CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF W.F. v. AUSTRIA

(Application no. 38275/97)

JUDGMENT

STRASBOURG

30 May 2002

FINAL

30/08/2002

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 W.F. v. Austria,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mrs E. STEINER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 7 May 2002,

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

PROCEDURE

1. The case originated in an application (no. 38275/97) 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, W.F. ("the applicant"), on 19 August 1997.

2. The applicant was represented by Mr. J. Postlmayr, a lawyer practising in Mattighofen (Austria). The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department of the Federal Ministry of Foreign Affairs.

3. The applicant alleged a violation of his right not to be tried or punished twice for the same offence.

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 11 September 2001 the Court declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

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 21 May 1995 the applicant was involved in a road traffic accident and, on 19 October 1995, he was found by the Braunau District Administrative Authority (*Bezirkshauptmannschaft*) to have been driving under the influence of alcohol, contrary to sections 5 § 1 and 99 § 1 (a) of the Road Traffic Act 1960 (*Straßenverkehrsordnung*). He was sentenced to pay a fine of ATS 14,000.00. It does not appear that the applicant appealed against this decision.

10. On 1 August 1996 the Mattighofen District Court convicted him under Article 88 §§ 1 and 3 of the Penal Code of negligently causing bodily harm in particularly dangerous conditions (*fahrlässige Körperverletzung unter besonders gefährlichen Verhältnissen*), and sentenced him to a fine of ATS 8,000.00.

11. On 2 June 1997 the Ried Regional Court dismissed the applicant's appeal. The Regional Court distinguished the present case from the Gradinger case of the European Court of Human Rights (Gradinger v. Austria judgment of 23 October 1995, Series A no. 328-C) on the ground that in the Gradinger case the administrative proceedings were after the criminal proceedings, whereas in the present case the order of the criminal and administrative criminal proceedings was reversed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Road Traffic Act

12. Section 5 of the Road Traffic Act 1960 provides that it is an offence for a person to drive a vehicle if the proportion of alcohol in his blood or breath is equal to or higher than 0.8 grams per litre or 0.4 milligrams per litre respectively.

13. Section 99 of the 1960 Act provides, so far as relevant, that:

> "(1) It shall be an administrative offence (*Verwaltungsübertretung*), punishable with a fine of not less than ATS 8,000 and not more than ATS 50,000 or, in default of payment, with one to six weeks' imprisonment, for any person:

(a) to drive a vehicle when under the influence of drink ...”

14. Section 99 § 6 of the Road Traffic Act regulates the relation between the offences under section 99 §§ 1-5 of that Act and offences of ordinary criminal law coming within the jurisdiction of the ordinary courts. While in respect of some offences under the Road Traffic Act Section 99 of that Act stipulates a relation of subsidiarity – if the same set of facts might constitute an offence of ordinary criminal law and the Roads Traffic Act only an offence falling within the jurisdiction of the ordinary courts is committed – this is not the case with the offence under the Road Traffic Act of driving a vehicle under the influence of drink.

15. In its judgment of 5 December 1996 the Constitutional Court had to examine the constitutionality of Section 99 subsection (6)(c) of the Road Traffic Act, by virtue of which the administrative offence of driving under the influence of drink was not subsidiary to an offence falling within the jurisdiction of the courts.

The Constitutional Court noted that that it was not contrary to Article 4 of Protocol No. 7 if a single act constituted more than one offence. This was a feature common to the criminal law of many European countries. However, it was also accepted in criminal law doctrine that sometimes a single act only appeared to constitute more than one offence, whereas interpretation showed that one offence entirely covered the wrong contained in the other so that there was no need for further punishment. Thus, Article 4 of Protocol No. 7 prohibited the trial and punishment of someone for different offences if interpretation showed that one excluded the application of the other. Where, as in the present case, the law explicitly provided that one offence was not subsidiary to another, it had to be guided by Article 4 of Protocol No. 7. The Court’s Gradinger judgment of 23 October 1995 had shown that there was a breach of this Article if an essential aspect of an offence, which had already been tried by the courts, was tried again by the administrative authorities.

Section 99 subsections (1)(a) and (6)(c) of the Road Traffic Act, taken together, meant that the criminal administrative offence of drunken driving could be prosecuted even when an offence falling within the competence of the normal criminal courts was also apparent. According to the criminal courts’ constant case-law under Article 81 § 2 of the Criminal Code (cited below), drunken driving was also an essential aspect of certain offences tried by these courts. In so far as section 99 (6)(c) of the Road Traffic Act limited the subsidiarity of administrative offences to those enumerated in subsections (2) to (4) of Section 99, thus excluding subsidiarity for the offence of drunken driving contained in section 99 (1)(a), it violated Article 4 of Protocol No. 7.

B. The Criminal Code

16. Under Article 88 § 1 of the Criminal Code, it is an offence, punishable by up to three months' imprisonment or a fine, to cause physical injury by negligence.

17. Section 88 § 3 increases the sentence in respect of causing injury by up to six months' imprisonment , if the special circumstances of Section 81 § 2 apply. Section 88 § 4 increases the sentence in respect of causing injury by up to two years' imprisonment, if the special circumstances of Section 81 § 2 apply and the injury is particularly serious.

18. Section 81 § 2 applies where a person commits the offence

> "after allowing himself, even if only negligently, to become intoxicated ... through the consumption of alcohol, ...".

19. Under an irrebuttable presumption applied by the criminal courts, a driver with a blood alcohol level of 0.8 grams per litre or higher is deemed to be "intoxicated" for the purposes of section 81 § 2.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

20. The applicant alleged a violation of Article 4 of Protocol No. 7 which, so far as relevant, provides as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

21. The applicant contended that he was punished twice for driving under the influence of drink, first by the District Administrative Authority under sections 5 § 1 and 99 § 1 (a) of the Road Traffic Act and, secondly, by the District Court , which found that the special circumstances of Article 81 § 2 of the Criminal Code applied. Thus, two sentences were imposed for essentially the same offence which was in breach of the principle of *ne bis in idem*.

22. The Government submit that the present case is comparable to the Oliveira v. Switzerland case (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V), where the Court had found no violation

of Article 4 of Protocol No. 7. The present case, like Oliveira, concerns "a typical example of a single act constituting various offences (*concours idéal d'infractions*)", i.e. a case where one criminal act constitutes two separate offences, which does not mean that a person has been tried or punished twice for the same offence and therefore did not infringe Article 4 of Protocol No. 7.

23. The Court observes at the outset that the aim of Article 4 of Protocol No. 7 is to prohibit that a person is tried or punished twice for the same aspect of one criminal act (see, *mutatis mutandis*, Gradinger v. Austria judgment of 23 October 1995, Series A no. 328-C, p. 65, § 53).

24. The Court recalls that it has dealt on various occasions with cases where two convictions arose out of the same factual event (Gradinger, op. cit.; Oliveira judgment, op. cit.; *Ponsetti and Chesnel v. France* (dec.), nos. 36855/97, 41731/98, ECHR 1999-VI, and *Franz Fischer v. Austria*, no. 37950/97, 29.8.2001).

25. In the most recent of these cases, that of Franz Fischer v. Austria (op. cit., § 25), the Court held as follows:

> "The Court observes that the wording of Article 4 of Protocol No. 7 does not refer to 'the same offence' but rather to trial and punishment 'again' for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others (see paragraph 14 above [also § 14 of the present judgment]). An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements."

26. Like the applicant in the present case, the applicant in the case of Franz Fischer was first convicted by a District Administrative Authority under sections 5 § 1 and 99 § 1 (a) of the Road Traffic Act of drunk driving and, subsequently, by a criminal court of having caused death by negligence under the special circumstances of Article 81 § 2 of the Criminal Code.

27. In its judgment in that case the Court, on the basis of the above quoted considerations found that the Franz Fischer case had to be distinguished from the Oliveira case but was similar to the Gradinger case and concluded that Article 4 of Protocol No. 7 has been violated.

28. Having regard to these circumstances, the Court finds that there is nothing to distinguish the present case from the Franz Fischer v. Austria judgment. It, therefore, concludes that in the proceedings complained of there has been a violation of Article 4 of Protocol No. 7.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicant claimed 30,000 Austrian schillings (ATS) (2,180.19 euros [EUR]) for non-pecuniary damage and submitted that he suffered considerable anxiety and distress by reason of the criminal court proceedings against him. As to pecuniary damage he claimed 8,000 ATS (581.38 EUR) as compensation for the fine imposed on him by the Mattighofen District Court.

31. The Government did not comment on the applicant's claims.

32. As regards the applicant's claim 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 4 Protocol No. 7, that it to say what sanction would have been imposed on the applicant if the Austrian criminal courts had not applied the special circumstances of Article 81 § 2 of the Criminal Code (see *Franz Fischer v. Austria*, op. cit., § 36; Werner v. Austria judgment of 24 November 1997, Reports 1997-VII, p. 2514, § 72). Therefore, the Court makes no award under this head.

33. As regards the applicant's claim for non-pecuniary damage, the Court finds that in the circumstances of the case the finding of a violation in itself constitutes sufficient just satisfaction (see *Franz Fischer v. Austria*, op. cit., § 37; *Lughofer v. Austria*, no. 22811/93, § 22, 30 November 1999).

B. Costs and expenses

34. The applicant claimed 73,988.80 ATS (5,376.98 EUR) for costs and expenses incurred in the domestic court proceedings.

35. The Government did not comment on the applicant's claim.

36. The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93,

ECHR 1999-III, § 80). The Court considers that these conditions are only met as regards the costs incurred in the appeal proceedings before the Ried Regional Court, which the applicant puts at 15,018.40 ATS (1,091.48 EUR). Consequently the Court awards this sum.

37. The applicant further claims 3,060 EUR for costs incurred in the Convention proceedings.

38. The Government did not comment on the applicant's claim.

39. The Court finds this claim reasonable, and consequently allows it in full.

C. Default interest

40. 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 4 of Protocol No. 7 to 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, 4,151.48 EUR (four thousand one hundred fifty one euros and forty eight cents) 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 claim for just satisfaction.

Done in English, and notified in writing on 30 May 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President