



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

FIRST SECTION

CASE OF JOSEF FISCHER v. AUSTRIA

(Application no. 33382/96)

JUDGMENT

STRASBOURG

17 January 2002

FINAL

17/04/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Josef Fischer v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr G. BONELLO,

Mr P. LORENZEN,

Mrs N. VAJIĆ,

Mrs S. BOTOUCHAROVA,

Mr V. ZAGREBELSKY,

Mrs E. STEINER, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 13 December 2001,

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

PROCEDURE

1. The case originated in an application (no. 33382/96) 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, Josef Fischer (“the applicant”), on 29 May 1996.

2. The applicant was represented before the Court by Mr. A. Adam, a lawyer practising in Neulengbach (Austria). The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that, in criminal proceedings against him, written observations of the Procurator General on his plea of nullity to the Supreme Court had not been communicated to him.

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 of the Rules of Court.

6. By a decision of 6 January 2000 the Court declared the application partly inadmissible. By a decision of 20 March 2001 the Court declared the remainder of the application admissible.

7. As from 1 November 2001 the application was reallocated to the First Section of the 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 of the Rules of Court.

8. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. On 12 May 1995 the Vienna Regional Court for Criminal Matters (*Landesgericht für Strafsachen*) convicted the applicant, *inter alia*, under Section 164 of the Penal Code (*Strafgesetzbuch*), on numerous counts of handling stolen goods (*Hehlerei*) and sentenced him to three years' imprisonment. The Regional Court found that the applicant, who dealt with antiques, had bought, between 1986 and 1988, antiques which had been stolen in the north of Italy.

10. On 14 September 1995 the applicant filed a plea of nullity and an appeal against sentence with the Supreme Court (*Oberster Gerichtshof*).

11. On 12 October 1995 the Procurator General (*Generalprokurator*) submitted the following comments on the applicant's plea of nullity:

"In the view of the Procurator General, the plea of nullity of the accused Josef Fischer can be dealt with under Section 285d of the Code of Criminal Procedure. The transmission of a decision is requested."

12. On 21 November 1995 the Supreme Court dismissed the applicant's plea of nullity and, as regards the appeal against sentence, referred the case to the Vienna Court of Appeal (*Oberlandesgericht*). On 23 January 1996 the Court of Appeal dismissed the applicant's appeal.

II. RELEVANT DOMESTIC LAW

13. Under Section 285 (d) § 1 of the Code of Criminal Procedure (*Strafprozessordnung*), a plea of nullity may be rejected by the Supreme Court after deliberations in private if the Supreme Court unanimously finds that the complaint should be dismissed as manifestly ill-founded without any need for further deliberation.

14. Section 35 § 2 of the Code of Criminal Procedure, as in force at the relevant time, reads as follows:

"If the public prosecutor at an appellate court submits observations on an appeal on grounds of nullity ..., the appellate court shall communicate those observations to the

accused (person concerned), advising him that he may submit comments on them within a reasonable period of time that it shall determine. Such communication may be dispensed with if the prosecutor confines himself to opposing the appeal without adducing any argument, if he merely supports the accused or if the accused's appeal is upheld."

15. Since the 1996 Criminal Law Amendment Act (*Strafrechtsänderungsgesetz*) the last sentence of Section 35 § 2 reads as follows:

"Such communication may be dispensed with if the prosecutor merely supports the accused or if the accused's appeal is upheld."

THE LAW

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

16. The applicant complains that the Supreme Court decided on his plea of nullity after having obtained the submissions of the Procurator General without informing him of these submissions or giving him an opportunity to react to them. He relies on Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

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

17. The Government submit that the Procurator General is a party *sui generis* and does not have a prosecuting function. Therefore it is not, strictly speaking, an opponent of the applicant. In any event, the brief submissions of the Procurator General did not amount to comments on the facts of the case or arguments. Thus, there is no breach of the principle of equality of arms in the present case.

18. The Court recalls that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent (*Dombo Beheer B.V. v. the Netherlands* judgment of 27 October 1993, Series A no. 274, p. 19, § 33). In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice (*Bulut v. Austria* judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II, p. 359, § 47).

19. As regards the contents of submissions filed by the prosecution, the Court recalls further that the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality. It is a matter for the defence to assess whether a submission

deserves a reaction. It is therefore unfair for the prosecution to make submissions to a court without the knowledge of the defence (*Bulut v. Austria* judgment, *op.cit.* § 49).

20. In the present case the Procurator General filed a short comment on the applicant's plea of nullity which was not communicated to the applicant.

21. The Court observes, that in the case of *Bulut v. Austria* it found a breach of the principle of equality of arms because the Procurator General had submitted to the Supreme Court comments on a plea of nullity - similar to those made in the present case - without bringing them to the attention of the accused. The Court sees no reason to come to a different conclusion in the present case and finds that the principle of equality of arms has not been respected in the proceedings before the Supreme Court.

22. There has, therefore, been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. 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

24. The applicant, without specifying whether he claimed pecuniary or non-pecuniary damages, claimed an amount of 550,000 Austrian schillings [ATS] (39,970.93 euros [EUR]) under this head. He submitted that this sum corresponded to the amount an Austrian court would grant as compensation for unlawful detention for a period comparable to his sentence.

25. The Government disputed this claim. In their view, a finding of a violation of Article 6 § 1 could not lead to the conclusion that the applicant's detention following his conviction has been unlawful. Rather, if the Court were to find a breach Article 6 § 1 in the present case, the consequence on the domestic level would be fresh proceedings before the Supreme Court.

26. Insofar the applicant may be understood to claim compensation for pecuniary damage, the Court finds that there is no causal link between the breach of which the complaint is made and the alleged damage; it is impossible to speculate as to what the outcome of the proceedings would have been if they had satisfied the requirements of Article 6 § 1 (see e.g. the *Werner v. Austria* judgment of 24 November 1997, Reports 1997-VII, p. 2514, § 72).

27. Insofar the applicant may be understood to claim non-pecuniary damage, the Court considers that in the circumstances of the case the finding of a violation in itself constitutes sufficient just satisfaction.

B. Costs and expenses

28. The applicant claimed 203,223 ATS (14,769.11 EUR) for costs and expenses incurred in the domestic proceedings. This claim is disputed by the Government.

29. The Court finds that compensation for costs incurred in the domestic proceedings may only be granted insofar as they were necessary in trying to prevent the violation found (König v. Germany judgment of 10 March 1980 (Article 50), Series A no. 36, p. 17, § 20). In the present case it does not appear from the applicant's submissions that any specific costs were incurred in any attempt to prevent the breaches of the Convention found. This part of the claim must therefore be rejected.

Further, the applicant claimed 45,720 ATS (3,322.67 EUR) for costs and expenses incurred in the Convention proceedings. The Government considered this claim excessive because the applicant's lawyer had charged the full fees for the observations in reply, while, given their length, only fees for a short letter should have been charged. In the Government's view an amount of 34,290 ATS was appropriate.

On the basis of the evidence in its possession, the observations of the parties, and its case-law, the Court considers it equitable to award 40,000 ATS (2,906.98 EUR).

C. Default interest

30. 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 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, for costs and expenses, 40,000 ATS (forty thousand Austrian schillings) i.e. 2,906.98 EUR (two thousand nine hundred and six euros ninety-eight cents);

(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 claim for just satisfaction.

Done in English, and notified in writing on 17 January 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President