



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

COURT (CHAMBER)

**CASE OF SCHMAUTZER v. AUSTRIA**

*(Application no. 15523/89)*

JUDGMENT

STRASBOURG

23 October 1995

**In the case of Schmutzer v. Austria <sup>1</sup>,**

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 Rules of Court A <sup>2</sup>, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr R. MACDONALD,

Mr S.K. MARTENS,

Mr I. FOIGHEL,

Mr J.M. MORENILLA,

Sir John Freeland,

Mr J. MAKARCZYK,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 28 April and 28 September 1995,

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 9 September 1994, 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. 15523/89) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Peter Schmutzer, on 26 May 1989.

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

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<sup>1</sup> The case is numbered 31/1994/478/560. 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.

<sup>2</sup> Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings; the President gave him leave to present his own case (Rule 30) and to use the German language (Rule 27 para. 3).

3. On 24 September 1994 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider the instant case and the cases of Umlauf, Gradinger, Pramstaller, Palaoro and Pfarrmeier v. Austria<sup>3</sup>.

The Chamber to be constituted for this purpose 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 the same day, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L. E. Pettiti, Mr R. Macdonald, Mr S.K. Martens, Mr I. Foighel, Mr J.M. Morenilla, Sir John Freeland and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 20 January 1995 and the applicant's memorial on 30 January 1995. On 3 February the Commission supplied the Registrar with various documents that he had requested on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 April 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr F. CEDE, Ambassador, Head of the International  
Law Department, Federal Ministry of  
Foreign Affairs,

*Agent,*

Ms I. SIEß, Constitutional Department,  
Federal Chancellery,

Ms E. BERTAGNOLI, International Law Department,  
Federal Ministry of Foreign Affairs,

*Advisers;*

(b) for the Commission

Mr A. WEITZEL,

*Delegate;*

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<sup>3</sup> Cases nos. 32/1994/479/561, 33/1994/480/562, 35/1994/482/564, 36/1994/483/565 and 37/1994/484/566.

(c) the applicant

Mr P. SCHMAUTZER, Rechtsanwalt.

The Court heard addresses by Mr Weitzel, Mr Schmautzer and Mr Cede, and a reply to the question it put.

## AS TO THE FACTS

### I. CIRCUMSTANCES OF THE CASE

6. On 30 April 1986 Mr Peter Schmautzer was stopped by the police while driving his car. He was not wearing his safety-belt. In a "sentence order" (Straferkenntnis) of 1 June 1987 the federal police authority (Bundespolizeidirektion) in Graz imposed on him a fine of 300 Austrian schillings (ATS) with twenty-four hours' imprisonment in default of payment, for an offence under section III(1) and (5)(a) of the third amendment to the Motor Vehicles Act (Kraftfahrgesetz - see paragraph 10 below).

7. The applicant appealed against that decision to the Styria regional government (Amt der Landesregierung), which upheld the decision on 2 February 1988 but reduced the fine to ATS 200 and the penalty in default to fourteen hours' imprisonment.

8. On 6 April 1988 the applicant applied to the Constitutional Court (Verfassungsgerichtshof). He complained of an infringement of the principle that all citizens are equal before the law and alleged that his being sentenced to imprisonment in default by an administrative authority that was not an "independent and impartial" tribunal breached Articles 5 and 6 (art. 5, art. 6) of the Convention. He also argued that the requirement to wear a safety-belt was an interference in his private life, contrary to Article 8 (art. 8) of the Convention.

On 27 February 1989, at the conclusion of a consideration of the case in private, the Constitutional Court declined to accept the appeal for adjudication (Article 144 para. 2 of the Federal Constitution (Bundes-Verfassungsgesetz) - see paragraph 12 below), since, in view of its case-law on Article 6 (art. 6) of the Convention, it did not have sufficient prospects of success; moreover, the case did not lie outside the jurisdiction of the Administrative Court (Verwaltungsgerichtshof).

At Mr Schmautzer's request, it also decided to refer the application to the Administrative Court.

9. On 20 September 1989 the Administrative Court stayed the proceedings before it as Mr Schmautzer's application did not satisfy the

substantive and formal requirements of section 34(2) of the Administrative Court Act (Verwaltungsgerichtshofsgesetz - see paragraph 14 below).

## II. RELEVANT DOMESTIC LAW

### A. Road traffic legislation

10. Section III of the 1976 Act as amended in 1984, which amended the Motor Vehicles Act 1967 (Kraftfahrgesetz), provides:

"1. Where a seat in a motor vehicle is equipped with a safety-belt as required by the Motor Vehicles Act, the driver and passengers occupying such a seat must wear the safety-belt in the conventional manner (bestimmungsgemäß) ...

...

5. It shall be an administrative offence ... punishable, in a sentence order without a hearing (Organstrafverfügung) pursuant to section 50 of the Administrative Criminal Justice Act 1950, with a fine of ATS 100 for

(a) the driver of a motor vehicle or

(b) a passenger in a motor vehicle

not to comply with the requirement in subsection (1), first sentence. In the event of refusal to pay the ... fine, the authority may impose a fine of up to ATS 300, with up to twenty-four hours' imprisonment in default of payment.

..."

### B. Procedure

11. Article 90 para. 1 of the Federal Constitution (Bundes-Verfassungsgesetz) provides:

"Hearings by trial courts in civil and criminal cases shall be oral and public. Exceptions may be prescribed by law."

#### *1. Proceedings in the Constitutional Court*

12. By Article 144 para. 1 of the Federal Constitution the Constitutional Court, when an application (Beschwerde) is made to it, has to determine whether an administrative decision (Bescheid) has infringed a right guaranteed by the Constitution or has applied regulations (Verordnung) contrary to the law, a law contrary to the Constitution or an international treaty incompatible with Austrian law.

Article 144 para. 2 provides:

"Up to the time of the hearing the Constitutional Court may by means of a decision (Beschluss) decline to accept a case for adjudication if it does not have sufficient prospects of success or if it cannot be expected that the judgment will clarify an issue of constitutional law. The court may not decline to accept for adjudication a case excluded from the jurisdiction of the Administrative Court by Article 133."

## *2. Proceedings in the Administrative Court*

13. By Article 130 para. 1 of the Federal Constitution, the Administrative Court has jurisdiction to hear, inter alia, applications alleging that an administrative decision is unlawful.

14. Section 34(2) of the Administrative Court Act (Verwaltungsgerichtshofsgesetz) provides:

"Applications which are not barred by any of the circumstances set out in subsection (1), but fail to satisfy the conditions as to form and content laid down in sections 23, 24, 28 and 29, must be adjourned for a brief period to enable their defects to be remedied (Behebung der Mängel); applications not rectified within the time-limit shall be deemed to have been withdrawn."

15. Section 39(1) provides, in particular, that at the end of the preliminary proceedings (Vorverfahren) the Administrative Court must hold a hearing where the applicant makes a request to that effect.

Section 39(2) reads as follows:

"Notwithstanding a party's application under subsection (1), the Administrative Court may decide not to hold a hearing where

1. the proceedings must be stayed (section 33) or the application dismissed (section 34);
2. the impugned decision must be quashed as unlawful because the respondent authority lacked jurisdiction (section 42(2)(2));
3. the impugned decision must be quashed as unlawful on account of a breach of procedural rules (section 42(2)(3));
4. the impugned decision must be quashed because its content is unlawful according to the established case-law of the Administrative Court;
5. neither the respondent authority nor any other party before the court has filed pleadings in reply and the impugned decision is to be quashed;
6. it is apparent to the court from the pleadings of the parties to the proceedings before it and from the files relating to the earlier administrative proceedings that a hearing is not likely to clarify the case further."

Sub-paragraphs 1 to 3 of section 39(2) were in force in 1958; sub-paragraphs 4 and 5 were inserted in 1964 and sub-paragraph 6 in 1982.

16. Section 41(1) of the Administrative Court Act provides:

"In so far as the Administrative Court does not find any unlawfulness deriving from the respondent authority's lack of jurisdiction or from breaches of procedural rules (section 42(2)(2) and (3)) ..., it must examine the impugned decision on the basis of the facts found by the respondent authority and with reference to the complaints put forward ... If it considers that reasons which have not yet been notified to one of the parties might be decisive for ruling on [one of these complaints] ..., it must hear the parties on this point and adjourn the proceedings if necessary."

17. Section 42(1) of the same Act states that, save as otherwise provided, the Administrative Court must either dismiss an application as ill-founded or quash the impugned decision.

By section 42(2),

"The Administrative Court shall quash the impugned decision if it is unlawful

1. by reason of its content, [or]
2. because the respondent authority lacked jurisdiction, [or]
3. on account of a breach of procedural rules, in that

(a) the respondent authority has made findings of fact which are, in an important respect, contradicted by the case file, or

(b) the facts require further investigation on an important point, or

(c) procedural rules have been disregarded, compliance with which could have led to a different decision by the respondent authority."

18. If the Administrative Court quashes the impugned decision, "the administrative authorities [are] under a duty ... to take immediate steps, using the legal means available to them, to bring about in the specific case the legal situation which corresponds to the Administrative Court's view of the law (Rechtsanschauung)" (section 63(1)).

19. In a judgment of 14 October 1987 (G 181/86) the Constitutional Court held:

"From the fact that it has been necessary to extend the reservation in respect of Article 5 (art. 5) of the Convention to cover the procedural safeguards of Article 6 (art. 6) of the Convention, because of the connection between those two provisions (art. 5, art. 6), it follows that, conversely, the limited review (die (bloß) nachprüfende Kontrolle) carried out by the Administrative Court or the Constitutional Court is insufficient in respect of criminal penalties within the meaning of the Convention that are not covered by the reservation."

### *3. The "independent administrative tribunals"*

20. Pursuant to Article 129 of the Federal Constitution, administrative courts called "independent administrative tribunals" (Unabhängige Verwaltungssenate) were set up in the Länder with effect from 1 January 1991. The functions of these tribunals include determining both the factual

and the legal issues arising in cases concerning administrative offences (Verwaltungsübertretungen).

### III. AUSTRIA'S RESERVATION IN RESPECT OF ARTICLE 5 (ART. 5) OF THE CONVENTION

21. The instrument of ratification of the Convention deposited by the Austrian Government on 3 September 1958 contains, *inter alia*, a reservation worded as follows:

"The provisions of Article 5 (art. 5) of the Convention shall be so applied that there shall be no interference with the measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl [Federal Official Gazette] No. 172/1950, subject to review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution."

### PROCEEDINGS BEFORE THE COMMISSION

22. Mr Schmutzler applied to the Commission on 26 May 1989. Relying on Articles 5 and 6 (art. 5, art. 6) of the Convention, he complained that in proceedings which could result in his being sentenced to a term of imprisonment he had not had access to an independent and impartial tribunal. He also complained of an interference in his private life on account of the requirement to wear a safety-belt, contrary to Articles 8 and 14 (art. 8, art. 14) of the Convention.

23. On 10 May 1993 the Commission declared the application (no. 15523/89) admissible as to the complaint raised under Article 6 (art. 6) and declared it inadmissible as to the remainder.

In its report of 19 May 1994 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 6 para. 1 (art. 6-1) as regards access to a court (unanimously) and that no separate issue arose under Article 6 para. 1 (art. 6-1) as to the failure to hold a hearing (unanimously). The full text of the Commission's opinion and of the concurring opinion contained in the report is reproduced as an annex to this judgment<sup>4</sup>.

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<sup>4</sup> Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 328-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

## FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

24. In their memorial the Government asked the Court to hold that

"Article 6 (art. 6) of the Convention is not applicable in the present case; or alternatively, that Article 6 (art. 6) of the Convention was not violated in the administrative criminal proceedings underlying the application".

## AS TO THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

25. The applicant complained of a violation of Article 6 para. 1 (art. 6-1) of the Convention, which provides:

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

He had, he maintained, been denied the right to a "tribunal" and to a hearing before such a body.

#### A. Applicability of Article 6 para. 1 (art. 6-1)

##### *1. Whether there was a "criminal charge"*

26. In Mr Schmautzer's submission, the administrative criminal offence of which he was accused gave rise to a "criminal charge". This was not disputed by the Government.

27. In order to determine whether an offence qualifies as "criminal" for the purposes of the Convention, it is first necessary to ascertain whether or not the provision (art. 6-1) defining the offence belongs, in the legal system of the respondent State, to criminal law; next the "very nature of the offence" and the degree of severity of the penalty risked must be considered (see, among other authorities, the *Öztürk v. Germany* judgment of 21 February 1984, Series A no. 73, p. 18, para. 50, and the *Demicoli v. Malta* judgment of 27 August 1991, Series A no. 210, pp. 15-17, paras. 31-34).

28. Like the Commission, the Court notes that, although the offences in issue and the procedures followed in the case fall within the administrative sphere, they are nevertheless criminal in nature. This is moreover reflected in the terminology employed. Thus Austrian law refers to administrative

offences (Verwaltungsstraftaten) and administrative criminal procedure (Verwaltungsstrafverfahren). In addition, the fine imposed on the applicant was accompanied by an order for his committal to prison in the event of his defaulting on payment (see paragraph 10 above).

These considerations are sufficient to establish that the offence of which the applicant was accused may be classified as "criminal" for the purposes of the Convention. It follows that Article 6 (art. 6) applies.

*2. Austria's reservation in respect of Article 5 (art. 5) of the Convention*

29. According to the Government, the procedure in question was covered by Austria's reservation in respect of Article 5 (art. 5) of the Convention. There could be no doubt that by the reference in that reservation to "measures for the deprivation of liberty" the Austrian Government had meant to include proceedings resulting in such measures. Any other construction would not only lack coherence; it would also run counter to the authorities' intention, which had been to remove from the scope of the Convention the whole administrative system, including the substantive and procedural provisions of administrative criminal law. That would be so even in a case where, as in this instance, the accused was merely fined, in so far as default on payment of that fine would entail committal to prison.

Admittedly, the Motor Vehicles Act 1967 was not one of the four laws designated in the reservation. However, one of those laws, the Administrative Criminal Justice Act, stated in section 10 that, except as otherwise provided, the general administrative laws were to determine the nature and severity of sanctions. It mattered little in this respect that section III of the third amended version of the Motor Vehicles Act, which was applied in the present case, had been enacted after the reservation had been deposited, because that provision merely clarified the substance of an existing obligation laid down in the Motor Vehicles Act 1955.

30. The applicant argued that the reservation could not apply in the present case. In the first place, it failed to satisfy the requirements of Article 64 (art. 64) of the Convention, which provides:

"1. Any State may, when signing [the] Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article (art. 64).

2. Any reservation made under this Article (art. 64) shall contain a brief statement of the law concerned."

Secondly, on a strict construction, its wording precluded extending its scope to the procedural sphere, which was in issue here.

31. The Court points out that in the *Chorherr v. Austria* judgment of 25 August 1993 it held that Austria's reservation in respect of Article 5 (art. 5) of the Convention was compatible with Article 64 (art. 64) (Series A no. 266-B, p. 35, para. 21). It therefore remains only to ascertain whether the provisions applied (art. 5, art. 64) in the present case are covered by that reservation. They differ in certain essential respects from those in issue in the *Chorherr* case.

The Court notes that Mr Schmutzler based his complaints on Article 6 (art. 6) of the Convention, whereas the wording of the reservation invoked by the Government mentions only Article 5 (art. 5) and makes express reference solely to measures for the deprivation of liberty. Moreover, the reservation only comes into play where both substantive and procedural provisions of one or more of the four specific laws indicated in it have been applied. Here, however, the substantive provisions of a different Act, the Motor Vehicles Act 1967, were applied.

These considerations are a sufficient basis for concluding that the reservation in question does not apply in the instant case.

## **B. Compliance with Article 6 para. 1 (art. 6-1)**

### *1. Access to a tribunal*

32. Mr Schmutzler contended that none of the bodies that had dealt with his case in the proceedings in issue could be regarded as a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1). This was true not only of the administrative authorities, but also of the Constitutional Court, whose review was confined to constitutional issues, and above all of the Administrative Court. The latter was bound by the administrative authorities' findings of fact, except where there was a procedural defect within the meaning of section 42(2), sub-paragraph 3, of the Administrative Court Act (see paragraph 17 above). It was therefore not empowered to take evidence itself, or to establish the facts, or to take cognisance of new matters. Moreover, in the event of its quashing an administrative measure, it was not entitled to substitute its own decision for that of the authority concerned, but had always to remit the case to that authority. In short, its review was confined exclusively to questions of law and therefore could not be regarded as equivalent to that of a body with full jurisdiction.

33. The Government contested this view, whereas the Commission accepted it.

34. The Court reiterates that decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 para. 1 (art. 6-1) of the Convention - as is the case in this instance with the federal police authority and the regional government (see paragraphs 6 and 7 above) - must be subject to subsequent control by a "judicial body that has

full jurisdiction" (see, *inter alia* and *mutatis mutandis*, the following judgments: *Albert and Le Compte v. Belgium* of 10 February 1983, Series A no. 58, p. 16, para. 29; *Öztürk*, previously cited, pp. 21-22, para. 56; and *Fischer v. Austria* of 26 April 1995, Series A no. 312, p. 17, para. 28).

35. The Constitutional Court is not such a body. In the present case it could look at the impugned proceedings only from the point of view of their conformity with the Constitution, and this did not enable it to examine all the relevant facts. It accordingly lacked the powers required under Article 6 para. 1 (art. 6-1).

36. The powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention. It follows that when the compatibility of those powers with Article 6 para. 1 (art. 6-1) is being gauged, regard must be had to the complaints raised in that court by the applicant as well as to the defining characteristics of a "judicial body that has full jurisdiction". These include the power to quash in all respects, on questions of fact and law, the decision of the body below. As the Administrative Court lacks that power, it cannot be regarded as a "tribunal" within the meaning of the Convention. Moreover, in a judgment of 14 October 1987 the Constitutional Court held that in respect of criminal penalties not covered by the reservation in respect of Article 5 (art. 5), the limited review carried out by the Administrative Court or the Constitutional Court was insufficient (see paragraph 19 above).

37. It follows that the applicant did not have access to a "tribunal". There has accordingly been a violation of Article 6 para. 1 (art. 6-1) on this point.

## *2. Lack of a hearing*

38. Mr Schmautzer further criticised the Administrative Court for failing to hold a hearing.

39. Having regard to the conclusion in paragraph 37 above, the Court does not consider it necessary to examine this complaint.

## II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

40. Under 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."

41. The Delegate of the Commission left the matter of just satisfaction to the discretion of the Court. A. Damage

42. In respect of pecuniary damage, the applicant claimed repayment of the fine imposed on him, that is to say ATS 200.

43. The Government contended that the Court had no jurisdiction to quash convictions pronounced by national courts or to order repayment of fines. Moreover, it could not, in awarding reparation, speculate as to what the outcome of the proceedings would have been if the applicant had had access to a tribunal within the meaning of Article 6 para. 1 (art. 6-1) of the Convention.

44. The Court agrees. It cannot speculate as to what the outcome of the proceedings in issue might have been if the violation of the Convention had not occurred (see the *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 24, para. 57; the *Saïdi v. France* judgment of 20 September 1993, Series A no. 261-C, p. 58, para. 49; and the *Fischer* judgment, previously cited, p. 21, para. 47). It considers that, in the circumstances of the case, the present judgment affords the applicant sufficient reparation.

#### **B. Costs and expenses**

45. In addition, Mr Schmutzer claimed the sum of ATS 111,217 for the costs and expenses incurred in the proceedings in the domestic courts and then before the Convention institutions.

46. The Government expressed the view that only the proceedings in the Administrative Court - which had given rise to the alleged violations - and those in Strasbourg could be taken into account. They also contested the quantum of the costs, but they were prepared to reimburse a total of ATS 54,900.

47. Making an assessment on an equitable basis, having regard to the information in its possession and its case-law, the Court awards Mr Schmutzer ATS 70,000.

#### **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. Holds that Article 6 para. 1 (art. 6-1) of the Convention applies in this case;
2. Holds that there has been a violation of that Article (art. 6-1) as regards access to a court;

3. Holds that it is not necessary to examine the complaint based on the lack of a hearing in the Administrative Court;
4. Holds that the respondent State is to pay the applicant, within three months, 70,000 (seventy thousand) Austrian schillings in respect of costs and expenses;
5. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 October 1995.

Rolv RYSSDAL  
President

Herbert PETZOLD  
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the separate opinion of Mr Martens is annexed to this judgment.

R. R.  
H. P.

## SEPARATE OPINION OF JUDGE MARTENS

1. I concur in the Court's finding that Article 6 (art. 6) has been violated, but cannot agree with its reasoning.

2. My objections concern paragraph 36 of the judgment, which starts with the statement:

"The powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention."

3. I will refrain from a structural criticism of this paragraph. I cannot help noting, however, that here again the Court finds it necessary to remark that when it is being assessed whether or not the Administrative Court is to be considered a court that affords the safeguards of Article 6 para. 1 (art. 6-1), "regard must be had to the complaints raised in that court". One looks in vain, however, for evidence of this methodological principle being put into practice: there does not follow any analysis of what the applicant argued before the Administrative Court, nor is there any trace of "regard" to these arguments in the assessment of the adequacy of the Administrative Court's jurisdiction. For the rest, I refer to the methodological objections to this "test" that I raised in paragraph 18 of my separate opinion in the case of *Fischer v. Austria* (judgment of 26 April 1995, Series A no. 312).

4. My main objection to this paragraph is the following. In the three civil cases discussed in my aforementioned separate opinion, the Court found that the Austrian Administrative Court met the requirements of a tribunal within the meaning of Article 6 para. 1 (art. 6-1). In the paragraph under discussion, however, it reaches the opposite conclusion, stressing that in this case the Administrative Court was sitting in proceedings of a criminal nature. One cannot but infer that the Court is of the opinion that in a case which under national law is an "administrative" one but under the Convention is a "criminal" one, the safeguards afforded by the tribunal that is to review the final decision of the administrative bodies differ from those required in a case that under national law is an "administrative" one but under the Convention is a "civil" one. I cannot see any justification for such differentiation, which does not find support in the wording or the purpose of Article 6 (art. 6) <sup>1</sup>. Nor does the Court offer one, its decision on this crucial point being unsupported by any argument. This is the more to be regretted as this differentiation is contrary to the Court's case-law <sup>2</sup>.

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<sup>1</sup> I refer in this context to footnote 62 of my aforementioned separate opinion in the case of *Fischer v. Austria*.

<sup>2</sup> See, inter alia, the *Le Compte, Van Leuven and De Meyere v. Belgium* judgment of 23 June 1981, Series A no. 43, pp. 23-24, para. 53; the *Albert and Le Compte v. Belgium* judgment of 10 February 1983, Series A no. 58, p. 17, para. 30; see also the *Diennet v. France* judgment of 26 September 1995, Series A no. 325-A, pp. 13-14, para. 28.