



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

COURT (CHAMBER)

CASE OF WINDISCH v. AUSTRIA (ARTICLE 50)

(Application no. 12489/86)

JUDGMENT

STRASBOURG

28 June 1993

In the case of Windisch 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 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 25 June 1993,

Delivers the following judgment, which was adopted on that 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, on 2 October 1986.

2. By judgment of 27 September 1990 ("the principal judgment"), the Court held that the applicant's conviction for burglary, which had been based to a large extent on the evidence of two anonymous witnesses, had given rise to a violation of paragraph 3 (d) of Article 6 of the Convention, taken together with paragraph 1 (art. 6-3-d, art. 6-1) Series A no. 186, paras. 22-32 of the reasons and point 1 of the operative provisions, pp. 9-11 and 13). Furthermore, the Court awarded to the applicant under Article 50 (art. 50) a certain amount in respect of costs and expenses incurred until then (*ibid.*, paras. 36-38 of the reasons and point 3 of the operative provisions,

* 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.

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

pp. 12-14). The only outstanding matter to be settled is the question of the application of Article 50 (art. 50) as regards an award of damages.

As to the facts of the case, reference is made to paragraphs 8 to 18 of the principal judgment (*ibid.*, pp. 6-8).

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

In the principal judgment, the Court stated that it was unable to accept the Government's plea as to the absence of a causal link between the alleged prejudice and the violation found. However, it considered that the question of the application of Article 50 (art. 50), as regards the award of damages, was not yet ready for decision, since there was the possibility of the applicant's case being reopened after the Attorney General had entered a plea of nullity in the interest of the law (*Nichtigkeitsbeschwerde zur Wahrung des Gesetzes* - Article 33 of the Code of Criminal Procedure) against the judgment of 20 November 1985 (*ibid.*, paras. 16 and 35, pp. 8 and 12). It, therefore, reserved the matter and invited the Government and the applicant to submit, within the coming three months, their written comments thereon and, in particular, to notify it of any agreement reached between them (*ibid.*, para. 35 of the reasons and point 2 of the operative provisions, pp. 12 and 13).

4. In a letter of 5 October 1990, the Agent of the Government informed the Registrar that the Supreme Court had quashed the above-mentioned judgment on 23 August 1990 and had referred the case back to the Innsbruck Regional Court for retrial and decision.

The applicant and the Government filed observations on 2 January 1991. On 14 January the Government requested an adjournment pending the outcome of the proceedings before the Austrian courts.

The Commission's Delegate and the applicant's counsel raised no objection. Accordingly, the President of the Court agreed to stay proceedings until judgment had been given by the Innsbruck Regional Court.

5. In a letter of 19 July 1991 the Agent of the Government informed the Registrar that by judgment of 25 June the Innsbruck Regional Court had convicted the applicant of burglary and attempted intimidation and sentenced him to three years' imprisonment after hearing in public the two witnesses concerned (see paragraph 2 above). Since this judgment was not final in view of the appeals entered by the applicant and the public prosecutor, the Agent asked the Court to maintain the suspension of the proceedings concerning Article 50 (art. 50). Neither the Commission's Delegate nor the applicant's counsel objected to the request, which was allowed by the President of the Court on 7 October.

6. On 27 April 1993 the Agent of the Government transmitted to the Registrar, in response to the latter's requests for information made on 24

June 1992 and 24 March 1993, copies of (1) the judgment of 20 February 1992 whereby the Supreme Court rejected the applicant's plea of nullity and (2) the judgment of 25 March 1992 whereby the Innsbruck Court of Appeal rejected his appeal against sentence.

7. In accordance with an order made by the President of the Court, the Registrar received, on 28 May and 14 June 1993 respectively, the applicant's and the Government's supplementary observations. The Commission's Delegate replied on 22 June 1993.

AS TO THE LAW

8. Article 50 (art. 50) of the Convention provides:

"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."

At this stage of the proceedings the applicant is no longer claiming the reimbursement of costs and expenses.

9. In observations filed on 5 March 1990 - that is to say prior to the Court's principal judgment - Mr Windisch's counsel had stated that her client was seeking financial compensation both for pecuniary and non-pecuniary damage deriving from the injustice suffered as a consequence of the long prison sentence and for the accompanying loss of earnings. She assessed the appropriate compensation at 1,080,000 Austrian schillings on the basis of the sums awarded customarily in Austria in such cases and by the Court in the *Unterpertinger v. Austria* judgment of 24 November 1986 (Series A no. 110, p. 16, para. 35).

10. For its part, the Government submitted at the hearing of 23 April 1990 that the applicant's claims should be rejected for lack of causal link between the alleged damage and any violation that the Court might find.

However, the Court considered in its principal judgment that "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)" (Series A no. 186, p. 12, para. 35).

11. The proceedings subsequently brought in Austria (see paragraphs 4-6 above) redressed the violation found by the Court on 27 September 1990 (see, *mutatis mutandis*, the *Piersack v. Belgium* judgment of 26 October 1984, Series A no. 85, pp. 15-16, para. 11). Following the annulment by the Supreme Court on 23 August 1990 of the judgment delivered by the Innsbruck Regional Court on 20 November 1985, the case was referred back

to the latter court, which retried the applicant. On 25 June 1991 the Regional Court convicted him again and imposed a sentence identical to that originally passed, but on this occasion the trial was attended by all the guarantees laid down by the Convention (*ibid.*, p. 16, para. 11); in particular, the two anonymous witnesses who had not been heard in public during the first trial gave evidence at the retrial (see paragraph 5 above). This judgment has now become final (see paragraph 6 above).

12. In her observations of 28 May 1993 (see paragraph 7 above), counsel for the applicant complained that, because of the conduct of the Austrian authorities, and especially the Attorney General's refusal to file a plea of nullity before the lodging of the application to the Commission, the proceedings against Mr Windisch had been excessively long. If the applicant's claims for compensation were rejected, the result of his application to the Commission would turn out to his disadvantage only. In fact, notwithstanding the finding of a violation by the Court, the only result for the applicant would be, following the reopening of domestic proceedings, an excessively long procedure and the persistence of an undecided situation for many years.

13. The Government replied on 14 June 1993 (see paragraph 7 above) that the applicant could not claim compensation for the length of the proceedings, since the violation found by the Court did not concern this point. Furthermore, in view of the fact that the second set of proceedings had the same outcome as the first, just satisfaction could only be claimed for non-pecuniary damage and, in this respect, the finding of a violation was sufficient.

The Delegate of the Commission agreed.

14. As regards the claim for pecuniary damage, the Court agrees with the Government: the end-result of the fresh set of proceedings, together with the fact that the term of imprisonment previously served by the applicant was fully taken into account, have brought about a situation as close to *restitutio in integrum* as was possible in the nature of things (see the above-mentioned *Piersack* judgment, Series A no. 85, pp. 15-16, para. 11).

15. Furthermore, the Court considers, like the Government, that the compensation sought in respect of the length of the national proceedings is not recoverable because the violation found in the principal judgment did not concern this point.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Rejects the remainder of the claims for just satisfaction.

Done in English and in French, and notified in writing under Rule 55 para. 2, second sub-paragraph, of the Rules of Court on 28 June 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar