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

COURT (CHAMBER)

CASE OF WINDISCH v. AUSTRIA

(Application no. 12489/86)

JUDGMENT

STRASBOURG

27 September 1990

In the Windisch 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 R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr F. MATSCHER,
Mr R. MACDONALD,
Mr R. BERNHARDT,
Mr J. DE MEYER,
Mr I. FOIGHEL,

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

Having deliberated in private on 27 April and 28 August 1990,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 October 1989, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12489/86) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian citizen, Mr Harald Windisch, in October 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 (art. 6) of the Convention.

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

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* The case is numbered 25/1989/185/245. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

30). The applicant, who was referred to as "W" in the proceedings before the Commission, subsequently agreed to the disclosure of his identity.

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 25 November 1989 the President drew by lot, in the presence of the Registrar, the names of the other five members, namely Mr J. Pinheiro Farinha, Mr R. Macdonald, Mr R. Bernhardt, Mrs E. Palm and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr J. Cremona and Mr J. De Meyer, substitute judges, replaced Mr Pinheiro Farinha and Mrs Palm, who were unable to take part in the consideration of the case (Rule 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the need for a written procedure (Rule 37 para. 1). In accordance with the orders made in consequence, the registry received, on 19 February and 8 March 1990 respectively, the Government's memorial and the applicant's claims under Article 50 (art. 50). On 28 November 1989 the President had granted the applicant leave to use the German language (Rule 27 para. 3).

In a letter of 15 March 1990 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing. Subsequently, the Secretary produced a number of documents requested by the Registrar on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 18 January 1990 that the oral proceedings should open on 23 April 1990 (Rule 38).

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

There appeared before the Court:

- for the Government
  Mr H. TÜRK, Ambassador,
  Ministry of Foreign Affairs, *Agent*,
  Mr W. OKRESEK, Federal Chancellery,
  Mr S. BENNER, Staatsanwalt, *Advisers*;
- for the Commission
  Mr F. ERMACORA, *Delegate*;
- for the applicant
  Mrs W. WALCH, Rechtsanwalt, *Counsel*.

The Court heard their addressees and their replies to its questions.

7. On 3 May 1990 counsel for the applicant filed a document setting out in detail the latter's claims for costs and expenses. The Government's comments thereon were received at the registry on 22 May.

AS TO THE FACTS

A. The particular circumstances of the case

8. The applicant, a pensioner of Austrian nationality, is at present residing in Innsbruck.

9. On the night of 20 to 21 May 1985 a burglary was committed in a café at Stams, in the Tyrol. From footprints found at the scene of the crime, the police inferred that at least two persons had taken part in the burglary.

10. On the following day two women, a mother and a daughter, came to the police station. After having received the assurance that their anonymity would be respected, they reported to the officers in charge that, on the previous evening, they had seen two men in a minibus in the vicinity of the place where the crime had been committed. One of the men had passed them in the street, under a street lamp, at approximately 10.00 p.m., his face partly covered by a handkerchief. The suspicious appearance of the men led the two witnesses to take down the licence number of the minibus.

The police arrested the owner of the minibus, who denied having had anything whatsoever to do with the burglary. As to the second man referred to by the anonymous witnesses, suspicion first fell on a former waiter at the café, but he had an alibi for the evening in question. The investigations then concentrated on his acquaintances, including the applicant.

Subsequently, the police informants were shown various photographs of the applicant and they recognised him as being the man who had passed them in the street.

11. Mr Windisch was arrested on 24 June 1985. On the following day the police arranged for a "covert confrontation" of the applicant with the two witnesses. It took place in Stams at noon: they were sitting in a car some seven to ten metres from the suspect and could not be seen by him; he was holding a handkerchief in front of his face. They had no hesitation in identifying him as one of the men they had seen. The applicant denied having been at Stams, claiming that he had been in Innsbruck throughout the night in question.

On 24 July 1985 he and the owner of the minibus were charged with burglary (schwerer Diebstahl durch Einbruch).

12. The Innsbruck Regional Court (Landesgericht) held a hearing on 6 November 1985 during which two police officers gave evidence concerning

the statements made by the two witnesses mentioned above. Their identity was not, however, disclosed in the court proceedings.

The applicant's requests to have those witnesses summoned to appear and to be confronted with them were rejected by the Regional Court. It noted that the police officers concerned had promised not to reveal the names of the witnesses, who feared retaliation, and that the Tyrol Police Department (Landesgendarmeriekommando) had not released the officers from their duty of secrecy in this respect. The court also considered that the police officers' testimony established sufficiently what the two women had seen and that they were reliable. The decision not to disclose their identity was therefore justified.

13. On 20 November 1985 the Regional Court, after hearing evidence from several witnesses, including another police officer, convicted the applicant and his co-accused of burglary and indicated orally the principal grounds for its decision. Mr Windisch was sentenced to three years' imprisonment, from which the periods of detention on remand were to be deducted. He stated immediately that he intended to lodge an application for a declaration of nullity (Nichtigkeitsbeschwerde) and an appeal against sentence (Berufung).

14. The written judgment of the Innsbruck Regional Court was served on the applicant on 10 December 1985. Extensive reference was made therein to the statements of the two unidentified witnesses to the police. In relation to the question of their anonymity, the court stated:

> "The names of these two women are not known to the court. The Tyrol Police Department had not released the investigating officers from their duty of secrecy, and they could not therefore disclose the identity of the two women. The court is bound by this decision ... . In this connection it should be stated that the police are under instructions to co-operate with the public in investigating crime. The two women asked the investigating officers not to disclose their names, because they are afraid of reprisals. The two women are simple but trustworthy persons. The investigating officers of the criminal investigation department can be relied upon for this kind of assessment. It is therefore entirely acceptable that the two persons should remain anonymous."

The Regional Court also took into consideration that another witness had provided the applicant, at his request, with certain details concerning the victim and his financial situation, and that the two defendants had been seen in Innsbruck, leaving a bar together, shortly before the events in question. Furthermore, the court found that the evidence given by the sixteen witnesses called on Mr Windisch's behalf had failed to establish an alibi. It concluded that Mr Windisch, together with his co-accused, had committed the crime.

15. On 20 March 1986 the Supreme Court (Oberster Gerichtshof) rejected Mr Windisch's application for a declaration of nullity. In its view, his request to have the anonymous witnesses summoned and examined could serve no purpose since it had not been specified how their identity

would be established and because the police had refused to answer enquiries in this respect. It would have been possible to identify the two witnesses by taking evidence from X, whom, according to their statement, they had met on the evening in question. However, the applicant had not submitted any request to this effect.

The applicant's appeal against sentence was dismissed on 24 April 1986.

16. By a letter of 25 July 1990 the Government informed the Registrar that the Attorney-General had recently brought before the Supreme Court a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes - Article 33 of the Code of Criminal Procedure) against the judgment of 20 November 1985.

B. The relevant domestic law

17. The taking of evidence at a trial is governed by Articles 246 to 254 of the Code of Criminal Procedure (Strafprozessordnung).

Article 247 para. 1 provides that "witnesses and experts shall be called separately and heard in the presence of the accused". The presiding judge and the other members of the court, the public prosecutor, the accused, the party seeking damages and their representatives may question them (Article 249). However, in certain exceptional circumstances, their previous statements may be read out at the hearing (Article 252).

No provision deals expressly with statements made by anonymous witnesses and hearsay evidence.

18. The assessment of evidence by the trial court is provided for in Article 258, which reads as follows:

> "(1) In passing judgment the court shall only have regard to what has occurred at the trial
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> (2) The court has to examine the evidence carefully and conscientiously with regard to its trustworthiness and conclusiveness separately and in its entirety. The judges do not decide upon the question whether or not a particular fact has been proven according to formal rules of evidence, but only according to their own conclusions drawn on the basis of their careful examination of all evidence before them."

PROCEEDINGS BEFORE THE COMMISSION

19. In his application (no. 12489/86) lodged with the Commission on 2 October 1986, Mr Windisch alleged a breach of Article 6 para. 3 (d) (art. 6-3-d) of the Convention on the ground that he had been convicted solely on the basis of evidence given by two anonymous witnesses, who had not been heard by the Regional Court and whom he had had no opportunity to examine.

20. The Commission declared the application admissible on 14 December 1988. In its report of 12 July 1989 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a violation of paragraph 1, read in conjunction with paragraph 3 (d), of Article 6 (art. 6-1, art. 6-3-d). The full text of the Commission's opinion is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS MADE TO THE COURT

21. At the hearing on 23 April 1990, counsel for Mr Windisch requested the Court to find that the applicant's rights under paragraph 1 of Article 6 of the Convention, taken together with paragraph 3 (d) (art. 6-1, art. 6-3-d), had been infringed and to grant him the compensation claimed.

The Agent of the Government, for his part, asked the Court to conclude that "there has been no violation of the ... Convention ... in the criminal proceedings underlying the application".

AS TO THE LAW

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

22. Mr Windisch complained that he had been convicted by the Innsbruck Regional Court on the basis of statements made by two anonymous witnesses, which were of decisive importance for the assessment of the other evidence. He alleged a violation of the following provisions of Article 6 (art. 6) of the Convention:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...
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> 2. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ..."

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* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 186 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

(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."

This allegation was accepted by the Commission, but contested by the Government.

23. The guarantees in paragraph 3 of Article 6 (art. 6-3) being specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1), the Court will consider the applicant's complaint under paragraphs 3(d) and 1 (art. 6-3-d, art. 6-1) taken together (see, amongst various authorities, the Kostovski judgment of 20 November 1989, Series A no. 166, p. 19, para. 39).

Although the two unidentified persons did not give direct evidence in court, they are to be regarded for the purposes of Article 6 para. 3(d) (art. 6-3-d) as witnesses - a term to be given an autonomous interpretation (see the Bönisch judgment of 6 May 1985, Series A no. 92, p. 15, paras. 31-32) - since their statements, as reported by the police officers, were in fact before the Regional Court, which took them into consideration (see paragraphs 12-14 above).

24. The Government attached crucial importance to the question whether the applicant's conviction was based "mainly" on the two anonymous witnesses' statements to the police; they concluded that a number of additional and weighty items of evidence had had to be evaluated. The Commission considered, on the contrary, that there was no other independent incriminating evidence.

25. In this respect, the Court recalls at the outset that the admissibility of evidence is primarily a matter for regulation by national law, and that, as a rule, it is for the national courts to assess the evidence before them (see, as the most recent authority, the above-mentioned Kostovski judgment, Series A no. 166, p. 19, para. 39). Accordingly, its task under the Convention is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (ibid.).

26. All the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the pre-trial stage is not always in itself inconsistent with paragraphs 3(d) and 1 of Article 6 (art. 6-3-d, art. 6-1), provided the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statement or at a later stage of the proceedings (see the above-mentioned Kostovski judgment, Series A no. 166, p. 20, para. 41).

27. In the instant case, the two persons in question had only been heard, at the investigation stage, by the police officers in charge of the case, who later gave evidence in court concerning their statements; they were neither examined by the trial court itself, nor questioned by any examining magistrate (see paragraphs 10-13 above). Likewise, their identification of

the applicant had taken place in special circumstances, during a "covert confrontation" of which he was not aware (see paragraph 11 above).

As a result, neither the applicant nor his counsel - in spite of their repeated requests (see paragraph 12 above) - ever had an opportunity to examine witnesses whose evidence had been taken in their absence, was later reported by third persons during the hearings and was, as appears from the judgment of 20 November 1985 (see paragraph 14 above), taken into account by the trial court.

28. At the hearings on 6 and 20 November 1985 the defence was admittedly able to question, in relation to the two women's statements, three of the police officers connected with the investigation. Furthermore, according to the Government, the applicant could have put written questions to the women, had he so requested at the trial. These possibilities cannot, however, replace the right to examine directly prosecution witnesses before the trial court. In particular, the nature and scope of the questions that could be put in either of these ways were, in the circumstances of the case, considerably restricted by reason of the decision to preserve the anonymity of these two persons (see paragraphs 12 and 14 above; see also the above-mentioned Kostovski judgment, Series A no. 166, p. 20, para. 42).

Being unaware of their identity, the defence was confronted with an almost insurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility (ibid.).

29. In addition, the trial court, which was also unaware of the two women's identity, was prevented from observing their demeanour under questioning and thus forming its own impression of their reliability (see the above-mentioned Kostovski judgment, Series A no. 166, p. 20, para. 43). The police officers' evidence on this point at the hearings cannot be regarded as a proper substitute for direct observation.

30. The Government referred to the legitimate interest of the two women in keeping their identity secret. In its judgment the Regional Court stated that they were trustworthy persons and were afraid of reprisals on the part of the suspects. It added that the police depended on the co-operation of the population in investigating crimes (see paragraph 14 above).

The collaboration of the public is undoubtedly of great importance for the police in their struggle against crime. In this connection the Court notes that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. However, the subsequent use of their statements by the trial court to found a conviction is another matter (see, mutatis mutandis, the above-mentioned Kostovski judgment, Series A no. 166, p. 21, para. 44). The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed (ibid.).

31. It must be stressed, as was done by the applicant, that in this case no one had observed the actual commission of the offence; the information

given and the identification made by the two anonymous witnesses were the only evidence indicating the applicant's presence on the scene of the crime, which question was the central issue during the investigation and at the hearings (see paragraphs 10 and 12 above). In convicting the applicant the trial court relied to a large extent on this evidence (see paragraph 14 above).

In these circumstances, the use of this evidence involved such limitations on the rights of the defence that Mr Windisch cannot be said to have received a fair trial.

32. There has thus been a violation of paragraph 3 (d), taken together with paragraph 1, of Article 6 (art. 6-3-d, art. 6-1).

II. APPLICATION OF ARTICLE 50 (art. 50)

33. According to Article 50 (art. 50) of the Convention:

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

Mr Windisch sought compensation for pecuniary and non-pecuniary damage, as well as the reimbursement of costs and expenses.

A. Damage

34. The applicant claimed 1,080,000 Austrian schillings for loss of earnings and unjust imprisonment, on the ground that he would not have been convicted by the Regional Court had it not been for the statements of the two anonymous witnesses.

The Delegate of the Commission did not submit any comments on this point.

In the Government's contention, there was no causal link between the damage alleged and any violation found by the Court, since the judgment in issue was not based "mainly" on the statements made by the two anonymous persons. Although they acknowledged that those depositions had played an important role, the Government drew attention to a number of other elements which lay at the basis of that judgment.

35. The Court is unable to accept this argument. The applicant's detention after his conviction was the direct consequence of the establishment of his guilt, which was effected in a manner that did not comply with some of the requirements of Article 6 (art. 6) (see, mutatis mutandis, the above-mentioned Kostovski judgment, Series A no. 166, p. 22, para. 48).

However, at the hearing of 23 April 1990, counsel for the Government referred to the possibility of the applicant's case being reopened if the Attorney General decided - as has in fact since happened (see paragraph 16 above) - to lodge a plea of nullity for the preservation of the law. He mentioned, as an example, the Unterpertinger case (judgment of 24 November 1986, Series A no. 110), where the criminal proceedings involved had been reopened as a result of the Court's judgment.

In consequence, the Court considers that the issue concerning the granting of damages under Article 50 (art. 50) is not yet ready for decision. It is therefore necessary to reserve the matter, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 54 paras. 1 and 4 of the Rules of Court).

B. Costs and expenses

36. Mr Windisch itemised his costs and expenses as follows:

(a) 93,720 schillings for the proceedings before the Austrian courts;

(b) 86,526 schillings for the proceedings before the Commission and the Court.

The Court will examine these claims in the light of the criteria emerging from its case-law as regards both the purpose of the costs allegedly incurred and the requirements that they be actually incurred, necessarily incurred and reasonable as to quantum (see, inter alia, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, pp. 55-56, para. 143).

37. The Government argued that the claim for costs allegedly incurred in Austria was not justified, since the applicant had been granted legal aid in the proceedings before the Innsbruck Regional Court.

The Court notes that at the relevant time the applicant's lawyer agreed to act on the basis that he would receive only the fees payable by the competent Austrian authorities under the national legal aid scheme. In these circumstances the applicant must be considered as not having incurred a liability to pay any additional fees (see, mutatis mutandis, the Luedicke, Belkacem and Koç judgment of 10 March 1980, Series A no. 36, p. 8, para. 15). Accordingly the Court cannot make any award under this head.

38. Mr Windisch was also granted legal aid for the purposes of the proceedings before the Commission and the Court. The Government, for their part, did not contest that he had incurred additional liabilities over and above the amounts so received, but maintained that the fees claimed for the filing of the application form on 20 October 1986 were not reasonable as to quantum.

The Court, however, considers that the amounts claimed satisfy the criteria laid down in its case-law. It therefore awards to the applicant, for his costs and expenses in Strasbourg, 86,526 schillings, less 5,290 French francs already paid by way of legal aid.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of paragraph 3 (d), taken together with paragraph 1, of Article 6 (art. 6-3-d, art. 6-1) of the Convention;

2. Holds that the question of the application of Article 50 (art. 50), as regards an award of damages, is not ready for decision;

accordingly,

(a) reserves this part of the said question;

(b) invites the Government and the applicant to submit, within the coming three months, their written comments thereon and, in particular, to notify the Court of any agreement reached between them;

(c) reserves the further procedure and delegates to the President of the Court power to fix the same if need be;

3. Holds that Austria is to pay to the applicant, in respect of costs and expenses, the sum of 86,526 (eighty-six thousand five hundred and twenty-six) Austrian schillings, less 5,290 (five thousand two hundred and ninety) French francs already paid by way of legal aid;

4. Rejects the remainder of the claim for costs and expenses.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 September 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar