

In the case of Artner v. Austria*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr B. Walsh,
Mr R. Macdonald,
Mr J. De Meyer,
Mrs E. Palm,
Mr F. Bigi,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 28 February and 25 June 1992,

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

Notes by the Registrar

* The case is numbered 39/1991/291/362. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13161/87) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Josef Artner, on 6 July 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 3 (d) and 1 (art. 6-3-d, art. 6-1) taken together.

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

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality

(Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 22 March 1991, Mr Matscher, having been duly delegated by the President, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr B. Walsh, Mr J. De Meyer, Mrs E. Palm and Mr F. Bigi (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr R. Macdonald, substitute judge, replaced Mrs Bindschedler-Robert, who had resigned and whose successor at the Court had taken up his duties before the hearing (Rules 2 para. 3 and 22 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 organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 3 June 1991 and the Government's memorial on 31 July. The applicant, having declared that he did not intend to attend the hearing, obtained the President's leave to lodge a memorial in reply, which he filed on 30 September.

On 12 September the Secretary to the Commission had informed the Registrar that the Delegate would make oral submissions. On 30 January 1992 the Secretary produced various documents from the proceedings before the Commission; he had been asked to do so by the Registrar, who had acted on the instructions of the President following a request from the applicant.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 February 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr H. Türk, Ambassador, Legal Adviser, Ministry of Foreign Affairs,	Agent,
Mr S. Rosenmayr, Federal Chancellery, Mr S. Benner, Federal Ministry of Justice,	Advisers;

(b) for the Commission

Mr M.P. Pellonpää,	Delegate.
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The Court heard addresses by the above-mentioned representatives, as well as their answers to its questions.

On the same day the Government provided to the Court other documents whose production it had requested.

AS TO THE FACTS

6. Mr Josef Artner, who is an Austrian national, currently resides in Vienna (Austria).

7. On 16 December 1986 the Vienna Regional Court (Landesgericht) sentenced him to three years' imprisonment on two counts of usury (Geldwucher) and on counts of aggravated fraud (schwerer Betrug) and attempted aggravated fraud, embezzlement (Veruntreuung) and aggravated theft (schwerer Diebstahl).

8. In one of the two cases of usury - the only one at issue in the present proceedings - the judgment found the following facts to

be proven. In response to an advertisement in the press, Miss L. had contacted the applicant in the course of the summer of 1982 with a view to obtaining a loan. As she was unable to provide any security, she abandoned the idea until she received a letter from him in which he purported to charge her 2,350 schillings because the negotiations had failed. He had then persuaded her to contract the loan jointly with a certain S., a Yugoslavian national, whom she did not know and who was to stand surety for the loan. On 24 August 1982 they both signed, as joint debtors, a loan agreement for 60,000 schillings with a bank, which paid over the sum to them immediately in Mr Artner's presence. The latter then demanded and obtained 10,000 schillings as commission, whilst S. received 30,000 and Miss L. the remaining 20,000. The previous day the applicant had talked her into agreeing to reimburse the monthly instalments payable by S. with effect from March 1984. Shortly afterwards S. disappeared, leaving Miss L. to pay off the debt in full.

9. Following a complaint laid by her, Miss L. was interviewed first by the police and then by the investigating judge, on 5 May and 4 July 1983. She was not, however, confronted with the applicant. As the latter had also disappeared, the investigating judge ordered, on 29 July 1983, that he be placed on the list of wanted persons. On 2 January and 2 April 1985, at the border, and on 17 April 1985, in Vienna, the police invited him to report to the Vienna Regional Court in connection with the criminal proceedings against him, but to no avail. Finally, he was extradited from Germany on 19 June 1986.

On 9 October 1986 the Regional Court summoned Miss L. to the hearing of 21 November 1986 as a prosecution witness. As she had moved in the meantime, the court instructed the Federal Police Department of Vienna to discover her new address, where it sent her the summons on 6 November 1986. On the day fixed for the hearing Miss L. failed to appear. Mr Artner had not himself asked that she be called to testify, but he refused to waive his right to have her called as a witness. Accordingly, the court adjourned the proceedings to 16 December and ordered the police to make further efforts to contact Miss L. and to bring her to the hearing. Their efforts were unsuccessful as she had moved again, without leaving an address. The court informed the applicant of this at the hearing on 16 December and then had Miss L.'s statements to the police and before the investigating judge read out, pursuant to Article 252, first paragraph, no. 1, of the Code of Criminal Procedure.

10. Mr Artner protested his innocence, claiming that he had received only 3,000 schillings as commission. He proposed to call as witnesses an employee of the bank which had lent the sum in question and a representative of a consumers' association which Miss L. had consulted before laying her complaint, but the court decided not to take evidence from them because they had not been present when the money had been shared out.

11. In the court's opinion the applicant could be convicted on the basis of Miss L.'s statements, which it found to be credible, and of the documents that she had produced in support. Although they revealed a slight discrepancy concerning the person to whom the bank had handed over the money, this was not deemed to be important as all three had been present on that occasion. Moreover the account of the events was very similar to that given by the victim in the other case of usury (a Mrs S.), in which the accused had allegedly received a commission of 15,000 schillings on a loan of 40,000 schillings.

Having regard to Mr Artner's eight previous convictions, mostly for theft, the court refused to accept his version of events, according to which he had received only 3,000 schillings. It considered that the applicant had, on the contrary, taken advantage

of Miss L.'s distress and inexperience to obtain remuneration which was manifestly disproportionate to the service rendered.

12. On 18 February 1987 Mr Artner filed with the Supreme Court (Oberster Gerichtshof) an appeal (Berufung) and an application for a declaration of nullity (Nichtigkeitsbeschwerde) against the judgment of 16 December 1986. On 26 May that court dismissed the submissions relating to the usury case. It took the view that he was not well-founded in criticising the Regional Court for having dispensed with hearing Miss L., whose appearance in court he had not, moreover, himself requested. The two attempts which the court had directed to be made to determine Miss L.'s whereabouts having failed, Article 252, first paragraph, no. 1, empowered the court to have the contested statements read out. The slight discrepancy referred to above could legitimately have been regarded as negligible since the applicant had admitted that he had received a commission (Provision) from the two borrowers. As regards the defence witnesses, the Regional Court had been justified in refusing to hear their testimony as irrelevant. The Supreme Court did, however, find fault with the lower court's judgment in a number of respects of no relevance to the present proceedings.

13. The case was remitted to the Regional Court, which on 20 November 1987 reduced the applicant's total sentence to two and a half years' imprisonment.

PROCEEDINGS BEFORE THE COMMISSION

14. Mr Artner lodged his application with the Commission on 6 July 1987. He complained that he had been convicted solely on the basis of the statements of Miss L., whom the Regional Court had not heard; he relied on Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention.

15. The Commission declared the application (no. 13161/87) admissible on 5 March 1990. In its report of 8 January 1991 (Article 31) (art. 31), it expressed the opinion, by nine votes to seven, that there had been no violation. The full text of its opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 242-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

16. The applicant alleged a breach of the following requirements 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 [a] ... tribunal ...

...

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;

..."

He maintained that the conviction he complained of had been based solely on Miss L.'s statements to the police and before the investigating judge, which had been read out at the hearing. It had never been possible for him "to examine or have examined" the complainant. Yet, at the hearing on 21 November 1986, he had clearly indicated that he did not wish to waive his right to have her called, all the more so because there were a number of contradictions between the two sets of statements.

17. In the Government's contention, on the other hand, the Vienna Regional Court had taken into account, in addition to the contested statements, the documents relating to the loan agreement and the very similar facts which had led to Mr Artner's conviction in the other case of usury (see paragraph 11 above).

Furthermore, prior to the disputed judgment, numerous attempts had been made to organise a confrontation. They had all failed owing to the conduct of the two persons concerned themselves; as both of them had moved house several times without leaving an address, neither the applicant nor Miss L. had been able to receive the summonses to appear, before the investigating judge in the former's case and before the Regional Court in the latter's (see paragraph 9 above).

Moreover, on 16 December 1986 Mr Artner had no longer insisted, as he had done on 21 November, that Miss L. be called to give evidence; he had merely requested that defence witnesses be called (see paragraphs 9-10 above).

18. The Commission subscribed in substance to the Government's view.

19. The guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1); the Court considers it appropriate to examine the complaint under the two provisions taken together (see, *inter alia*, the *Asch v. Austria* judgment of 26 April 1991, Series A no. 203, p. 10, para. 25).

Although the Regional Court did not hear Miss L., she should, for the purposes of Article 6 para. 3 (d) (art. 6-3-d), be regarded as a witness - a term to be given an autonomous interpretation (see the same judgment, p. 10, para. 25) - because her statements, as taken down in writing and then read out at the hearing, were before the court, which took account of them.

20. In the present case it should be noted in the first place that from June 1983 to June 1986 the applicant's absence made it impossible to organise a confrontation between him and Miss L. From the moment when the proceedings were first instituted, he had proved impossible to trace; indeed so much so that in July 1983 the investigating judge had directed that he be placed on the list of wanted persons. Despite the fact that the police had on several occasions invited Mr Artner to contact the Vienna Regional Court in connection with the proceedings brought against him, the investigating judge had to wait until he was extradited on 19 June 1986 before he could question him (see paragraph 9 above).

21. Shortly afterwards Miss L. disappeared in her turn. The Regional Court twice instructed the police to make every effort to find her, even adjourning the hearing in order to allow the inquiries sufficient time to bear fruit, but to no avail (*ibid.*). It would of course have been preferable if she could have testified

in court, but her failure to appear did not in itself make it necessary to halt the prosecution - the appropriateness of which, moreover, falls outside the scope of the Court's review -, provided that the authorities had not been negligent in their efforts to find the persons concerned.

22. As it was impossible to secure Miss L.'s attendance at the hearing, it was open to the national court, subject to the rights of the defence being respected, to have regard to the statements obtained by the police and the investigating judge, in particular in view of the fact that it could consider those statements to be corroborated by other evidence before it.

23. That other evidence included the documents concerning the loan agreement, and notably Mr Artner's letter demanding that Miss L. pay him the sum of 2,350 schillings following their first unsuccessful discussions, or again the undertaking which he had made her sign to reimburse with effect from March 1984 the monthly instalments payable by S. (see paragraph 8 above). There were in addition the applicant's criminal record and his conviction - against which he did not appeal (see paragraphs 8 and 11 above) - in the other case of usury on similar facts. Although this evidence did not provide a precise indication as to the amount of commission received, it could nevertheless, in the victim's absence, help the judges to form their opinion.

24. It follows that Miss L.'s contested statements were not the only evidence on which the Regional Court based its finding.

Accordingly, the fact that it was impossible to examine her at the hearing did not, in the circumstances of the case, infringe the rights of the defence to such an extent that it constituted a breach of paragraphs 1 and 3 (d) of Article 6, taken together (art. 6-1, art. 6-3-d).

FOR THESE REASONS, THE COURT

Holds by five votes to four that there has been no violation of paragraphs 1 and 3 (d) of Article 6, taken together (art. 6-1, art. 6-3-d).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 August 1992.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Thór Vilhjálmsson and the joint dissenting opinion of Mr Walsh, Mr Macdonald and Mrs Palm are annexed to this judgment.

Initialled: R.R.

Initialled: M.-A. E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSOON

The case-law of our Court shows that it is not always possible to apply strictly the important rule set out in Article 6 para. 3 (d) (art. 6-3-d) of our Convention, despite the fact that it is stated in this very same paragraph that the rights set out therein are minimum rights. Unfortunately, the interpretation of this rule takes our Court into forbidden territory

so to say, i.e. the assessment of evidence, which should be the reserved domain of the national courts. I consider that there are insufficient reasons in the present case for departing from the rule cited. The applicant clearly did not have an opportunity to examine the witness Miss L., who was only heard by an investigating judge. Neither the applicant nor his lawyer was present on that occasion. It may perhaps be said that her testimony was not the only evidence taken into account. Nevertheless, it seems beyond doubt that it was by far the most important, so that this case cannot, in my opinion, be distinguished from the Unterperfinger case.

I am therefore of the opinion that there was a violation.

JOINT DISSENTING OPINION OF JUDGES WALSH, MACDONALD AND PALM

1. In our opinion the procedure adopted by the Austrian court amounted to a violation of Article 6 paras. 1 and 3 (art. 6-1, art. 6-3) of the Convention.

2. The right of the applicant to question the evidence of Miss L., by way of examination as guaranteed by Article 6 (art. 6), was not vindicated. It was alleged that she had disappeared and that the police had been unable to trace her, in contrast to their success in securing the extradition of the applicant to stand trial. The failure of the police to ensure the presence of the complainant to give evidence in person at the trial did not justify her untested written statement being admitted in evidence. Its admission was very prejudicial to the applicant at his trial and in fact was relied on by the trial court as evidence of his guilt. That there was other incriminating evidence is beside the point. It appears that without the use of the statement the conviction could not have been obtained. If the case were otherwise, there would have been no need to admit the statement. The applicant, through no fault of his, was deprived of his right to examine Miss L. as to the accuracy and/or truth of her obviously damaging statement which filled the gap in the evidence necessary to secure the conviction. In the event the prejudicial effect remained uncorrected.

3. We also agree with the reasoning in the dissenting opinion expressed in the report of the Commission by Vice-President Trechsel and his five colleagues.