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

THIRD SECTION

CASE OF RIEPAN v. AUSTRIA

(*Application no. 35115/97*)

JUDGMENT

STRASBOURG

14 November 2000

FINAL

14/02/2001

In the case of Riepan v. Austria,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 15 June, 29 August and 24 October 2000,

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

PROCEDURE

1. The case originated in an application (no. 35115/97) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Oliver Riepan ("the applicant"), on 23 December 1996.

2. The applicant had been granted legal aid. The Austrian Government ("the Government") were represented by their Agent, Mr H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that in criminal proceedings against him, relating to charges of threatening behaviour, he did not have a public hearing as the trial was held in the prison where he was detained.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 15 June 2000 the Chamber declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 29 August 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr W. OKRESEK, Head of the Constitutional Law Section at the Federal Chancellery, *Agent*,
Mrs E. SCHINDLER, Federal Ministry of Justice, *Adviser*;

(b) *for the applicant*
Mr H. BLUM, of the Linz Bar, *Counsel*.

The Court heard addresses by Mr Blum, Mr Okresek and Mrs Schindler.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is serving an eighteen-year prison term following his conviction for murder and burglary in 1987. He was first detained at Karlau Prison, from which he escaped in 1991 but was rearrested within a day. In September 1994 he was transferred to Stein Prison and on 8 May 1995 to Garsten Prison, as the prison administration feared that he and a number of other inmates were devising an escape plan.

10. On 8 May 1995, when prison personnel at Garsten carried out the necessary reception formalities, the applicant refused to cooperate and demanded to be returned to Stein Prison, threatening that otherwise he and other inmates would set fire to Garsten Prison. On the following day, in the course of an interview with a senior prison officer, he again insisted on being returned to Stein Prison and threatened the prison officer that otherwise someone would pay the officer “a private visit”. A few days later he threatened a prison warder saying “that he should not turn his back on him”. On account of these incidents, criminal proceedings on charges of threatening behaviour (*gefährliche Drohung*) were instituted against the applicant.

11. The Steyr Regional Court (*Landesgericht*) decided to hold the hearing at Garsten Prison, which is situated about 5 km from Steyr. It set down 29 January 1996 as the date for the trial. The summons indicating the

date and place of the hearing was served on the applicant as well as on his official defence counsel a month before the hearing.

12. At the material time information about hearings held at the Steyr Regional Court was given as follows.

The public prosecutor's office at the Regional Court issued a hearing list (*Verhandlungsspiegel*) in the middle of each week for the following week, containing, *inter alia*, the date and place of all hearings in criminal proceedings. This information would also include the number of the court hearing room and would, if appropriate, indicate that the hearing was to be held at the scene of the crime or the name of the prison at which it was to take place. The Government were unable to provide the list for the week of 29 January 1996, as these lists are not kept, but asserted that it would, in accordance with the usual practice, have indicated Garsten Prison as the place of the hearing in the applicant's case. The hearing list was distributed by the public prosecutor's office to the media, namely to the most important national and regional newspapers, as well as to the national broadcasting station. Furthermore, a copy was given to the Regional Court's registry and information desk. Thus, interested persons could obtain information about forthcoming hearings either by calling the court's registry or by presenting themselves at the court's entrance.

13. On 29 January 1996 the Steyr Regional Court, sitting with a single judge, held a hearing in the closed area (*Gesperre*) of Garsten Prison. The hearing room measured about 25 sq. m. It was furnished with a table and seats for the judge, the secretary, the public prosecutor, the applicant and his defence counsel. There is disagreement between the parties as to whether there were further seats available for witnesses and potential spectators.

14. The hearing, which according to the minutes was public, was opened at 8.30 a.m. It lasted thirty-five minutes. The applicant, assisted by counsel, pleaded not guilty. The court heard the four prison officers to whom the applicant had allegedly addressed threats as witnesses. Neither the applicant nor his counsel complained about a lack of publicity at that time. Following the hearing, the Regional Court convicted the applicant of threatening behaviour, finding that he had on three occasions threatened prison personnel with arson or assault, and sentenced him to ten months' imprisonment.

15. Thereupon, the applicant filed an appeal on points of law and fact, as well as against sentence (*Berufung wegen Nichtigkeit, Schuld und Strafe*). He complained, in particular, as a ground of nullity, that the hearing on 29 January 1996 had not been public since it took place in the closed area of Garsten Prison, to which only people with special permits, other than prison personnel, had access. He also claimed that the room in which the hearing was held was too small to accommodate any spectators and alleged that not even the witnesses had been able to stay in the room simultaneously. Moreover, he challenged the Regional Court's assessment of the evidence

and its establishment of the facts. Finally, he complained that the sentence was too severe.

16. On 5 July 1996 the Linz Court of Appeal (*Oberlandesgericht*) held a public hearing in the court building in the presence of the applicant and his counsel. The appellate court is about 50 km from Garsten Prison. The hearing lasted three-quarters of an hour. The court heard the applicant as regards the alleged lack of publicity of the hearing on 29 January 1996. It also heard him on the various counts of threatening behaviour, questioning him as regards the statements made by the witnesses at the trial. It did not rehear the witnesses and the defence made no request to this effect.

17. The Court of Appeal dismissed the case. As to the complaint that the hearing on 29 January 1996 had not been public, the court noted that, according to information submitted by the Steyr Regional Court, the hearing was public in the sense that any interested person would have been allowed to attend. Had the prison governor been concerned that interested persons should not be granted access to the closed area, he would have been obliged to prohibit the conduct of the trial in that part of the prison. In any case, no such persons wishing to attend the trial had been present at the beginning of the hearing, and the judge had not been informed of any potential spectators.

18. As to the applicant's appeal on points of fact, the Court of Appeal stated that it had no doubts regarding the Regional Court's evaluation of the evidence and its establishment of the facts. The appellate court also confirmed the Regional Court's legal view that the applicant had, by threatening prison personnel with arson or assault, committed the offence of threatening behaviour. Finally, it found that the sentence was commensurate with the applicant's guilt.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Federal Constitution

19. Article 90 § 1 of the Federal Constitution (*Bundesverfassungsgesetz*) provides:

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

B. Code of Criminal Procedure

1. *Publicity of hearings*

20. Article 228 § 1 of the Code of Criminal Procedure (*Strafprozessordnung*) provides that the trial is to be public. Failure to comply with this requirement constitutes a ground of nullity.

According to Article 229 § 1, the public may be excluded from the trial in the interests of morals or public order. The court has to take a formal decision on the exclusion of the public. No remedy lies against such a decision.

Pursuant to Article 488, the above provisions apply to proceedings before a single judge.

21. According to Article 489 § 1 taken together with Article 472 § 1, an appeal hearing against a judgment of a single judge has to be public. Articles 228 and 229 apply.

2. *Appeal against a conviction by a single judge*

22. According to Article 489 § 1 taken together with Article 464, an appeal on points of law and fact and against sentence lies against the judgment of a single judge. By virtue of Article 467 § 1, the appellant may adduce new facts and evidence.

In accordance with Article 473 § 2, the appellate court will rehear witnesses and experts if it has doubts as to the correctness of the first-instance court's establishment of the facts, or if it holds that the hearing of new witnesses or experts as regards the same facts is necessary. Otherwise, it will take its decision on the basis of the file.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

23. The applicant alleged that he was deprived of a public hearing, as the Steyr Regional Court had held the trial in the closed area of Garsten Prison. He relied on Article 6 § 1 of the Convention, of which the relevant parts read as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... public hearing ... by [a] ... tribunal ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent

strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

24. The Government submitted as their principal argument that the hearing at Garsten Prison complied with the requirement of publicity. In the alternative they asserted that, in any case, there were sufficient reasons to justify an exclusion of the public. Furthermore, they contended that any possible lack of publicity at the trial stage was remedied by the public appeal hearing. The Court will examine each of these questions in turn.

A. Whether the hearing at Garsten Prison was public

25. The applicant asserted that, although the Steyr Regional Court had not formally excluded the public from the trial of 29 January 1996, the choice of the place of the hearing *de facto* deprived it of any publicity. He emphasised that the hearing was held in the closed area of Garsten Prison, to which visitors have no access. The room in which it was held was too small to accommodate any audience and was not furnished for this purpose. In any case, the attendance of spectators was merely theoretical since the public had not been informed that the hearing would be held in the prison. Even if potential spectators had wished to attend, they would hardly have been able to complete the necessary access formalities, given that the hearing was held quite early in the morning outside the usual prison visiting hours and only lasted for about half an hour.

26. The Government, for their part, pointed out that the Steyr Regional Court had not ordered the exclusion of the public under Article 229 § 1 of the Code of Criminal Procedure. They contended that, in accordance with the usual practice, the trial was included in the Steyr Regional Court's hearing list with an indication that the hearing would be held at Garsten Prison. As this hearing list is distributed to the media and is available to any interested person at the Regional Court, the public was adequately informed. In addition, the applicant and his counsel were informed about the place of the hearing about a month in advance and were free to invite potential spectators. Moreover, the Government maintained that any potential spectators would have been admitted to the hearing room following presentation of an identity card. Unlike regular prison visitors, they would have been granted access to the closed area. As to the hearing room, the Government conceded that it was small, but maintained that it could have accommodated a moderate number of spectators. Furthermore, had a fairly large audience assembled before the trial, it would have been possible to transfer the hearing to a larger room in the prison.

27. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the secret administration of justice with no public scrutiny; it is also one of the means whereby

confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society (see, for instance, the Pretto and Others v. Italy judgment of 8 December 1983, Series A no. 71, p. 11, § 21; the Diennet v. France judgment of 26 September 1995, Series A no. 325-A, pp. 14-15, § 33; and the Werner v. Austria judgment of 24 November 1997*, Reports of Judgments and Decisions* 1997-VII, p. 2510, § 45). The public character of the proceedings assumes a particular importance in a case such as the present, where the defendant in the criminal proceedings is a prisoner, where the charges relate to the making of threats against prison officers and where the witnesses are officers of the prison in which the defendant is detained.

28. It was undisputed in the present case that the publicity of the hearing was not formally excluded. However, hindrance in fact can contravene the Convention just like a legal impediment (see the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 14, § 25). The Court considers that the mere fact that the trial took place in the precincts of Garsten Prison does not necessarily lead to the conclusion that it lacked publicity. Nor did the fact that any potential spectators would have had to undergo certain identity and possibly security checks in itself deprive the hearing of its public nature (see Allen v. the United Kingdom, application no. 35580/97, Commission decision of 22 October 1998, unreported).

29. Nevertheless, it must be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see the Artico v. Italy judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33). The Court considers that a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators. However, the Court observes that the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.

30. The Court will therefore examine whether such measures were taken in the present case. As to the question whether the public could obtain information about the date and place of the hearing, the Court notes that the hearing was included in a weekly hearing list held by the Steyr Regional Court, which apparently contained an indication that the hearing would be held at Garsten Prison (see paragraph 12 above). This list was distributed to

the media and was available to the general public at the Regional Court's registry and information desk. However, apart from this routine announcement, no particular measures were taken, such as a separate announcement on the Regional Court's notice-board accompanied, if need be, by information about how to reach Garsten Prison, with a clear indication of the access conditions.

Moreover, the other circumstances in which the hearing was held were hardly designed to encourage public attendance: it was held early in the morning in a room which, although not too small to accommodate an audience, does not appear to have been equipped as a regular courtroom.

31. In sum, the Court finds that the Steyr Regional Court failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Garsten Prison had on its public character. Consequently, the hearing of 29 January 1996 did not comply with the requirement of publicity laid down in Article 6 § 1 of the Convention.

B. Whether the lack of publicity was justified for any of the reasons set out in the second sentence of Article 6 § 1

32. The applicant contended that there was no justification for the lack of a public hearing in his case. Had there been any security reasons to exclude the public, the Steyr Regional Court could have taken a decision in accordance with Article 229 § 1 of the Code of Criminal Procedure. However, it did not do so. Moreover, in so far as the alleged danger of his absconding was relied on, it was illogical that the Steyr Regional Court should have held the trial at Garsten Prison, which is only 5 km from Steyr, whereas the appeal hearing was held only a few months later in the court building of the Linz Court of Appeal, which is about 50 km from Garsten.

33. The Government asserted that, although the Steyr Regional Court had not excluded the public from the hearing of 29 January 1996, there would have been sufficient reasons to justify such a decision. They recalled, in particular, that the applicant had already escaped from prison in 1991 and that he had been transferred from Stein Prison to Garsten Prison as there was a suspicion that he, together with a number of other inmates, was devising an escape plan. The Government added that, due to the lapse of time, the danger of the applicant's absconding had become less acute by the time of the appeal hearing.

34. The Court considers that the present case concerning ordinary criminal proceedings cannot be compared to that of Campbell and Fell v. the United Kingdom, where it held that a requirement that disciplinary proceedings against convicted prisoners should be held in public would impose a disproportionate burden on the authorities of the State (judgment of 28 June 1984, Series A no. 80, p. 42, § 87). The Court would add that

security problems are a common feature of many criminal proceedings, but cases in which security concerns justify excluding the public from a trial are nevertheless rare. In the present case, although there were apparently some security concerns, the Steyr Regional Court did not consider them serious enough to necessitate a formal decision under Article 229 § 1 of the Code of Criminal Procedure excluding the public. Nor did the Linz Court of Appeal take such a view.

In these circumstances, the Court finds no justification for the lack of a public hearing at first instance in the present case.

C. Whether the lack of publicity at first instance was remedied by the public appeal hearing

35. The applicant asserted that publicity is especially important at the first-instance trial, when usually witnesses are heard and the facts are established. He argued that in the present case all the evidence was produced before the Steyr Regional Court, whereas before the Linz Court of Appeal not a single witness was heard.

36. The Government maintained that any lack of publicity was remedied by the public appeal hearing. They pointed out that in these proceedings the appellate court was competent to deal with all questions of fact and law. Moreover, referring to the Court's De Cubber v. Belgium judgment (26 October 1984, Series A no. 86), they argued that a lack of publicity, unlike a lack of impartiality, did not affect the court's internal organisation and was, in principle, capable of being remedied. It was more akin to a defect in the fairness of the proceedings which could be rectified by an appellate court (see the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B).

37. The Court recalls that it has already dealt with the question whether the lack of a public hearing before the lower instance may be remedied by a public hearing at the appeal stage. In a number of cases it has found that the fact that proceedings before an appellate court are held in public cannot remedy the lack of a public hearing at the lower instances where the scope of the appeal proceedings is limited, in particular where the appellate court cannot review the merits of the case, including a review of the facts and an assessment of the proportionality between the fault and the sanction (see, for instance, the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, p. 26, § 60, the Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 19, § 36, and the Diennet judgment cited above, p. 15, § 34, all relating to disciplinary proceedings falling under the civil head of Article 6 § 1; see also the Weber v. Switzerland judgment of 22 May 1990, Series A no. 177, p. 20, § 39, concerning good order in court proceedings falling under the criminal head of Article 6 § 1).

38. The Court doubts whether, in the present case, a conclusion *a contrario* can be drawn from this case-law which was developed in the context of proceedings to which Article 6 § 1 would not have been applicable had it not been for the "autonomy" of the concepts of "civil rights and obligations" and "criminal charge".

39. The Court recalls that in the area of proceedings which are classified neither as "civil" nor as "criminal" under domestic law, but as disciplinary or administrative, it is well established that the duty of adjudicating disciplinary or minor offences may be conferred on professional or administrative bodies which do not themselves comply with the requirements of Article 6 § 1 of the Convention as long as they are subject to review by a judicial body that has full jurisdiction (see, in particular, the Albert and Le Compte judgment cited above, p. 16, § 29, for disciplinary proceedings; see, as examples, the Öztürk v. Germany judgment of 21 February 1984, Series A no. 73, pp. 21-22, § 56, and the Schmautzer v. Austria judgment of 23 October 1995, Series A no. 328-A, p. 15, § 34, for administrative proceedings concerning minor offences). Thereby it has accepted that in such proceedings the lower instances may not qualify as independent and impartial tribunals and that the hearings before them may not be public.

40. The present case, however, concerns proceedings before courts of a classic kind which are classified as "criminal" both under domestic and Convention law. In this field, the Court has, in the context of the requirement of a tribunal's independence and impartiality, rejected the possibility that a defect at first instance could be remedied at a later stage, finding that the accused was entitled to a first-instance tribunal that fully met the requirements of Article 6 § 1 (see the De Cubber judgment cited above, pp. 18-19, §§ 32-33, and the Findlay v. the United Kingdom judgment of 25 February 1997, *Reports* 1997-I, p. 282, § 79).

The Court considers that a normal criminal trial requires the same kind of fundamental guarantee in the form of publicity. As stated above, by rendering the administration of justice transparent, the public character of a criminal trial serves to maintain confidence in the courts and contributes to the achievement of the aim of Article 6 § 1, namely a fair trial. To this end, all the evidence should, in principle, be produced in the presence of the accused at a public hearing with a view to adversarial argument (see the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 34, § 78, and the Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, p. 14, § 31). Given the possible detrimental effects that the lack of a public hearing before the trial court could have on the fairness of the proceedings, the absence of publicity could not in any event be remedied by anything other than a complete re-hearing before the appellate court.

41. However, an examination of the facts of the present case reveals that the review carried out by the Linz Court of Appeal did not have the requisite scope. It is true that the appellate court could review the case as regards questions of law and fact and could reassess the sentence. However, apart from questioning the applicant, the court did not take any evidence, and in particular did not rehear the witnesses. It is of little importance that the applicant did not request a rehearing of the witnesses. Firstly, the appellate court would, in accordance with the relevant procedural rules (see paragraph 22 above), have acceded to such a request only if it considered that the trial court's taking of evidence had been incomplete or defective. Secondly, it is for the courts to secure the accused's right to have evidence adduced at a public hearing.

Accordingly, the Court finds that the lack of a public hearing before the Steyr Regional Court was not remedied by the public hearing before the Linz Court of Appeal.

D. Conclusion

42. The Court concludes that there has been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

44. As regards pecuniary damage, the applicant claimed that the lack of publicity negatively influenced the outcome of the criminal proceedings against him, which resulted in a ten-month prison term. He therefore requested 150,000 Austrian schillings (ATS) as compensation for loss of income. Under the head of non-pecuniary damage, the applicant requested ATS 150,000 for the humiliation and anxiety suffered as a result of the lack of publicity at his trial.

45. The Government contended that there was no causal link between the violation and the pecuniary damage allegedly suffered. As to non-pecuniary damage, they submitted that the finding of a violation would provide sufficient redress.

46. The Court recalls that it cannot speculate as to what the outcome of the proceedings at issue might have been if the violation of the Convention had not occurred (see the Schmautzer judgment cited above, p. 16, § 44). It therefore makes no award under the head of pecuniary damage.

47. Further, the Court considers that the finding of a violation constitutes sufficient reparation in respect of any non-pecuniary damage suffered (see, for instance, the Diennet judgment cited above, p. 17, § 43).

B. Costs and expenses

48. The applicant claimed ATS 91,785.50 as regards costs and expenses incurred in the Convention proceedings. The Government, noting that the applicant has had the benefit of legal aid in the proceedings before the Court, argued that about half the amount would be appropriate.

49. The Court, noting that the applicant received a total amount of 7,011.07 French francs under the Court's legal aid scheme and making an assessment on an equitable basis, awards ATS 50,000 under this head.

C. Default interest

50. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the any non-pecuniary damage sustained by the applicant;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, ATS 50,000 (fifty thousand Austrian schillings) in respect of costs and expenses;
   (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 14 November 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ Registrar	J.-P. COSTA President