



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

COURT (CHAMBER)

CASE OF FEY v. AUSTRIA

(Application no. 14396/88)

JUDGMENT

STRASBOURG

24 February 1993

In the case of Fey 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. BERNHARDT, *President*,

Mr F. GÖLCÜKLÜ,

Mr F. MATSCHER,

Mr R. MACDONALD,

Mr A. SPIELMANN,

Mr S.K. MARTENS,

Mr A.N. LOIZOU,

Sir John FREELAND,

Mr A.B. BAKA,

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

Having deliberated in private on 24 September and 28 October 1992, and 28 January 1993,

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

PROCEDURE

1. The case was referred to the Court on 13 December 1991 by the European Commission of Human Rights ("the Commission") and on 7 February 1992 by the Government of the Republic of Austria ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 14396/88) against Austria lodged with the Commission under Article 25 (art. 25) by Mr Hans Jürgen Fey, a German citizen, on 10 November 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application referred to Article 48 (art. 48). The object of the request and of the application was

* The case is numbered 93/1991/345/418. 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.

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 para. 1 (art. 6-1).

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). The German Government, having been informed by the Registrar of its right to intervene in the proceedings (Article 48, sub-paragraph (b), of the Convention and Rule 33 para. 3 (b)) (art. 48-b), replied that they did not wish to do so.

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 24 January 1992 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr A. Spielmann, Mr S.K. Martens, Mr A.N. Loizou, Sir John Freeland and Mr A.B. Baka (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representative of the applicant on the organisation of the procedure (Rules 37 para. 1 and 38). In accordance with the order made in consequence, the registry received, on 15 July 1992 the Government's memorial and, on 20 July the applicant's. By letter of 29 July 1992 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 24 August 1992 further particulars were submitted by the applicant on his claim under Article 50 (art. 50). On 4 September the Commission filed a number of documents which the Registrar had sought from it on the President's instructions.

5. As directed by the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 September 1992. The Court had held a preparatory meeting beforehand. Mr R. Bernhardt, Vice-President of the Court, replaced Mr Ryssdal who was unable to take part in the further consideration of the case (Rule 21 para. 5, second sub-paragraph).

There appeared before the Court:

- for the Government

Mr H. TÜRK, Ambassador,

Legal Adviser, Ministry of Foreign Affairs,

Mrs S. BERNEGGER, Federal Chancellery,

Mrs I. GARTNER, Federal Ministry of Justice,

- for the Commission

Mr A. WEITZEL,

- for the applicant

Agent,

Advisers;

Delegate;

Mr M. ORGLER, Rechtsanwalt,
The Court heard addresses by them.

Counsel.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant, a German national residing at Geeste in Germany, is a pensioner.

7. From 17 to 27 January 1988 he rented a room in Mayrhofen in Austria from a Mrs Rosa Kröll. During this period he told her that his wife was very ill and was undergoing treatment in an Innsbruck hospital. He also claimed that he was expecting to receive payments under a pension scheme in Germany. As a result Mrs Kröll handed over to him 2,500 schillings and waived the rent of 1,500 schillings.

Purportedly in the expectation of receiving the above-mentioned payments, the applicant opened an account at a bank in Mayrhofen on 19 January 1988 and, on 22 January, Mrs Kröll gave him a further 600 schillings.

8. On 27 January 1988, Mrs Kröll reported the matter to the police. The Innsbruck Public Prosecutor's Office (Staatsanwaltschaft) asked, on 8 February 1988, the investigating judge of the Innsbruck Regional Court (Landesgericht) to institute a preliminary investigation concerning the applicant on suspicion of fraud as a recidivist offender. In addition, the prosecutor requested the judge to order his detention on remand on the ground that there was a risk of his absconding.

The judge granted these requests on 9 February 1988. Prior to this, the applicant had been detained since 4 February, pending extradition to Germany. On 10 February he was questioned by the investigating judge.

9. The latter sent, on 12 February 1988, a rogatory letter (Rechtshilfeersuchen) to the Zell am Ziller District Court (Bezirksgericht) asking it to put some specific questions to Mrs Kröll as a witness. District Court Judge, Mrs Andrea Kohlegger, did so on 25 February.

10. On 1 March 1988, the Innsbruck Public Prosecutor's Office dropped one of the fraud charges against the applicant. As a result, the Regional Court no longer had jurisdiction. Accordingly, the prosecutor asked to have the case, which now concerned only the alleged fraud against Mrs Kröll, transmitted to the District Court which had jurisdiction to deal with offences of lesser gravity, that is, according to Article 9 of the Code of Criminal Procedure (Strafprozeßordnung), offences punishable by a fine or a term of imprisonment not exceeding six months. Moreover, on the same date, the

prosecutor, in pursuance of Article 451 (1) of the Code, called for the applicant's conviction on charges of fraud.

11. At the time when the case was referred to the District Court the case-file contained mainly the following items:

- criminal information to the Mayrhofen police;
- the applicant's criminal record in Germany;
- the order made by the Regional Court's investigating judge for the applicant's detention on remand;
- a record of the investigating judge's interrogation of the applicant;
- a record of District Court Judge, Mrs Kohlegger's interrogation of witness, Mrs Kröll;
- letters from the applicant to the prosecution, asking it to drop the charges, and to the Regional Court, complaining about his detention on remand;
- a note to the effect that the applicant had withdrawn his complaint against detention.

12. During the ensuing period, Judge Kohlegger took the following steps in the applicant's case:

In a letter to the Osnabrück Execution of Sentence Chamber (Strafvollstreckungskammer) in Germany, she enquired why a prison sentence imposed on the applicant had been partly suspended. She received a reply on 1 April 1988.

She sent the case-file to the Innsbruck District Court together with a rogatory letter asking it to question the applicant in order to establish whether his expectations as regards the pension payments allegedly due in January 1988, had been justified and to obtain details of his pension or any other revenue from insurance policies.

On 17 March 1988, she telephoned the Mayrhofen bank to establish whether any payments had been entered on the account opened by the applicant (see paragraph 7 above); by letter of the same date the bank replied that no payment had so far been recorded.

In addition, she telephoned the Provincial Insurance Companies of Hannover and of Oldenburg-Bremen (Germany) in order to find out whether the applicant had ever applied for or received a pension. According to a note in the case-file, prepared by Judge Kohlegger on 18 March 1988, the first of these companies had replied that, under the reference number which the applicant had indicated, a pension had never been requested by him and that no pension benefits had been paid to him; the other company had stated that he had not been granted a pension.

On 18 March 1988, she set down the trial hearing for 24 March (Article 451 (4) of the Code of Criminal Procedure).

13. On the latter date a hearing was held by the Zell am Ziller District Court, with Judge Kohlegger sitting as a single judge. The District Prosecutor (Bezirksanwalt) was present, but the applicant's lawyer at the

time did not appear although he had been summoned. The court heard the applicant first, who claimed that he was innocent. It then heard Mrs Kröll as a witness and a police officer replacing a colleague who had visited her house after the applicant's arrest. Various documents were exhibited (dargetan), including:

- the complaint to the police;
- the results of the police investigations in the case;
- the applicant's criminal record;
- the case-file of the Regional Court (see paragraph 11 above);
- the information provided by the Mayrhofen bank and the two German insurance companies and a letter from a third such company.

After the court had finished taking evidence, the prosecutor invited it to find the applicant guilty. The applicant asked the court to ascertain that, on 9 April 1987, he had applied to a German insurance company for a pension. The court dismissed this request, finding that the facts in the case were sufficiently clear.

14. By judgment of 24 March 1988, the District Court acquitted the applicant of the fraud charge concerning the 600 schillings which he had received from Mrs Kröll on 22 January 1988 but convicted him of having fraudulently induced her to hand over 2,500 schillings to him and to waive the rent of 1,500 schillings; it sentenced him to three months' imprisonment and ordered him to pay Mrs Kröll 4,000 schillings. The periods of detention pending extradition and the trial were deducted from the sentence.

The judgment, which was signed by Judge Kohlegger, was founded inter alia on Mrs Kröll's testimony as well as the information obtained from the bank and the insurance companies.

15. The applicant appealed against his conviction and sentence to the Regional Court. He complained, inter alia, that in the proceedings before the District Court, the case had been investigated and tried by the same person.

16. On 20 April 1988 the Review Chamber (Ratskammer) of the Regional Court dismissed several requests for release submitted by the applicant on 6, 12 and 15 March.

17. In a judgment of 13 May 1988, the Regional Court, composed of three members who had previously taken the above-mentioned decision of 20 April 1988, dismissed the appeal. As to his complaint described in paragraph 15 above, the judgment stated:

"As a reply thereto, reference should be made to the prevailing legal opinion derived from Articles 451 and 452 of the Code of Criminal Procedure, according to which the trial judge in District Court proceedings may also undertake preliminary inquiries and a judge who has carried out such inquiries will therefore not be excluded from the trial

Equally, if a judge acts in a criminal case as a judge ... under a rogatory letter, this will not prevent him from participating at the trial It is not necessary for the [Regional Court] in the present case to make a thorough examination of the extent to

which this legal opinion, which is generally applied, corresponds to Article 6 (art. 6) of the Convention ..., since the accused, who became aware of the (alleged) ground of nullity at the latest at the beginning of the trial, did not ... immediately raise this ground before the Zell am Ziller District Court."

II. THE RELEVANT DOMESTIC LAW

18. 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 inquiries (Vorerhebungen) carried out by the investigating judge, the District Courts and the police authorities (Article 88 (1) of the Code of Criminal Procedure).

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, Article 90 (1)). However, in District Court proceedings there is no formal process of investigation and no special procedure of committal for trial: 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, Article 451 (1)).

19. Pursuant to Article 451 (1) and (4), taken together, the District Court may carry out preliminary inquiries, but not formal preliminary investigations like the Regional Court. When undertaking preliminary inquiries a District Court judge must in principle observe the same rules as those that apply to an investigating judge of the Regional Court during preliminary investigations. However, according to Article 452, which sets out exceptions to this principle, the District Court judge has narrower powers with respect to such matters as pre-trial detention, arrest and search for documentary evidence.

Under Article 194 (1) of the Code of Criminal Procedure, the District Court judge may order the release of a person held on remand, subject to agreement with the District Prosecutor that the grounds for detention have ceased to exist.

The District Court judge shall set a date for the hearing after such preliminary inquiries as may be necessary have been made (Article 451 (4)).

20. Article 68 (2) of the Code of Criminal Procedure, which provides that an investigating judge may not participate in the trial of the case, does not apply to District Court proceedings. In such proceedings, preliminary inquiries are, according to established court practice, carried out by the trial judge.

21. A judge who has acted under a rogatory letter in a case, but not as an investigating judge, is not thereby excluded from trying the same case (see the collection of Supreme Court decisions SS 30/50).

PROCEEDINGS BEFORE THE COMMISSION

22. In his application (no. 14396/88) lodged with the Commission on 10 November 1988, Mr Fey alleged that the criminal charge raised against him had not been determined by an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1), as the District Court judge had both undertaken preliminary investigations and tried the case. Further, the applicant complained that the Regional Court judges who had rejected his request for release were subsequently called upon to rule on his appeal.

23. By decision of 9 October 1990, the Commission declared the first of these complaints admissible and the second inadmissible.

In its report of 15 October 1991 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 6 para. 1 (art. 6-1) (by sixteen votes to three). The full text of the Commission's opinion and the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS MADE TO THE COURT

24. At the hearing on 22 September 1992 the Government confirmed the submission set out in their memorial, in which they asked the Court to hold that the applicant's right to an impartial tribunal under Article 6 para. 1 (art. 6-1) had not been violated in the proceedings before the District Court.

AS TO THE LAW

25. Mr Fey contended that he had not received a fair hearing by an impartial tribunal within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, which, in so far as relevant, provides:

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

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

26. In support of his allegation the applicant advanced arguments that fell into two categories.

The first category concerned the functions of District Court judges at the pre-trial stage of criminal proceedings in Austria (see paragraphs 18-19

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 255-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

above), which functions were, the applicant maintained, essentially the same as those of investigating judges of a Regional Court. Although a District Court judge could only carry out preliminary inquiries, such inquiries could in fact be just as extensive as formal preliminary investigations conducted by an investigating judge. Moreover, the former was vested with powers to order detention on remand which were similar to, albeit more limited than, those of the latter. What is more, a District Court judge had a "suspiciously close relationship" with a public prosecutor. For instance, whilst an investigating judge had to send the case back to the prosecutor once the investigations had been completed, a District Court judge might himself set the case down for trial at that stage; if he did so, this provided a clear indication of a belief on his part that there was a likelihood that the accused was guilty.

The applicant's second category of arguments related to the measures undertaken at the pre-trial stage by District Court Judge Kohlegger (see paragraphs 9-12 above). He shared the Commission's view that they were measures that were typical of an investigating judge. They had been aimed at establishing whether the applicant had fraudulently obtained money from the landlady, Mrs Kröll, yet this was precisely the issue to be determined at his trial (see paragraph 13 above). Judge Kohlegger had thus acquired, before the trial, a particularly detailed knowledge of the file. By having previously acted as an investigating judge in the case, she had also, according to the applicant, formed an opinion on the case before she set it down for trial.

27. The Court's task is not to review the relevant law and practice in abstracto, but to examine whether the manner in which they were applied to or affected the applicant gave rise to a violation of Article 6 para. 1 (art. 6-1) (see, amongst other authorities, the *Thorgeir Thorgeirson v. Iceland* judgment of 25 June 1992, Series A no. 239, p. 23, para. 48).

28. The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (*ibid.*, para. 49).

29. As to the subjective test, the applicant did not dispute the personal impartiality of Judge Kohlegger.

30. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a

particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified (*ibid.*, para. 51).

In this regard, the Court has previously held that the mere fact that a judge has also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to his impartiality (see the *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 22, para. 50). Although this statement referred to systems like the Danish, where investigation and prosecution are exclusively the domain of the police and the prosecution, it must also be of some relevance to systems of an inquisitorial character, such as the Austrian. What matters is the extent and nature of the pre-trial measures taken by the judge (see, *mutatis mutandis*, the *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, pp. 15-16, paras. 29-30, and the above-mentioned *Thorgeir Thorgeirson* judgment, Series A no. 239, p. 24, para. 53).

31. The Court observes, in the first place, that before the case was referred to the District Court on 1 March 1988, a formal preliminary investigation had already been carried out by the investigating judge of the Innsbruck Regional Court. This had involved, *inter alia*, interrogations of the applicant and the landlady, the records of which were subsequently included in the case-file of the District Court (see paragraphs 8, 9, 11 and 13 above).

It is true that interrogation of the landlady had been conducted by Judge Kohlegger, but this had been done under a rogatory letter from the investigating judge that asked the District Court to put some very specific questions to the landlady. Judge Kohlegger carried out this task and sent the investigating judge a report of the interrogation of Mrs Kröll, which consisted in essence solely of making a record of the statements made by her. In the limited capacity in which she acted it was not for Judge Kohlegger to examine the merits of the accusations against the applicant, nor does it appear from the case-file that she actually did so, and there is no indication that at the time when the questioning took place there was any prospect of Judge Kohlegger later trying the case.

32. Following referral of the case to the Zell am Ziller District Court, Judge Kohlegger admittedly undertook certain pre-trial measures, which consisted of collecting simple information, mainly by asking a bank and two insurance companies whether any payments had been made to the applicant's account and whether he had applied for or received a pension; she also transmitted the case-file to the Innsbruck District Court so that it could put further questions to the applicant (see paragraph 12 above). However, these measures were, in the Court's view, of a preparatory character, being designed to complete the case-file before the hearing (see paragraph 13 above).

33. The Court does not consider that Judge Kohlegger's decision of 18 March 1988 to set the case down for trial reflected, as the applicant alleged, a belief on her part that there was a likelihood that he was guilty. That decision merely gave effect to the rule, under the applicable law, that the hearing date should be fixed as soon as such preliminary inquiries as may be necessary have been made (see paragraph 19 above). It cannot be regarded as the equivalent of a formal decision to commit an accused for trial, a step which was not provided for in proceedings, such as the present, instituted simply on an application by a public prosecutor to a District Court for the imposition of a penalty (see paragraph 18 above).

34. It was not until the hearing on 24 March 1988 that Judge Kohlegger was faced with the applicant for the first time; she then heard both him and the landlady and all the evidence in the case was presented (see paragraph 13 above). In the Court's view, it was only at that stage that she was in a position to form any opinion as to the applicant's guilt. It does not appear that the various measures which she had taken prior to the trial were such as could have led her to reach a preconceived view on the merits. In this regard, it should be noted that she did acquit Mr Fey on one of the two counts (see paragraph 14 above).

35. Thus, the extent and nature of the pre-trial measures taken by the District Court judge are clearly distinguishable from those that were dealt with in the above-mentioned *De Cubber* judgment. In that case the Court concluded that the impartiality of the tribunal in question had been capable of appearing to the applicant to be open to doubt, bearing in mind, *inter alia*, the fact that one of its members had carried out extensive investigations in the case, including numerous interrogations of the accused (see pp. 15-16, paras. 29-30, of the judgment).

36. In the light of the foregoing, the Court does not find that such fears as the applicant may have had as to the District Court judge's impartiality can be held to have been objectively justified. Accordingly, there has been no violation of Article 6 para. 1 (art. 6-1) in the present case.

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 February 1993.

Rudolf BERNHARDT
President

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 following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Spielmann;
- (b) concurring opinion of Mr Martens;
- (c) dissenting opinion of Mr Loizou.

R. B.
M.-A. E.

DISSENTING OPINION OF JUDGE SPIELMANN

(Translation)

1. I have been unable to vote with the majority for a finding of non-violation, since in my opinion there has quite evidently been a breach of Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights.

2. I entirely adopt the majority opinion of the Commission (sixteen votes to three) in particular paragraph 56 of its report, which reads as follows:

"In the Commission's opinion, at a stage preceding the trial, Judge Kohlegger in fact undertook typical acts of an investigating judge. The investigations aimed at establishing whether the applicant had fraudulently obtained money from the landlady. Yet these issues were precisely those which she had to deal with at the trial when deciding on the applicant's guilt."

The majority of the Commission accordingly concluded, rightly in my opinion, that the applicant could legitimately fear that Judge Kohlegger, when acting as the sole trial judge, had a preconceived opinion as to his guilt, and therefore have doubts as to her impartiality (see paragraph 58 of the Commission's report).

3. While I agree with the Court's finding that there is no indication that at the time when the landlady was questioned under a warrant issued by an investigating judge there was any prospect of Judge Kohlegger later trying the case (see paragraph 31 of the judgment), I consider, however, that that judge should have stood down and not tried the case.

If the composition of District Courts in Austria might indeed on certain occasions pose organisational problems, that is not a factor which can have any influence on the decisions of the Strasbourg institutions.

4. Finally, I do not share the opinion of the majority of the Court that the present case is clearly distinguishable from the *De Cubber v. Belgium* case (see paragraph 35 of the judgment). In my opinion, no distinction should be drawn between extensive investigations and less extensive investigations.

This is a question of principle.

CONCURRING OPINION OF JUDGE MARTENS

1. The procedure followed by Judge Kohlegger of the Zell am Ziller District Court, which in the applicant's view violated Article 6 para. 1 (art. 6-1), was in every respect in conformity with Articles 451 and 452 of the Austrian Code of Criminal Procedure. Consequently, in assessing whether the application of those provisions in fact gave rise to a violation, the first step should be to review whether they are in conformity with the Convention.

This approach is not only required by logic and truthfulness (see my dissenting opinion in the *Brogan and Others v. the United Kingdom* case, judgment of 29 November 1988, Series A no. 145-B, p. 50, para. 7), but also by the Court's present position within the legal community instituted by the Convention and gradually elaborated by the Court's case-law. That position implies that, where possible, the Court should not base its decision (solely) on the particular circumstances of the individual case, but should endeavour (also) to give reasons that afford clear guidance to national courts and authorities for the category of cases under consideration.

2. When assessing whether Articles 451 and 452 of the Austrian Code of Criminal Procedure are compatible with the Convention, a first point to be made is that a District Court judge who is conducting a preliminary inquiry must be deemed to be carrying out the functions of an investigating judge. His inquiries are of an inquisitorial nature, they are secret and are not in principle conducted in the presence of both parties. When undertaking such inquiries, the District Court judge is not exercising the typical functions of a judge presiding over the hearing of the parties, but those of a judicial officer preparing the case for trial. Significantly Article 452 requires him to observe the provisions pertaining to an investigating judge*.

I am not persuaded by the Government's argument that there is a fundamental difference between the preliminary investigations (*Voruntersuchungen*) conducted by an investigating judge under Articles 91 et seq. and the preliminary inquiries (*Vorerhebungen*) carried out by a District Court judge under Articles 451 and 452**. From the point of view of

* The provision clearly implies that a District Court judge who is conducting a preliminary inquiry has - save for the exception specified therein - the same powers as an investigating judge.

** The Government have sought to reinforce their argument by comparing preliminary inquiries conducted by a District Court judge with those provided for in Article 224 para. 1 which, according to the Government, empowers the presiding judge in Regional Court proceedings to make further investigations during the period after the accused has been committed for trial, in which the judge is preparing for the trial. This comparison, however, in fact undermines their argument, in that one reads in Mayerhofer/Rieder, *Das österreichische Strafrecht, II, Strafprozessordnung* (3rd ed. 1991), 1, p. 563, Anm. 4 ad Article 224, that the presiding judge should not make such further investigations himself

increasing the chances that the judge, as a result of his pre-trial fact-finding activities, will start the trial with a pre-formed opinion, there is no difference at all.

3. Since a District Court judge who is conducting a preliminary inquiry must be deemed to be carrying out the functions of an investigating judge, Articles 451 and 452 do, in principle, violate Article 6 para. 1 (art. 6-1) as that provision has to be interpreted under the De Cubber doctrine.

It is intentionally that I have referred to the De Cubber doctrine. Both the considerations set out in paragraph 1 above and the arguments used in the Court's De Cubber v. Belgium judgment of 26 October 1984 (Series A no. 86, pp. 15-16, paras. 29-30) - which latter centre around an abstract analysis of the legal position of the investigating judge within the national legal system - warrant the conclusion that in that judgment the Court laid down a rule that the functions of an investigating judge are incompatible with those of a trial judge.

This interpretation finds further support in paragraph 50 of the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 22: there the Court, evidently in order to distinguish that case from the De Cubber case, analysed "[t]he judge's functions on the exercise of which the applicant's fear of lack of impartiality [was] based, and which relate[d] to the pre-trial stage". It found that they were those of "an independent judge who [was] not responsible for preparing the case for trial or deciding whether the accused should be brought to trial" and concluded by saying:

"Indeed, as to the nature of the functions which the judges involved in this case exercised before taking part in its determination, this case is distinguishable from the Piersack and the De Cubber cases." (emphasis added)

The De Cubber doctrine may be compared with that enunciated in the Huber v. Switzerland judgment of 23 October 1990, Series A no. 188, where the Court laid down the rule that membership of the prosecution disqualifies a person from being a trial judge (compare the Brincat v. Italy judgment of 26 November 1992, Series A no. 249-A, p. 11, para. 20).

These rules should, in principle, apply irrespective of differences of detail between the relevant national provisions. It is therefore unnecessary to examine whether the Austrian District Court judge - when making preliminary inquiries - displays all the features which have been held to be decisive in respect of the Belgian investigating judge. It suffices that when making these inquiries he belongs to the same category of judicial officers, namely officers whose function it is to prepare the case for trial by actively conducting an inquisitorial inquiry. By the same token the extent of the

but should request the investigating judge to do so, since making them himself would preclude him from presiding at the trial.

inquiries made is also immaterial: what is at issue is a functional lack of impartiality.

4. However, the conclusion that Articles 451 and 452 are incompatible with Article 6 para. 1 (art. 6-1) of the Convention can only be a preliminary one. The fact that a District Court judge who has made preliminary inquiries carried out the functions of an investigating judge admittedly shows that the circumstances are such that the possibility of his being prejudiced cannot be excluded. Nevertheless, as I stated in paragraphs 3.4 and 3.5 of my dissenting opinion in the *Borgers v. Belgium* case (judgment of 30 October 1991, Series A no. 214-B, pp. 45-46), for a final conclusion a second test is required. Indeed, determining whether fears as to impartiality are "objectively justified" implies also a weighing of interests, since what is at stake is not only the confidence which the courts must inspire, but also the public interest in having a rational and smoothly operating judicial system. Consequently, it remains to be seen whether, in cases like the present one, the latter interests should prevail.

In my opinion, this question has to be answered in the affirmative. Many Contracting States have a District Court system which is essentially similar to the Austrian one. Its main features are a close network of often small courts where both civil and criminal cases of lesser importance are dealt with locally (i.e. where those concerned are domiciled), in proceedings characterised by a minimum of formalities. This makes it possible for those who so wish to defend themselves and to settle cases within a short time and with a minimum of costs and expenses. Extension of the *De Cubber* doctrine to criminal proceedings before District Courts would undoubtedly upset this valuable system, if only because it may be supposed that the situation will not infrequently be like that described by the Government which alleged*** that "in Austria's rural areas many District Courts have only one judge or one judge may be in charge of several district courts". To require in such situations that a case not be tried by a judge who has made preliminary inquiries would result in the trial having to be held before another District Court to which the accused would have to travel. Seeing also that a professional judge who has already had to deal with a case at an earlier stage of the proceedings must be deemed to be able to put this out of his mind when sitting as a trial judge (this being the rationale of paragraphs 49 and 50 of the above-mentioned *Hauschildt* judgment of 24 May 1989), I feel that to oblige Contracting States to change the District Court system by extending the *De Cubber* doctrine would amount to setting too much store by appearances.

*** At the hearing the applicant's lawyer contested this allegation; he told the Court that in 1988 it was already exceptional for Austrian District Courts to have only one judge. In the context of my reasoning this factual dispute is immaterial: what is material, is that it cannot be excluded that, in those Contracting States where the District Court system exists, it is not exceptional for there to be only one judge.

5. For these reasons I have voted for non-violation of Article 6 para. 1 (art. 6-1).

DISSENTING OPINION OF JUDGE LOIZOU

I regret that I cannot share the Court's opinion in its conclusion that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

The salient facts appear sufficiently in the judgment of the Court, and in particular in paragraphs 9 to 12, but I wish to stress for the purposes of this opinion that Judge Kohlegger, *inter alia*, questioned the landlady, Mrs Rosa Kröll, as a witness and then tried to secure further evidence by telephoning later to the bank in Mayrhofen to establish whether money had been paid into the bank account opened by the applicant. The bank replied by letter on the same day that so far there had been no receipts from the applicant. Furthermore, she telephoned the two German insurance companies to establish whether the applicant had applied for, or received, a pension payment on 18 March 1988. Their reply over the telephone was that the applicant had not received a pension. She was thus collating all the essential material with which the elements of the offence with which the applicant was charged would be established.

The very fact that the judge was collecting evidence and ascertaining facts could not but create reasonable doubt in the mind of the accused as to the impartiality of the judge who to the knowledge of the accused had full knowledge of the file which she herself had compiled. His fears could not but be, in the circumstances of this case, objectively justified.

These circumstances have led me to the conclusion like the Commission that the applicant could have a legitimate fear that this judge, when acting as the sole trial court judge, could have a preconceived opinion as to the applicant's guilt, and that her impartiality accordingly could appear to be open to doubt.

In my view, the applicant at his trial was not heard by an impartial tribunal within the meaning of Article 6 para. 1 (art. 6-1) of the Convention. Needless to say that the rights enshrined in it are equally applicable to all categories of cases, whether serious or not.