschuldigter) which had happened on 12 July 1977. She alleged that the accused had caused her an injury, namely a bruise on her left arm and another below her left breast, with a bunch of keys. The investigations made thereupon and the expert opinion have shown (ergeben)

that in the course of a quarrel the accused flew into a rage and threw an envelope containing a key in the direction of Mrs. Anneliese Schuh who however managed to avoid the missile, while the 85-year-old Irma Proxauf standing behind her was hit. The key first struck the back of the right hand, causing a superficial abrasion, and then bounced against the left side of the above-named person's chest. No injury could be established on the chest.

The injury found (festgestellte) is insignificant (geringfügig) as it does not exceed the three-day limit; the fault (Verschulden) of the accused may be described as insignificant (geringfügig), and his character gives cause to expect that he will conduct himself properly in future.

Therefore the conditions of section 42 of the Penal Code are met, justifying the above decision.

District Court of Innsbruck, Section 9, 10 January 1978."

13. The applicant challenged this decision before the Regional Court (Landesgericht) of Innsbruck which, on 23 February 1978, declared the appeal (Beschwerde) inadmissible on the ground that section 451 par. 2 of the Code of Criminal Procedure limited the right of appeal to the prosecutor (Ankläger).

14. On 25 January 1980, a little more than six months after the European Commission of Human Rights had accepted the application, the Generalprokurator (the public prosecutor attached to the Supreme Court (Oberster Gerichtshof) filed, with the Supreme Court, pursuant to section 33 par. 2 of the Code of Criminal Procedure, an application for annulment of the decision dated 10 January 1978 in the interests of the proper application of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes).

The Generalprokurator drew a distinction between the termination of proceedings by virtue of section 451 par. 2 and their termination by virtue of section 90 par. 1 of the Code of Criminal Procedure. The former provision applied when, prior to the trial hearing, the court was satisfied that the conditions of section 42 of the Penal Code were met; where, however, no sufficient grounds existed for continuing with the prosecution, the public prosecutor should close the file (zurücklegen) on the complaint and the investigating judge should bring the proceeding to an end in accordance with the general rules laid down in section 90 par. 1 and 447 par. 1. In both cases, he said, the decisions would be taken without the formal hearing of evidence (Beweisverfahren), something which, as followed in any event from Article 6 par. 1 (art. 6-1) of the Convention - Article 6 par. 1 (art. 6-1) being a provision that has constitutional status in Austrian law -, should in principle precede any finding of guilt (Schulderkenntnis).

Thus, in the submission of the Generalprokurator, section 42 of the Penal Code was not appropriate where, on the basis of the complaint or the preliminary enquiries, no offence could be established on the facts or existed in law. On the other hand, for section 42 to apply it was not essential

for there to be proof of guilt, but merely a suspicion (Tatverdacht) such as would warrant the opening of preliminary enquiries or an application seeking the imposition of a penalty. A court decision terminating proceedings in accordance with section 42 could therefore only be grounded on a "suspected state of affairs" (Verdachtslage) as disclosed by the case-file: the court had to limit itself to ascertaining whether there existed against the suspect sufficient suspicion for proceeding with the prosecution and whether, on the hypothetical assumption that the suspect had indeed committed the alleged offence, he was or was not entitled to benefit from the ground for exoneration (Strafausschließungsgrund) provided for under section 42 of the Penal Code. It seemed inadmissible to state in the reasons for such a decision conclusions on the objective and subjective aspects of the act and to take it as proved against the suspect that he had engaged in a certain course of conduct constituting a punishable act. Such an assertion in the reasons for a decision terminating proceedings amounted to a finding of guilt without any formal taking of evidence at a public hearing, which would be in violation of Article 6 par. 2 (art. 6-2) of the Convention.

In the instant case, said the Generalprokurator, the District Court had clearly indicated that it accepted the account of the incident given by Mrs. Proxauf and corroborated by the police investigations and by the medical evidence, and that it disbelieved the applicant's denials which were mainly concerned with what had happened during the incident (Tathergang). He submitted that as the decision in issue was not capable of causing Mr. Adolf any direct prejudice, a finding that it had infringed the law would be sufficient. The Generalprokurator therefore moved the Supreme Court to hold that the Innsbruck District Court's decision dated 10 January 1978 was, as regards its reasoning, contrary to the law, that is to say section 451 par. 2 of the Code of Criminal Procedure read in conjunction with Article 6 par. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

15. On 24 February 1980, Mr. Adolf submitted to the Supreme Court certain observations on the application for annulment. Whilst welcoming the initiative taken by the Generalprokurator, he considered that the latter had disregarded essential elements of violation of the law inherent in the impugned decision. In particular, he disputed the interpretation given by the Generalprokurator to section 42 of the Penal Code; in the applicant's view, this section in fact required the court to make a positive finding of an act fulfilling the description of a criminal offence. He relied on section 451 par. 2 of the Code of Criminal Procedure which places the judge under a duty to satisfy himself, before bringing the proceedings to a close, that the conditions stipulated under section 42 of the Penal Code are met; in order to do this, so the applicant contended, the judge must have regard to all the evidence adduced and not simply to the evidence supporting the suspicion.

Mr. Adolf criticised the District Court for having failed to take into consideration evidence in his favour, for having declined to hear witnesses

requested by him and for not having given him the opportunity to challenge the expert medical opinion; he alleged a breach of Article 6 par. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention. He accordingly called on the Supreme Court to find infringements of the law other than those pleaded by the Generalprokurator and to order that the proceedings be terminated under section 451 par. 1 of the Code of Criminal Procedure.

16. The Supreme Court rejected the application for annulment on 28 February 1980.

In the opinion of the Supreme Court, the application of section 42 par. 1 of the Penal Code did not place the suspect in a worse position than where the case is closed for some other reason (for example, in pursuance of section 90 par. 1 of the Code of Criminal Procedure), that is to say, a closure of the case which, in general, does not involve establishing the innocence of the person concerned. Section 42 is not at all meant to be used to terminate proceedings when it is certain that an offence cannot be proved on the facts or does not exist in law. On the other hand, section 42 does not demand verification of the objective and subjective elements of the offence; indeed, this would be contrary to the main object of the section, namely procedural economy (*Prozessökonomie* - the principle that the court's time should be usefully employed). The person concerned thus has no right to have doubtful issues in the case clarified.

Section 42 simply requires the existence of a suspicion. Even if a court describes the suspect's conduct in terms of findings of fact, any statements to this effect could not be regarded as judicial findings (*Konstatierungen*), within the meaning of section 270 par. 2, no. 5, of the Code of Criminal Procedure, with the attendant legal consequences. In point of fact, by reason of its basic legal character, any decision taken in pursuance of section 42 of the Penal Code can only be understood in one way: further clarification of, and possible prosecution in, a case which is already recognisable as being a trifling matter is to be avoided, not least in the interests of procedural economy. Howsoever the reasons given therefore may be worded, any such decision contains - if only because of its very nature - a negative ruling on the merits of the case and does not at all amount to a declaration, equivalent to a finding of guilt, that the suspect has (unlawfully and with criminal intent) committed a punishable act.

It would certainly have been preferable had the Innsbruck District Court stated this explicitly and without ambiguity in the decision being challenged. Nonetheless, the more or less apposite choice of wording in the reasoning could not deprive the reasoning of the specific significance it had as a result of the nature of the decision given and could not, therefore, in any way adversely affect the person concerned.

Since legal proof of the suspect's guilt is not the object pursued under section 42 of the Penal Code, no question arises as to the extent to which a decision given in pursuance of this provision has or has not been preceded

by proceedings complying with the requirements of Article 6 par. 1 (art. 6-1) of the Convention.

17. The judgment of the Supreme Court was reproduced in an Austrian legal journal but the applicant's identity was not revealed. The accompanying commentary on the judgment referred to an article entitled "A trivial affair leads to an application against Austria" ("Aus Bagatellsache wurde Klage gegen Österreich"), which had been published in a newspaper in May 1980 and which did disclose his name, profession and place of residence.

The professional association to which Mr. Adolf belongs has not instituted any disciplinary proceedings against him in respect of the facts underlying Mrs. Proxauf's complaint.

According to Mr. Adolf, the file on his case, including the Innsbruck District Court's decision dated 10 January 1978, has been produced in evidence in a civil action between himself and Mrs. Proxauf in the matter of an easement (Dienstbarkeit); an order issued by the competent civil court in Innsbruck took the case-file into consideration.

18. The costs of the procedure, and notably the costs of the medical opinion, were borne by the State. The applicant himself had to pay his lawyer's fees and his own expenses.

II. THE RELEVANT LEGISLATION

19. In Austria, the public prosecutor (Staatsanwalt) is required by law to inquire into the correctness of any report (Anzeige) of an offence for which a prosecution must be brought as a matter of course (section 87 par. 1 of the Code of Criminal Procedure). He is obliged, as a matter of course, to prosecute in respect of any offence which appears to him to have been committed and where it is not a precondition of investigation and punishment that an application be made by the victim or some other person concerned; it is his duty to cause the competent court to take the necessary measures of investigation and punishment (section 34 par. 1).

In order to procure the necessary evidence for the institution of criminal proceedings or for the closing of the file (Zurücklegung) on a complaint, the public prosecutor may have preliminary enquiries (Vorerhebungen) carried out by the investigating judge, the district courts and the police authorities (section 88 par. 1).

20. Where the public prosecutor is satisfied that there are sufficient grounds for bringing a criminal prosecution, he shall either apply for the institution of a preliminary investigation (Voruntersuchung) or file a formal accusation (Anklageschrift, section 90 par. 1). However, in district court proceedings there is no formal process of investigation and no special procedure of accusation: all that is required is a written or oral application

from the district prosecutor seeking the imposition of a penalty on the person concerned (Antrag auf gesetzliche Bestrafung, section 451 par. 1).

21. Where sufficient grounds for prosecuting the individual in question are lacking, the public prosecutor shall take no further action on the complaint and shall transmit the file to the investigating judge, together with a statement to the effect that he sees no reason to continue with the prosecution; the judge must then terminate the preliminary enquiries (section 90 par. 1). This provision applies, *mutatis mutandis*, to district court proceedings (section 447 par. 1).

Under the terms of section 90 par. 2 of the Code of Criminal Procedure, the public prosecutor may alternatively ask the investigating judge to hold that the conditions of section 42 of the Penal Code are met. In cases before a district court, the decision terminating proceedings is governed by section 451 par. 2 of the Code of Criminal Procedure, which provides (translation from German):

"If the court is satisfied that the conditions laid down in section 42 are met, it shall terminate the proceedings by a decision. The public prosecutor may lodge an appeal against any such decision ..."

22. Section 42 of the Penal Code reads as follows (translation from German):

"(1) Where an act requiring public prosecution as a matter of course involves liability to no more than a fine, a custodial sentence not exceeding one year or both, the act shall not be punishable (*strafbar*) if

1. the guilt (*Schuld*) of the author of the act is slight (*gering*);
2. the act has had no or only trifling consequences, and in addition
3. punishment is not necessary in order to deter the author of the act or other persons from committing criminal offences.

(2) The decision whether or not the conditions of paragraph (1) hereof are met shall be taken by the court; where the court decides in the affirmative, it shall bring the proceedings to a close no matter what stage they may have reached."

Section 42 was introduced into the new Austrian Penal Code which entered into force on 1 January 1975, and is aimed at avoiding criminal trials in trivial cases, notably for reasons of procedural economy; the section is headed "acts not meriting punishment" ("*mangelnde Strafwürdigkeit der Tat*"). The Supreme Court and the great majority of legal commentators regard it as a clause which is not concerned with mere procedure but which provides a substantive ground for exonerating the accused (*sachlicher Strafausschliessungsgrund*).

23. A decision taken by a court in pursuance of section 42 to terminate proceedings is not entered in the criminal record of the person concerned. The file relating to a case closed in this manner may be used in other legal

(and disciplinary) proceedings, as may, in principle, the case-file in any legal action whatever its outcome.

According to Mr. Adolf, anyone may go to the court and consult the register of cases and the register of names and, at least as far as the former is concerned, ask for an extract. The Government contested these assertions, save apparently as regards the possibility of having access to the register of names. The latter simply contains a reference to the register of cases without giving any indication as to the nature of the litigation.

24. As a result of the present case, two circulars were issued on 15 January 1979 and 24 March 1980 by the relevant Austrian authorities drawing the attention of the courts to the problems raised by the application of section 42 of the Penal Code and to the need for a careful wording of the relevant decisions (see paragraphs 33 and 34 of the report of the Commission).

PROCEEDINGS BEFORE THE COMMISSION

25. In his application of 7 June 1978 to the Commission (no. 8269/78), Mr. Adolf complained of the Innsbruck District Court's decision dated 10 January 1978. He claimed that this decision was contrary to Article 6 par. 2 (art. 6-2) of the Convention as it contained findings both on the facts of the alleged offence and on his guilt. In his submission, since such findings were required by the very terms of section 42 of the Penal Code, the legislation itself was inconsistent with Article 6 par. 2 (art. 6-2). He further alleged violation of the rights guaranteed by Article 6 par. 1 and 3 (d) (art. 6-1, art. 6-3-d) in that, notwithstanding his denial of the accusations made against him and his request for the hearing of witnesses in his favour, the District Court took its decision without holding a trial hearing and without proper inquiry into the evidence.

26. The Commission accepted the application on 6 July 1979.

In its report of 8 October 1980 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion that there had been breach of paragraph 2 of Article 6 (art. 6-2) (nine votes to six, with one abstention), but no breach of paragraph 1 or paragraph 3 (d) (art. 6-1, art. 6-3-d) (twelve votes to three, with one abstention).

The report contains three dissenting opinions.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

27. In their memorial, the Government requested the Court

"to hold that in the present case the provisions of paragraphs 1, 2 and 3 (d) of Article 6 (art. 6-1, art. 6-2, art. 6-3-d) of the Convention were not violated and that, as a consequence, the facts underlying the dispute do not indicate any breach by the Republic of Austria of its obligations under the Convention".

At the close of the hearings held on 24 November 1981, the Agent of the Government made "a final submission and a formal motion, namely that the Court, when considering this matter, come to the conclusion that, in the present case, there was no violation of the European Convention on Human Rights and Fundamental Freedoms in all three aspects which have been mentioned".

AS TO THE LAW

28. The applicant claimed to be the victim of a breach of paragraphs 1, 2 and 3 (d) of Article 6 (art. 6-1, art. 6-2, art. 6-3-d) which provide as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal ...

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

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

...

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

..."

In the submission of Mr. Adolf, this breach resulted from the Innsbruck District Court's decision dated 10 January 1978, from the earlier procedure and also from section 42 of the Austrian Penal Code itself.

I. THE APPLICABILITY OF ARTICLE 6 (art. 6)

29. The Government's principal submission was that Article 6 (art. 6) was not applicable in the present case since no criminal charge existed at any time or, at least, at the time when the decision at issue was rendered.

This view was not shared by the Commission and was contested by the applicant.

30. The Court thus has to ascertain whether there was a "criminal charge" ("accusation en matière pénale", Article 6 par. 1 (art. 6-1)) against Mr. Adolf or whether he was "charged with a criminal offence" ("accusé d'une infraction" and "accusé", Article 6 par. 2 and 3) (art. 6-2, art 6-3).

These expressions are to be interpreted as having an "autonomous" meaning in the context of the Convention and not on the basis of their meaning in domestic law (see notably, *mutatis mutandis*, the Deweer judgment of 27 February 1980, Series A no. 35, p. 22, par. 42). The legislation of the State concerned is certainly relevant, but it provides no more than a starting point in ascertaining whether at any time there was a "criminal charge" against Mr. Adolf or he was "charged with a criminal offence" (see, *mutatis mutandis*, the Engel and others judgment of 8 June 1976, Series A no. 22, p. 35, par. 82, and the König judgment of 28 June 1978, Series A no. 27, p. 30, par. 89). The prominent place held in a democratic society by the right to a fair trial favours a "substantive", rather than a "formal", conception of the "charge" referred to by Article 6 (art. 6); it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of Article 6 (art. 6) (see the above-mentioned Deweer judgment, p. 23, par. 44).

In particular, the applicant's situation under the domestic legal rules in force has to be examined in the light of the object and purpose of Article 6 (art. 6), namely the protection of the rights of the defence.

31. On 12 August 1977, following Mrs. Proxauf's complaint, the public prosecutor's office had instructed the federal police to investigate "whether or not a punishable act had been committed". The police questioned Mr. Adolf and several witnesses about the complaint and then returned the case-file to the public prosecutor's office which, on 28 September 1977, asked the District Court to procure a medical report on the seriousness of Mrs. Proxauf's injury. The Court entered the case in the register and, under the heading "punishable act", referred to section 83 of the Penal Code, this being a provision - amongst others - that deals with the infliction of bodily harm. Following receipt of the doctor's opinion, the court assessed the costs of the opinion in a decision of 11 November 1977 which mentioned "the criminal proceedings against Gustav Adolf under section 83 of the Penal Code" and described him as "accused".

In view of these circumstances, which are not contested (see paragraph 11 above), the Court considers that there is a combination of factors demonstrating that at the relevant time there was a "criminal charge" against Mr. Adolf within the meaning of the Convention. Since Mr. Adolf complained of the decision dated 10 January 1978 and of the legal basis thereof, namely section 42 of the Penal Code, but not of the institution of

proceedings against him, it is unnecessary to determine the precise moment at which he was "charged".

32. According to the Government, as a matter of law the termination of proceedings took effect on 24 November 1977, so that at least from that date onwards Mr. Adolf could no longer be regarded as a person "charged with a criminal offence" within the meaning of Article 6 (art. 6) of the Convention. In the Court's opinion, the decision taken by the District Court on that date, which was not notified to the applicant, is inseparable from the reasoned written version dated 10 January 1978, the latter having spelt out the grounds underlying the former. In short, there was - to adopt the expression utilised by the Commission's Delegate - "a single procedural act effected in several stages". Besides, this was how the Austrian judicial authorities understood the position: the Generalprokurator's application for annulment, on which the Supreme Court ruled on 28 February 1980, was directed exclusively against the decision dated 10 January 1978 (see paragraphs 14 and 16 above).

33. In the submission of the Government, the fact that the District Court applied section 42 of the Penal Code proved that there never was a "charge" or an "offence" in this case. The Government pointed out, furthermore, that the Supreme Court and the great majority of Austrian legal commentators regard the section as not being concerned with procedure but as providing a substantive ground for exonerating the accused, its purpose, it is said, being to "decriminalise" certain acts of a trivial nature by making them non-punishable (see paragraph 22 above).

In the first place, the Court observes, as did the Commission's Delegate, that recourse to section 42 cannot affect the existence, or retroactively alter the nature, of the procedures conducted prior to the court order terminating proceedings. The decision dated 10 January 1978 referred to "the criminal case against Dr. Gustav Adolf for the offence of inflicting bodily harm, within the meaning of section 83 of the Penal Code" and described him as an "accused" (see paragraph 12 above). In the notification of 22 December 1977 (*ibid.*), the District Court had moreover already mentioned the "proceedings against Gustav Adolf under section 83 of the Penal Code".

As regards the concept of a non-punishable act, it is clearly in line with the title and text of section 42 (*mangelnde Strafwürdigkeit, nicht strafbar*). Nevertheless, non-punishable or unpunished criminal offences do exist and Article 6 (art. 6) of the Convention does not distinguish between them and other criminal offences; it applies whenever a person is "charged" with any criminal offence.

34. To sum up, in 1977 Mr. Adolf was subject to a criminal charge (within the meaning of the Convention) to which the reasoned decision dated 10 January 1978 related. Article 6 (art. 6) was thus applicable in the present case.

II. COMPLIANCE WITH ARTICLE 6 (art. 6)

35. Relying on paragraphs 1, 2 and 3 (d) of Article 6 (art. 6-1, art. 6-2, art. 6-3-d), the applicant reiterated in substance the arguments he had put forward before the Commission (see paragraph 25 above). In reply, the Government pleaded as their alternative submission that neither the impugned decision of the Innsbruck District Court nor its basis in law, namely section 42 of the Penal Code, infringed the requirements of Article 6 (art. 6) of the Convention. The Commission, for its part, considered that there had been a violation of paragraph 2 (art. 6-2), but not of any other paragraph, such violation arising solely from the said decision.

36. As to whether section 42 of the Penal Code is in itself compatible with the Convention, the Court would recall its established case-law: "in proceedings originating in an individual application, [the Court] has to confine its attention, as far as possible, to the issues raised by the concrete case before it" (see notably the *Guzzardi* judgment of 6 November 1980, Series A no. 39, pp. 31-32, par. 88). Accordingly, the Court's task is not review in abstracto under the Convention the provision of domestic law challenged by Mr. Adolf but to review the manner in which that provision was applied to him (see notably, in addition to the *Guzzardi* judgment, loc. cit., the *X v. the United Kingdom* judgment of 5 November 1981, Series A no. 46, p. 14, par. 41).

37. The Government contended that Mr. Adolf was not actually prejudiced by the District Court's decision and was therefore not a victim of a violation of his Convention rights. However, in its use of the word "victim", Article 25 (art. 25) denotes "the person directly affected by the act or omission which is in issue" - that is to say, in the present case, the applicant; and the existence of a violation is conceivable even in the absence of prejudice, prejudice being relevant only in the context of Article 50 (art. 50) (see notably the *Artico* judgment of 13 May 1980, Series A no. 37, p. 18, par. 35).

38. In its decision dated 10 January 1978, the District Court stated (see paragraph 12 above):

"... The investigations ... and the expert opinion have shown that in the course of a quarrel the accused flew into a rage and threw an envelope containing a key in the direction of Mrs. Anneliese Schuh who however managed to avoid the missile, while ... Irma Proxauf standing behind her was hit. The key first struck the back of the right hand, causing a superficial abrasion, and then bounced against the left side of the above-mentioned person's chest.

The injury found is insignificant as it does not exceed the three-day limit; the fault of the accused may be described as insignificant, and his character gives cause to expect that he will conduct himself properly in future."

In the Court's opinion, this reasoning was capable of suggesting that Mr. Adolf had inflicted bodily harm on Mrs. Proxauf and that he was at fault in

doing so. The above-quoted extract is not limited to recounting a "suspected state of affairs": it presents as established certain facts alleged by the complainant, without even mentioning that Mr. Adolf had denied throwing any keys and had denounced the complaint as being knowingly false.

39. The Government considered that a distinction should be drawn between operative provisions and reasoning adduced; they questioned whether the use of imprecise or incorrect terminology in the reasoning, but not in the operative provisions, of a decision terminating proceedings and hence, in their submission, one that was beneficial to the person concerned, could in itself go counter to the presumption of innocence. They drew attention, in this connection also, to the particular legal character of section 42 of the Penal Code: the application of this section, so they contended, meant that the District Court objectively could not, and subjectively did not, intend to make a finding of legal or moral guilt.

According to the Supreme Court and the Austrian authorities, section 42 must be read in the light of, *inter alia*, its drafting history, the rules of criminal procedure and Article 6 par. 2 (art. 6-2) of the Convention, the Convention having constitutional status in Austria. When the section is so construed, the termination of proceedings under it should be understood as being based on the mere existence of suspicion and not on actual findings of fact and guilt (see paragraphs 14, 16 and 24 above).

The fact nonetheless remains that the reasoning in the decision dated 10 January 1978 was in terms that, in the opinion of the Court, were well capable of being understood as meaning that Mr. Adolf was guilty of a criminal offence, albeit one that did not merit punishment; as the Delegate of the Commission pointed out, the decision's reasoning forms a whole with and cannot be dissociated from the operative provisions.

40. According to the Government, the District Court's decision should be read in conjunction with the judgment of the Supreme Court; this judgment, the Government submitted, clarified the District Court's decision by showing that it was grounded solely on the existence of a "suspected state of affairs".

The judgment of 28 February 1980 (see paragraph 16 above) did indeed hold that a decision taken in pursuance of section 42 of the Penal Code does not, because of its very character and whatever may be its wording, involve anything in the nature of a verdict of guilt. It would have been preferable, the judgment added, had the District Court stated this explicitly and without ambiguity, but the more or less apposite choice of wording in the reasoning could not deprive the reasoning of the specific significance it had as a result of the nature of the decision given.

The Court recognises that the District Court's reasoned decision dated 10 January 1978 must be read with the judgment of the Supreme Court and in the light of it. That judgment has cleared Mr. Adolf of any finding of guilt and thus the presumption of his innocence is no longer called into question.

By reason of the nature of section 42 of the Penal Code, the proceedings, on that section being applied, did not and could not terminate with any finding of guilt; it was therefore not necessary for the District Court to proceed with any hearing in the case or examination of evidence.

41. There has accordingly been no breach of Article 6 (art. 6) of the Convention.

FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 6 (art. 6) of the Convention was applicable in the present case;
2. Holds, by four votes to three, that there has been no breach of that Article (art. 6).

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-sixth day of March, one thousand nine hundred and eighty-two.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 par. 2 (art. 51-2) of the Convention and Rule 50 par. 2 of the Rules of Court:

- joint dissenting opinion of Mr. Cremona, Mr. Liesch and Mr. Pettiti;
- concurring opinion of Mr. Matscher.

G.W.
M.-A.E.

JOINT DISSENTING OPINION OF JUDGES CREMONA,
LIESCH AND PETTITI

We find ourselves unable to agree with the majority of our colleagues that there was no violation of the Convention in this case.

We do go along with them as far as their conclusions that in 1977 the applicant was subjected to a criminal charge and that Article 6 (art. 6) of the Convention is in fact applicable to this case. But then we cannot agree that the decision of the Austrian Supreme Court of 28 February 1980, so far as it went, contrived to set right a situation which was then already in violation of Article 6, paragraphs 1 and 2 (art. 6-1, art. 6-2), of the Convention. It is here at this crucial point that we are compelled to part ways with the majority.

In its decision dated 10 January 1978 ("Decision in the criminal case against Dr. Gustav Adolf for the offence of inflicting bodily harm, within the meaning of section 83 of the Penal Code") the Innsbruck District Court, applying section 42 of the Penal Code, stated as follows:

"... The investigations ... and the expert opinion have shown that in the course of a quarrel the accused flew into a rage and threw an envelope containing a key in the direction of Mrs. Anneliese Schuh who however managed to avoid the missile, while ... Irma Proxauf standing behind her was hit. The key first struck the back of the right hand, causing a superficial abrasion, and then bounced against the left side of the above-mentioned person's chest.

The injury found is insignificant as it does not exceed the three-day limit; the fault (Verschulden) of the accused may be described as insignificant, and his character gives cause to expect that he will conduct himself properly in future."

In our view this reasoning clearly amounts to a judicial finding, in the context of a criminal charge, that the applicant inflicted bodily harm on another person and that he was in a state of guilt in doing so. The net result is that, notwithstanding the applicant's persistent denial of the allegations made against him, and without holding a public trial, hearing any witnesses and giving the applicant the opportunity to challenge the aforesaid expert medical opinion, that Court made findings establishing both the disputed facts and his contested guilt.

It is true that in its decision of 28 February 1980 the Austrian Supreme Court in effect stated that, notwithstanding the infelicitous wording used by the District Court in its decision, that decision, inasmuch as it applied section 42 of the Austrian Penal Code, was based solely on the existence of a "suspected state of affairs".

But whilst it is clear that, in a case like this, in principle it is not within the province of our Court to review the correctness of the construction put upon section 42 of the Penal Code of Austria by the Austrian Supreme Court, it is equally clear that what was found by the District Court in unambiguous and unmistakable language cannot be made to mean other

than what it obviously and unavoidably means. The "fact" of those findings was not erased by mere "hypothetical" whitewashing.

Indeed the fact remains that the District Court's decision, the grounds of which in effect amounted to declaring the applicant guilty of a criminal offence, still stands. The Supreme Court did not set it aside and the construction put upon it in no way erased the positive findings actually made in it. Nor did that Court correct the failure of the District Court to respect the requirements of Article 6 §§ 1 and 2 (art. 6-1, art. 6-2) of the Convention taken together, which should have been observed before those findings were actually reached.

Clearly, before a person is found guilty of a criminal offence it is essential that he should have the benefit of the guarantees of Article 6 (art. 6) of the Convention. But the decision of the District Court, which as already stated still stands, was reached by a procedure under which the applicant did not have the opportunity to exercise his rights under that Article (art. 6), in particular his right to a fair and public hearing and his right to be presumed innocent until proved guilty according to law.

We therefore find that there was a breach of Article 6, paragraphs 1 and 2 (art. 6-1, art. 6-2), of the Convention.

In view of this conclusion, we feel dispensed from ascertaining whether there was, in addition, a breach of Article 6 § 3 (d) (art. 6-3-d).

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

I voted for the conclusion that there had been no violation of Article 6 § 2 (art. 6-2) of the Convention, primarily for the reasons given in the judgment.

Nonetheless, I should like to point out that the same conclusion could be reached by other routes, for example by reliance on the nature of section 42 of the Austrian Penal Code, from which it follows that the district court, whenever it applies this section of the Penal Code, is deciding that the contested facts do not attain the level of seriousness of a criminal offence and thus fall completely outside the sphere of the criminal law; in other words, by applying this provision a district court can never violate Article 6 § 2 (art. 6-2) of the Convention, which safeguards the presumption of innocence only in respect of a charge of a criminal offence.

It could also be maintained that whilst the Innsbruck District Court did indeed make a finding of certain facts in the reasoning of its decision, it did so in such a generic manner that what it stated did not amount to finding proved all the various elements that must be proved for there to be a specific criminal offence.

On the other hand, I well understand the way of thinking of my colleagues who have felt unable to concur with the majority. In point of fact, the present case is the result of a chain of unfortunate circumstances and of mishandling on the part of the relevant authorities, something which can make it difficult in the particular event to reach the conclusion that there was no breach of Article 6 § 2 (art. 6-2) of the Convention.

To begin with, section 42 of the Austrian Penal Code seems to me to be unsatisfactorily drafted. Read literally, it could be taken as suggesting that its application presupposes a finding of guilt, which would hardly be reconcilable with the presumption of innocence within the meaning of Article 6 § 2 (art. 6-2) of the Convention (unless the argument based on the very nature of section 42 of the Penal Code be adopted; as to this, see above). The picture changes only if section 42 of the Penal Code is construed in the light of its drafting history, the corpus of the rules of criminal procedure and Article 6 § 2 (art. 6-2) of the Convention (which has constitutional status in Austria).

It is also understandable that, confronted with this text which, as is evident can be conducive to misunderstandings, the judge at Innsbruck should have resorted to what the Supreme Court called a "more or less apposite choice of wording" but what I, personally, would prefer to term as a choice of totally improper wording. It is precisely this factor that lies at the root of the present application.

Furthermore, it was wrong of the District Court to have dated 10 January 1978 the written reasoning requested by the applicant, without specifying that as a matter of law the termination decision had been taken earlier on 24 November 1977.

Finally, it would have been preferable had the Supreme Court taken advantage of the occasion offered to it by holding the reasoning of 10 January 1978 to be contrary to the law, as it had been moved to do by the Generalprokurator. Such a course of action was all the more open to the Supreme Court in view of the fact that section 292 of the Code of Criminal Procedure, fourth sentence, provides, *inter alia*, for judgment declaring that a "manner of proceeding" (Vorgang) was contrary to the law; and this, without any doubt, was what occurred in the present case.

To sum up, notwithstanding the circumstances that I have just recounted, I consider the correct conclusion to be that there was no breach of Article 6 § 2 (art. 6-2) of the Convention.