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

FIRST SECTION

CASE OF I.H. AND OTHERS v. AUSTRIA

(Application no. 42780/98)

JUDGMENT

STRASBOURG

20 April 2006

FINAL

20/07/2006

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 I.H. and Others v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 30 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 42780/98) 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 I.H., Me.H, R.H. and Mu.H. Austrian nationals, ("the applicants"), on 23 July 1998.

2. The applicants were represented by Mr W.L. Weh, a lawyer practising in Bregenz (Austria). The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicants alleged, in particular, that the re-qualification of the offence by the trial court from rape under section 201 § 2 of the Penal Code to rape under section 201 § 1 prevented them from exercising their defence rights properly.

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 23 October 2001 the Court declared the application partly inadmissible and decided to give notice to the respondent government of the remainder of the application.

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 (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

8. By a decision of 6 May 2003 the Court declared the remainder of the application partly admissible.

9. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the First Section.

10. The applicants, but not the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicants, four in all, are Austrian nationals of Turkish origin, born in 1978, 1959, 1959 and 1961 respectively, and are living in Lustenau (Austria). The second applicant is the first applicant's father, the third applicant his mother and the fourth applicant his uncle. On 21 March 1997 the Feldkirch Public Prosecutor filed a bill of indictment against the applicants charging them with rape under section 201 § 2 of the Penal Code, coercion and deprivation of liberty. The public prosecutor stated that since September 1995 the first applicant had been the fiancé of F.D. Their future marriage had been arranged by their respective fathers. After the death of F.D.'s father in May 1996, F.D. considered herself no longer bound by the promise of betrothal given by her father. She told this to the first applicant and his parents who, however, refused to accept her change of mind.

12. Ever since the death of F.D.'s father the second applicant regularly brought F.D. by car to her place of work and drove her home again after work. On 22 July 1996, around 5.00 a.m., the second applicant, accompanied by the first and third applicant, picked up F.D. and brought her to the home of the fourth applicant. The second applicant told her that she was going to have sexual intercourse with the first applicant. He also told her that if she resisted she would be held by the second and fourth applicants and that the third applicant would force her legs apart. She was accompanied to the bedroom. The first applicant attempted to have sexual intercourse with her, but this attempt failed because of F.D.'s resistance. Thereupon, the first applicant requested the third applicant to help him. The third applicant tied F.D.'s hands with adhesive tape and stuck a strip of adhesive tape over her mouth. She then held F.D.s arms while the first applicant had intercourse with F.D. Thereafter, F.D. was constrained to spend the rest of the day with the first applicant in the house.

13. The second and third applicants phoned her mother and told her that F.D. had been kidnapped by them and that she should not contact the police, otherwise F.D. would be killed. Nevertheless, F.D.'s mother informed the police about the incident. Around 8.00 p.m. F.D. was allowed to phone her mother. Soon afterwards police officers arrived at the house and arrested all four applicants.

14. On 23 May 1997 the applicants' trial was held before the Feldkirch Regional Court. The applicants, assisted by counsel, Mr. Weh, maintained their innocence and claimed that F.D. had accompanied them voluntarily in order to become closer acquainted with the first applicant's uncle and that, on this occasion, she had had sexual intercourse with the first applicant of her own free will. No violence whatsoever had been used against her. The court heard the applicants and several witnesses, including the victim, her mother and a doctor who had examined the victim at the hospital. F.D. repeated to the court the statements she made to the police and the investigating judge, but added that her family and the applicants' family had meanwhile settled the matter and that she had received a payment of 50,000 ATS from the applicants' family.

15. On the same day the Regional Court convicted the applicants of rape under section 201 § 1 of the Penal Code and of deprivation of liberty. The first and second applicants were also convicted of aggravated coercion. The first applicant was sentenced to one year's imprisonment, the second applicant to two years, the third applicant to twenty months and the fourth applicant to eighteen months of imprisonment. In its judgment, the court described the course of the events in the same terms as in the bill of indictment.

16. As regards the classification of the offence in law, the court found that from the facts established it was apparent that F.D. had been exposed to and had been threatened with acts of serious violence. It therefore had to convict the applicants of rape under Section 201 § 1 of the Penal Code.

17. On 24 July 1997 the applicants filed pleas of nullity (*Nichtigkeits-beschwerde*) and appeals against sentence (*Berufung*). The applicants complained, inter alia, that their conviction for rape had gone beyond the terms of the indictment (*Anklageüberschreitung*) as they were convicted of rape under section 201 § 1 of the Penal Code while the bill of indictment had charged them with rape under section 201 § 2 of the Penal Code. In the applicants' submission, if the Regional Court had been of the opinion that the public prosecutor's indictment had not corresponded to all the elements of the case it should have given the public prosecutor the opportunity to amend the indictment. This would at the same time have given the applicants the opportunity to react to the amendment and to dispute the existence of any aggravating circumstances.

18. On 2 December 1997 the Supreme Court rejected the applicants' appeal under section 285d § 1 of the Code of Criminal Procedure without

holding a hearing. As regards the complaint that the judgment had exceeded the terms of the indictment with respect to the charge of rape, the Supreme Court found that a ground of nullity could only be made out if the applicants had been found guilty of an offence which had not been the subject matter of the indictment. The subject matter of an indictment was a specific act or event which, in the eyes of the public prosecutor, had brought about a punishable result. If, on the basis of the evidence taken, the event which formed the basis of the indictment had, in certain details, occurred in a manner different from that assumed by the prosecution, the court had to apply the correct law to the established facts even if the result was that the legal qualification then applied differed from the one made by the public prosecutor.

It was only where the taking of evidence showed a course of events which was entirely different from the events described in the indictment such that it could no longer be considered covered by the terms of the indictment, that a conviction would pre-suppose the prior amendment of the indictment. In the present case, the act with which the applicants were charged was identical to the established facts as set out in the judgment. The trial court had merely come to a different legal qualification on the facts. However, this did not exceed the terms of the indictment (*Anklageüberschreitung*). Moreover, the different legal qualification given to the offence was not in breach of the Convention. It was the main purpose of Article 6 § 3 (d) of the Convention to achieve equality of arms between the prosecution and the defence. However, it could not be considered that a legal qualification in the judgment which differed from the one in the indictment infringed this or any other provision of the Convention. The Supreme Court remitted the applicants' appeal against sentence to the Innsbruck Court of Appeal.

19. On 11 February 1998 the Court of Appeal dismissed the applicants' appeal and confirmed the sentences fixed by the Regional Court.

II. RELEVANT DOMESTIC LAW

20. Section 201 of the Penal Code (*Strafgesetzbuch*) reads as follows:

> "1. Anyone who compels another person, by use of serious violence or threats of immediate serious danger to life or limb, to have sexual intercourse or to perform a sexual act which amounts to sexual intercourse shall be punished by imprisonment of one to ten years. Rendering unconscious also qualifies as use of serious violence.
>
> 2. Anyone who, except for the case under paragraph 1, compels another person, by use of violence, deprivation of liberty or threats of danger to life or limb, to have sexual intercourse or to perform a sexual act which amounts to sexual intercourse shall be punished by imprisonment of six months to five years.

3. If the violence resulted in serious bodily harm to the victim, or if the victim has endured great pain for a prolonged period or has been particularly humiliated, the perpetrator of the offence shall be punished by imprisonment of five to fifteen years in the case of paragraph 1 and by imprisonment of one to ten years in the case of paragraph 2. If the violence resulted in the death of the victim the perpetrator of the offence shall be punished by imprisonment of ten to twenty years in the case of paragraph 1 and by imprisonment of five to fifteen years in the case of paragraph 2."

21. Under the Code of Criminal Procedure the remedies against a judgment by a chamber of a Regional Court are, on the one hand, a plea of nullity (*Nichtigkeitsbeschwerde*) and, on the other, an appeal against sentence (*Berufung*). A plea of nullity has to be addressed to the Supreme Court while an appeal against sentence has to be addressed to the Court of Appeal. Section 281 enumerates exhaustively the various grounds for nullity which can be invoked in a plea of nullity. They comprise such elements as participation of an excluded judge (S. 281 § 1 (1)), lack of proper assistance by a defence counsel (S. 281 § 1 (1a)) or breach of a provision of the Code of Criminal Procedure for which the sanction of nullity is expressly provided for (S. 281 § 1 (3). Moreover, it is a ground for nullity if, due to incorrect interpretation, an inapplicable legal provision has been applied to the act underlying a judgment (s. 281 § 1 (10)). In a plea of nullity the assessment of evidence by the Regional Court cannot be challenged unless in the judgment the assessment of evidence is not set out, or if it is unclear, illogic, or in contradiction to the case file (S. 281 § 1 (5) and (5a).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicants complained that the re-qualification of the offence by the trial court from rape under section 201 § 2 of the Penal Code to rape under section 201 § 1 without any prior change to the indictment prevented them from exercising their defence rights properly.

23. Article 6 of the Convention in its relevant parts provides:

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

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence; ..."

24. The Government submitted that it flows from the "principle of prosecution" which governs criminal procedures in Austria that the prosecution must bring a charge by filing a bill of indictment. Under the relevant law the subject matters of an indictment are essentially elements of fact. Although a bill of indictment must also include the legal definition of the offence the accused is charged with, the courts are not bound by the legal qualification given by the prosecution. Criminal courts cannot convict an accused of an offence which was neither included in the bill of indictment itself nor to which the indictment was extended in the course of the trial, but this limitation only relates to the events which form the basis of the charges, not to the legal qualification.

25. In the present case the trial court had based its finding of guilt on established facts which were described in exactly the same manner as in the bill of indictment. Thus, the trial court did not go beyond the terms of the indictment, but merely found that the requirements of the offence of rape under Section 201 § 1 of the Criminal Code - instead of Section 201 § 2 - were fulfilled by the incriminated act. Since the trial court, in doing so, did not rely on any additional element, the applicants could not have been hindered in preparing their defence. The applicants, who had been assisted by counsel throughout the proceedings, must have been well aware of the possibility that the trial court might adopt a different legal qualification than the prosecution as regards the element of violence involved.

26. Moreover already the court of first instance convicted the applicants of the offence under Section 201 § 1 of the Criminal Code. Instead of merely arguing in their pleas of nullity that the Regional Court had exceeded the bill of indictment, the applicants could have explained why they believed that the established facts ought to be subsumed under Section 201 § 2 of the Criminal Code. This would have enabled the Supreme Court to deal with the matter and decide on the merits. The applicants had sufficient time at their disposal to bring such arguments.

27. The applicants submitted that the possibility of a conviction under Section 201 § 1 of the Criminal Code was neither raised by the public prosecutor at any stage of the trial nor were the applicants warned of this possibility by the presiding judge and invited to comment thereon. The modification of the offence was therefore a complete surprise for them. Without any warning the Regional Court convicted the applicant of an offence which carried the double maximum penalty than the offence contained in the bill of indictment.

28. In the applicants' view it could not be decisive whether there was the theoretical possibility of a different qualification of the offence by the prosecution and the trial court which the defence should have anticipated. Rather, the concrete situation in the criminal proceedings at issue and the conduct of all parties involved should be taken into account. If an experienced public prosecutor submitted a precise bill of indictment and the

possibility of an extension of the indictment was not even alluded to at the trial the defence should not be compelled to take into account alternative possibilities.

29. The applicants also refuted the Government's argument that in the proceedings on the plea of nullity shortcomings of the first instance proceedings could have been remedied, as the Supreme Court had only a very limited possibility of review of the first instance proceedings.

30. The Court recalls that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (*Kamasinski v. Austria* judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed (*Pélissier and Sassi v. France* [GC], no. 25444/94, § 51, ECHR 1999-II; *Dallos v. Hungary*, no. 29082/95, § 47, 1 March 2001; *Lakatos v. Hungary* (dec.), no. 43659/98, 20 September 2001).

31. The scope of the above provision must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair. In this respect it is to be observed that Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him. The Court further recalls that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (*Pélissier and Sassi v. France*, op. cit., §§ 52-54, *Lakatos v. Hungary* (dec.), loc. cit.).

32. In the instant case, it does not appear that the applicants were at any stage of the trial made aware that they risked conviction under section 201 § 1 of the Penal Code. This is accepted by the Government. They submitted, however, that the applicant, assisted by counsel should have been aware of the possibility that the trial court might change the legal qualification of the offence even without informing the parties beforehand of such a possibility. Accordingly the applicant's counsel, who was an experienced defence lawyer, could have anticipated this situation and prepared the defence accordingly.

33. The Court is not persuaded by this argument. It must be remembered that read as a whole, Article 6 of the Convention guarantees the right of an accused to participate effectively in a criminal trial. In general this includes not only the right to be present, but also the right to receive legal assistance, if necessary, and to follow the proceedings effectively. Such rights are implicit in the very notion of an adversarial procedure (*Stanford v. the United Kingdom* judgment of 23 February 1994, Series A no. 282-A, pp. 10–11, § 26; *Lagerblom v. Sweden*, no. 26891/95, 14 January 2003, § 49).

34. Thus, in order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the charges made, including the legal characterisation that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution as regards the qualification of an offence is clearly not sufficient.

35. The Government argued further that at the stage of the plea of nullity the applicants, who at that time were aware of the changed qualification, could have submitted arguments why, on the basis of the established facts, another qualification was indicated. Instead, they merely argued that the Regional Court had exceeded the bill of indictment. This is disputed by the applicants who pointed at the limited scope of review afforded to the Supreme Court.

36. The Court is not persuaded by that argument either. It is true that in previous cases the Court, when assessing the fairness of criminal proceedings as a whole, accepted that a re-qualification of an offence did not impair the rights of the defence when the accused, in review proceedings, had sufficient opportunity to defend themselves (see *Dallos v. Hungary*, cited above, § 47-53; *Sipavičius v. Lithuania*, no. 49093/99, § 30, 21 February 2002). However, this was only the case if in the review or appeal proceedings the accused was entitled to contest the conviction in respect of all relevant legal and factual aspects before the appeal court (see *Dallos v. Hungary*, cited above, § 50; *Sipavičius v. Lithuania*, cited above, § 31; *Balette v. Belgium* (dec.), no. 48193/99, 24 June 2004).

37. The Court notes that the scope of the Supreme Court's jurisdiction does not extend to the examination of questions of fact in plea of nullity proceedings as it has to base its decision essentially on the facts established by the court of first instance. Furthermore, the assessment of evidence by a lower court cannot normally be challenged. Having regard to this limited scope of review the Court cannot find that this possibility was sufficient for giving the applicants a real opportunity to argue their case. It is not for the

Court to assess the merits of the defence the applicants could have relied on, had they had an opportunity to make submissions on the charges as re-qualified in the judgment, and, whether or not their defence would have embraced questions of fact excluded from the scope of review of the Supreme Court. However, given the importance the right to an effective defence has for ensuring that proceedings are fair, it is indispensable that a full guarantee for the exercise of that right at one level of jurisdiction at least is guaranteed.

38. The Court accordingly considers that in using the right which it unquestionably had to re-qualify facts over which it properly had jurisdiction, the Regional Court should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and in good time. In the absence of a real opportunity to cure this defect at a later stage in the proceedings, the applicants have been hindered in the effective exercise of their rights of defence.

39. Accordingly, there has been a breach of Article 6 § 3 (a) and (b) of the Convention, taken together with paragraph 1 of that Article, which provides for a fair trial.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicants claimed a lump sum of EUR 103,500 as non-pecuniary damages. They submit that if they would have been convicted of the offence under Section 201 § 2 of the Penal Code - the one with which they had been charged in the indictment - they would have been sentenced to much lighter sentences and, in all likeliness, to suspended terms of imprisonment. Since Section 201 § 1 of the Penal Code was applied, they had received higher and unconditional sentences, which the first, second and third applicant have already served.

42. The Government contested the claims. Even if the applicants were convicted under Section 201 § 2 of the Penal Code it was by no means likely that a suspended term of imprisonment would have been imposed. On the one hand, the range of punishment under Section 201 § 2 goes up to five years of imprisonment and, on the other hand, general preventive considerations, which the Regional Court actually made in its judgment of

23 May 1997, could have prevented the court from fixing a term of imprisonment suspended on probation. Moreover, the applicants did not specify how they have calculated the amount requested.

43. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicants did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

B. Costs and expenses

44. The applicants sought a total of EUR 18,417.50 (including turnover tax) for costs and expenses. This amount included costs for the plea of nullity proceedings before the Supreme Court in the amount of EUR 3,387.37 (including turnover tax) and EUR 13,084.88 (including turnover tax) for the Convention proceedings.

45. The Government submitted that the costs claimed were excessive and in part unjustified.

46. As regards the domestic proceedings before the Supreme Court, the Court observes that in their plea of nullity the applicants, besides the complaint in respect of which a breach of the Convention was found, had raised several other issues which related to complaints not submitted to the Court or which have been declared inadmissible. The Court therefore finds that these costs were only in part incurred in an attempt to prevent or redress the violation fund and, accordingly, reimbursement of only a part of these costs can be granted. It considers it reasonable to award the applicants EUR 1,500 under this head plus any tax that may be chargeable on that amount.

47. In respect of the costs incurred in the Strasbourg proceedings, the Court observes that the applicants, who were represented by counsel, did not have the benefit of legal aid and that they were only partly successful with their application. It considers it reasonable to award them EUR 6,500 under this head plus any tax that may be chargeable on that amount.

C. Default interest

48. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

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

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

3. *Holds,* by four votes to three,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of costs and expenses plus any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses,* unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 April 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President