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

FIRST SECTION

CASE OF SAILER v. AUSTRIA

(Application no. 38237/97)

JUDGMENT

STRASBOURG

6 June 2002

FINAL

06/09/2002

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 Sailer 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. VAJIC,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 16 May 2002,

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

PROCEDURE

1. The case originated in an application (no. 38237/97) 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 a German national, Gerhard Sailer ("the applicant"), on 7 October 1997.

2. The applicant was represented by Mr J. Postlmayr, a lawyer practising in Mattighofen. 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. The German Government, having been informed by the Registrar of their right to intervene, did not avail themselves of that right (Article 36 of the Convention).

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

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 10 May 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 First Section

8. The applicant filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1970 and lives in St. Peter am Hart.

10. On 9 July 1995 the applicant was involved in a road traffic accident in which his passenger was slightly injured.

11. On 25 September 1995 the Braunau District Administrative Authority (*Bezirkshauptmannschaft*) ordered the applicant to pay a fine of 10,000 Austrian schillings (ATS), with nine days' imprisonment in default, for driving under the influence of drink, contrary to sections 5 (1) and 99 (1) (a) of the Road Traffic Act 1960 (*Straßenverkehrsordnung*). The applicant did not appeal.

12. Meanwhile, on 8 August 1995, a criminal information was laid against him.

13. On 7 January 1997 the Grieskirchen District Court (*Bezirksgericht*) convicted the applicant under Article 88 §§ 1 and 3 of the Criminal Code (*Strafgesetzbuch*) of causing injury by negligence, with the additional element of Article 81 § 2, and sentenced him to pay a fine of ATS 8,000 with twenty days' imprisonment in default.

14. On 18 June 1997 the Wels Regional Court (*Landesgericht*) dismissed the applicant's appeal. The Regional Court noted that the European Court of Human Rights had meanwhile found that the Austrian reservation in respect of Article 4 of Protocol No. 7 was invalid (see the Gradinger v. Austria judgment of 23 October 1995, Series A no. 328-C, pp. 64-65, §§ 49-51). However, the judgment was not directly applicable and, therefore, it had to be assumed that double punishment was still lawful under domestic law, if the courts decided after the administrative authorities. In addition it noted that, following a judgment of the Constitutional Court changing the subsidiarity provisions in section 99 (6) (c) of the Road Traffic Act, the administrative offence of drunken driving was subsidiary to an offence under the Criminal Code committed with the additional element of Article 81 § 2. This change of law was however not applicable to the case in issue.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Road Traffic Act

15. Section 5 (1) 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.

16. Section 99 of the 1960 Act, so far as relevant, provided at the material time, that:

> "(1) It shall be an administrative offence (*Verwaltungsubertretung*), 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 ...
>
> (6) An administrative offence is not committed where: ...
> (c) facts constituting an offence under sub-sections (2), (2a), (2b), (3) or (4) also constitute an offence falling within the jurisdiction of the [ordinary] courts ... ."

17. 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. Insofar 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.

18. Meanwhile, section 99 (6)(c) of the Road Traffic Act has been amended. It now provides that an administrative offence is not committed where facts constituting an offence under the Road Traffic Act also constitute an offence falling within the jurisdiction of the ordinary courts.

B. The Criminal Code

19. By Article 88 § 1 of the Criminal Code, it is an offence, punishable by up to three months' imprisonment or a fine of up to one-hundred and eighty day-rates, to cause injury by negligence. By virtue of Article 88 § 3, where the special circumstances of Article 81 § 2 apply, the maximum possible sentence is increased from three months' to six months' imprisonment or a fine of up to three-hundred and sixty day-rates.

20. Article 81 § 2 applies where a person commits the offence

> "after allowing himself, even if only negligently, to become intoxicated ... through the consumption of alcohol, but not to an extent which excludes his responsibility, notwithstanding that he has foreseen or could have foreseen that he would shortly have to engage in an activity likely to pose ... a danger to the lives ... of others if performed in that state".

By virtue of 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 Article 81 § 2.

THE LAW

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

21. 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."

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 convicted him under Article 88 §§ 1 and 3 of the Criminal Code finding that the special circumstance of Article 81 § 2 applied. The applicant maintained that the present case was not comparable to the Oliveira v. Switzerland case (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V), but resembled the Gradinger v. Austria case (cited above), in which the Court had found a violation of Article 4 of Protocol No. 7.

22. The Government asserted that the present case was comparable to the Oliveira case, as it concerned a typical example of a single act constituting various offences, i.e. a case where one criminal act constitutes two separate offences, which did not infringe Article 4 of Protocol No. 7.

23. The Court recalls that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see the Gradinger judgment, cited above, p. 65, § 53).

24. The Court further recalls that it has dealt on various occasions with cases where two convictions arose out of the same set of facts (see the Gradinger judgment and the Oliveira judgment, both cited above, as well as *Ponsetti and Chesnel v. France* (dec.), nos. 36855/97 and 41731/98, ECHR 1999-VI and *Franz Fischer v. Austria,* no. 37950/97, 29.05.2001).

25. In the most recent of these cases, the *Franz Fischer v. Austria* judgment (*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 (...). 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. The Franz Fischer case is similar to the present one, as it related to the applicant's conviction by the criminal courts of causing death by negligence under the special circumstance of Article 81 § 2 of the Criminal Code following a conviction by the administrative authority under sections 5 (1) and 99 (1)(a) of the Road Traffic Act for driving under the influence of drink.

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 v. Switzerland case but was similar to the Gradinger v. Austria case and concluded that Article 4 of Protocol No. 7 had been violated.

28. Having regard to these circumstances and noting that the parties have not advanced any new argument, the Court sees nothing to distinguish the present case from the Franz Fischer case. It therefore concludes that 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 requested ATS 8,000, that is 581.38 euro (EUR) as compensation for the fine imposed by the criminal courts. Further, he requested ATS 30,000 or EUR 2,180.19 for non-pecuniary damage.

31. The Government did not comment.

32. As to 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 of Protocol No. 7, that is to say what sanction would have been imposed on the applicant if the criminal courts had not applied the special circumstance of Article 81 § 2 of the Criminal Code (see *Franz Fischer v. Austria*, cited above, § 36). Therefore, the Court makes no award under this head.

33. Moreover, the Court having regard to its case-law in comparable cases (*Franz Fischer v. Austria*, *ibid*.), considers that the finding of a violation constitutes in itself sufficient just satisfaction as regards any non-pecuniary damage the applicant may have sustained.

B. Costs and expenses

34. The applicant requested ATS 47,334.84 or EUR 3,439.36 for costs and expenses incurred in the domestic proceedings and ATS 40,455.28 or EUR 2,940 for costs and expenses incurred in the Convention proceedings.

35. The Government did not comment.

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 as a recent authority, *Jerusalem v. Austria*, no. 26958/95, § 57, to be published in ECHR 2001).

37. As to the costs of the domestic proceedings the Court notes that only the costs and expenses incurred in the appeal proceedings before the Regional Court which amount to ATS 15,280.56 or EUR 1,110.48 were incurred to prevent or redress the breach of the Convention found. As to the Convention proceedings the Court finds the amount claimed by the applicant reasonable and therefore allows it in full.

38. Thus, the Court awards a total amount of EUR 4,050.48 for costs and expenses.

C. Default interest

39. 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. that there has been a violation of Article 4 of Protocol No. 7 to the Convention;

2. that this finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage the applicant may have sustained;

3. (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, EUR 4,050.48 (four thousand and fifty euros and 48 cents) for 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 6 June 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NIELSEN C.L. Rozakis
Deputy Registrar President