

In the case of K. 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 R. Bernhardt,
Mr F. Matscher,
Mr J. De Meyer,
Mr J.M. Morenilla,
Mr F. Bigi,
Sir John Freeland,
Mr G. Mifsud Bonnici,
Mr J. Makarczyk,

and also of Mr M.-A. Eissen, Registrar,

Having deliberated in private on 26 May 1993,

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

Notes by the Registrar

* The case is numbered 47/1992/392/470. 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 11 December 1992, 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. 16002/90) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr K., on 27 November 1989. The applicant asked the Court not to divulge his identity.

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 5 paras. 1 and 4, and Articles 6 and 10 (art. 5-1, art. 5-4, art. 6, art. 10).

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), whom the President of the Court gave leave to use the German language (Rule 27 para. 3).

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 29 January 1993 Mr R. Bernhardt, the Vice-President of the Court, drew by lot, in the presence of the Registrar, the names of the other seven members, namely himself, Mr J. De Meyer, Mr J.M. Morenilla, Mr F. Bigi, Sir John Freeland, Mr G. Mifsud Bonnici and Mr J. Makarczyk (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 Austrian Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38).

5. On 27 April the Government, and on 5 May Mr K.'s lawyer, communicated to the Registrar the text of an agreement concluded between them.

The Delegate of the Commission was consulted (Rule 49 para. 2) and submitted his observations on 14 May 1993.

6. On 25 May the Registrar received from the Government information concerning a bill to amend the contested Articles of the Austrian Code of Criminal Procedure; on 17 May he had requested this information from them.

7. On 26 May the Court decided to dispense with a hearing in the case, having satisfied itself that the conditions for such a derogation from the usual procedure had been met (Rules 26 and 38).

AS TO THE FACTS

8. In 1989 the applicant was accused of having bought heroin from a couple - Mr and Mrs W. -, who were facing a separate prosecution for drug-trafficking. He pleaded not guilty in the Linz District Court (Bezirksgericht), which adjourned the trial on 19 May 1989. The Linz Regional Court (Landesgericht) summoned him to appear on 30 May 1989 to give evidence in the trial of Mr and Mrs W. At the hearing Mr K. refused to testify because of the proceedings pending against him. The court then decided not to give him leave to remain silent (Article 153 of the Code of Criminal Procedure) and, as he persisted in his refusal, first fined him 3,000 schillings and then sentenced him to five days' imprisonment.

The applicant was incarcerated from 30 May to 4 June 1989 and paid the fine on 6 March 1990. On 2 June 1989 the Linz Court of Appeal (Oberlandesgericht) declared inadmissible his appeal (Beschwerde). On 25 January 1990, when the applicant was again questioned in connection with the proceedings against Mr and Mrs W., he admitted having twice purchased heroin from them.

9. In the intervening period the Attorney General's Office (Generalprokuratur) had filed an appeal in the interests of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) against the order imprisoning the applicant. The Supreme Court (Oberster Gerichtshof) dismissed this appeal on 19 December 1990, finding in substance that the Regional Court had not exceeded its discretionary power.

PROCEEDINGS BEFORE THE COMMISSION

10. Mr K. applied to the Commission on 27 November 1989. He claimed that the proceedings resulting in the imposition of the fine had infringed Article 6 (art. 6) of the Convention, in particular sub-paragraphs (a) to (c) of paragraph 3 (art. 6-3-a, art. 6-3-b, art. 6-3-c), and that the obligation to make a statement liable to incriminate himself had been contrary to Article 6 para. 1 (art. 6-1). He also complained of his detention and the lack of any possibility of

judicial review thereof (Article 5 paras. 1 and 4) (art. 5-1, art. 5-4).

11. The Commission declared the application (no. 16002/90) admissible on 18 February 1992; it decided to examine the complaint relating to the obligation to testify also under Article 10 (art. 10). In its report of 13 October 1992 (made under Article 31) (art. 31) it expressed the following opinion:

- (a) by seven votes to five that Article 6 (art. 6) was inapplicable to the proceedings imposing the fine;
- (b) by ten votes to two that there had been a violation of Article 10 (art. 10) as regards the refusal to allow the applicant to remain silent;
- (c) by eleven votes to one that there had been no violation of Article 6 para. 1 (art. 6-1) on the same point;
- (d) by ten votes to two that there had been a violation of Article 5 paras. 1 and 4 (art. 5-1, art. 5-4).

The full text of the Commission's opinion and the partly 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 255-B 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

12. On 27 April 1993 the Court received from the Ministry of Foreign Affairs of the Republic of Austria a copy of the text of the agreement set out below signed by the Government's representative and Mr K.'s lawyer:

"The parties in the proceedings currently pending before the European Court of Human Rights have reached agreement on the following friendly settlement:

1. The Republic of Austria will pay the applicant in settlement of all possible claims arising from the present application the sum of 18,000 schillings as compensation for the detention plus 103,460.40 schillings as costs.
2. The applicant declares that he has obtained full satisfaction in respect of the above-mentioned application.
3. He waives his right to pursue any further claims against Austria arising out of the subject-matter of the said application."

By a letter of 28 April 1993 to the Registrar, the applicant's lawyer confirmed this agreement.

13. The Delegate of the Commission was consulted in accordance with Rule 49 para. 2 of the Rules of Court. On 14 May 1993, after having sought the Commission's opinion, he sent to the Registrar the following comments:

" ...

In its report the Commission found a violation of the

Convention which was the result of the application of [Articles] 153 and 160 of the Austrian Code of Criminal Procedure.

The friendly settlement now proposed by the parties does not refer to this problem at all and consequently similar violations of the Convention could occur again.

The Delegate has considerable doubts as to whether the settlement can be regarded as being 'on the basis of respect for human rights' (see Eur. Court H. R., Can judgment of 30 September 1985, Series A no. 96, pp. 10-11, paras. 17 and 18). He therefore considers that, in the absence of any commitment on the part of the Austrian Government regarding the general interest, the case should not be struck off the record as it raises important issues of principle."

14. In connection with the legislative reform under way, the Government communicated on 25 May the following information (see paragraph 6 above):

" ...

The European Commission's doubts as to whether the friendly settlement reached between the parties in the present case could be regarded as being 'on the basis of respect for human rights', and its belief that accordingly the case should not be struck out of the list in the absence of any commitment on the part of the Austrian Government regarding the general interest, are not justified.

Underlying the friendly settlement was the consideration that the continuation of the proceedings by the European Court would serve no purpose since the domestic legal position which gave rise to the application is anyway to be changed. As regards the violation of Article 10 (art. 10) found by the European Commission, it should be noted that the 1993 bill to amend the Code of Criminal Procedure, which amends Article 152 (1) of the Code of Criminal Procedure, setting out the grounds on which persons may be exempted from giving evidence, provides that persons who are suspected of committing an offence, in respect of which they are under investigation, or whose statements may expose them to risk of prosecution, shall be exempted from the obligation to give evidence. A witness, against whom on account of the same facts criminal proceedings are pending and who may incriminate himself through his own statements given as a witness, will therefore have an unconditional right to refuse to give evidence. This ensures that breaches of the Convention of this type can no longer arise.

The same is true of the breach found by the Commission of Article 5 paras. 1 and 4 (art. 5-1, art. 5-4) of the Convention. Quite apart from the fact that the imposition of coercive sanctions [Beugemittel] (fine or imprisonment) in a case such as the present will no longer be possible in view of the unconditional right to refuse to give evidence under the amending bill ..., that draft legislation also proposes to add to Article 160 of the Code of Criminal Procedure, which governs the imposition of such penalties, the following sentence:

'These coercive penalties shall be imposed only in so far as they are not disproportionate to the gravity of the criminal case, to the importance of the witness's statements or to his personal circumstances.'

Since 1 January 1993 moreover the imposition of a prison sentence can be challenged by a complaint to the Supreme Court on the ground of a breach of the fundamental right to liberty of the person ..., where no other legal remedy is (still) available. (This applies too where the detention is imposed in first-instance proceedings during the trial or by the Regional Court or the Court of Appeal in appeal proceedings.)

The bill ... is to be examined by Parliament in July 1993 and it will therefore be possible for it to enter into force on 1 January 1994.

..."

The Government also communicated the text of the proposed new provisions:

"19. Article 152 shall read as follows:

'Article 152 (1) The following shall be exempted from the obligation to testify:

1. Persons who are suspected of having committed an offence, in respect of which they are under investigation, or whose statements expose them to the risk of criminal prosecution;
2. Persons who are called upon to testify in proceedings against a relative (Article 72 of the Criminal Code) or whose testimony carries with it the risk of criminal prosecution of a relative, and in this connection where the person's status as a relative is based on a marriage, he retains that status even where the marriage no longer subsists;
3. Persons who, when they are called upon to testify, have not yet reached fourteen years of age, where there are grounds for assuming that they were harmed by the offence with which the accused is charged;
4. Defence counsel, lawyers, notaries, trustees, psychiatrists, psychotherapists, psychologists, social workers and persons working for officially recognised institutions providing psychosocial advice and care, in respect of matters learnt in that capacity;
5. Any person concerning how he has exercised his right to vote, where the exercise of this right is confidential according to the law.

(2) Persons who participate as part of their professional training in the activities of, or who assist, the persons referred to in paragraph (1) 4 shall be treated as the latter.

(3) Denial of the right of the persons referred to in paragraphs (1) 4 and (2) to refuse to testify will entail nullity.

(4) If a person called as a witness has one of the above-mentioned relationships with only one of several accused, he can refuse to testify in respect of the others only if it is impossible to separate the statements which concern the others. The same applies where the ground for refusing to testify relates to only one of several sets of facts.

(5) The investigating judge is under a duty, before

questioning the persons mentioned in paragraphs (1) and (2) or as soon as the ground for exempting them from the obligation to testify is known, to inform them of their right to refuse to testify and to take down in the record of the examination their declarations in this respect. Unless the witness has expressly waived his right to refuse to testify, his statements will be inadmissible.'

20. In Article 153 (1) the expression in brackets should read '(Article 152 (1) 2)'; the words 'criminal prosecution' are to be deleted.

21. The following sentence shall be added to Article 160:

'These coercive penalties shall be imposed only in so far as they are not disproportionate to the gravity of the criminal case, to the importance of the witness's statements and to his personal circumstances.'

15. The Court observes that the possibility of a breach, deriving not from a provision of domestic law as such, but from the manner in which the national authorities applied it or might apply it in a specific case, cannot in itself justify a refusal to strike a case out of the list. This is moreover confirmed by the Court's practice in this field.

It should be noted in addition that the Austrian Government has laid before Parliament a bill which is intended, inter alia, to amend Articles 152, 153 and 160 of the Code of Criminal Procedure (Strafprozeßänderungsgesetz 1993). The new draft provisions would guarantee, in accordance with (im Sinne) the Constitutional Court's case-law, the right to refuse to testify where the person concerned runs the risk of incriminating himself. The adoption of these provisions would eliminate any public policy reason for requiring a decision on the merits of the case.

Accordingly, the Court takes formal note of the friendly settlement reached between the Government and Mr K. and considers it appropriate to strike the case out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Done in English and in French, and notified in writing under Rule 55 para. 2, second sub-paragraph, of the Rules of Court on 2 June 1993.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar