



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

FIRST SECTION

Application no. 24714/12
Eduard MOSCHITZ
against Austria
lodged on 19 April 2012

STATEMENT OF FACTS

The applicant, Mr Eduard Moschitz, is an Austrian national, who was born in 1969 and lives in Vienna. He is represented before the Court by Ms M. Windhager, a lawyer practising in Vienna.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is a journalist and the editor of the documentary series “At the scene” (“*Am Schauplatz*”) produced by the Austrian Broadcasting Corporation (*ORF*). Within the series, the applicant worked on a documentary named “At the right edge” (“*Am rechten Rand*”) concerning the development and distribution of extremist right-wing ideology in Austria. The applicant worked in particular with two members of the neo-Nazi scene in Austria with the purpose to create a faithful and authentic image of their lives and thinking. He had met those two protagonists in the course of the work on a documentary on attack dogs. According to the applicant, he had proposed to go together to an election rally of the Austrian Freedom Party (*FPÖ*), since the two protagonists had shown an interest in its politics and leader. Thereupon, the applicant, a cameraman, a sound technician and the two protagonists met at an election rally of the Freedom Party in Wiener Neustadt on 12 March 2010.

It seems that after the leader of the Freedom Party, H.-C.S., had given his speech, he was available for autographs and photo opportunities behind the stage. The recording team was also there, as were the young protagonists.

H.-C.S. claimed subsequently to have heard someone shouting “Heil Hitler” or “Sieg heil”. Thereupon, he, H.-C.S., had turned around and confronted the applicant with what he had heard. Later, the security manager of the Freedom Party lodged charges with members of the Wiener Neustadt Police present.

On 13 March 2010 the Wiener Neustadt public prosecutor ordered the securing and seizure of the recorded material from the applicant. It stated that the applicant was suspected to have prompted an unknown person to shout “Sieg heil!” at the above mentioned event. He was therefore a suspect under section 3g of the Prohibition Act (*Verbotsgesetz*). The order stated that the original recordings should be returned after the production of copies. On the same day the applicant voluntarily handed over the IMX tape titled “AS-at the right edge # 4”. It seems that the applicant objected to the securing and seizure of the tape. However, on 19 March 2010, he withdrew his objection and stated that, in view of the importance of a rapid clarification of the situation, the examination of the material should go forward as soon as possible.

On 23 March 2010 the Wiener Neustadt public prosecutor commissioned an expert opinion asking whether the seized tape was an original or a copy, whether there were indications of subsequent editing of the tape (sound and/or image) and whether an original state of the tape could be reconstructed. On 21 June 2010 the expert concluded that sound deficiencies in the first ten minutes of the tape happened probably already at the recording because of the low temperatures. As regards the integrity of the tape the expert stated that it had been stopped and restarted often during the recording, a method usually used for reports and documentaries. Without real-time time codes the duration of stops could not be verified. It could not be excluded that stop-restart sequences had been simulated by cutting the tape; that course of action was however not very probable.

On 24 November 2010 H.-C.S., a private party to the proceedings, requested an addendum to the expert opinion referring to the results of a privately commissioned expert opinion. Thereupon, on 31 March 2011, the officially commissioned expert provided an addendum to his expert opinion and concluded that he could not conclusively state whether the tape had been manipulated or not. It was as likely that the tape had been manipulated as that it had not been manipulated. The expert recommended a further forensic examination of the tape. He also recommended the participation of a linguist, since, at the relevant time code, neither he nor uninformed test persons could discern the words “Sieg heil” under the heavy breathing audible on the tape.

On 1 June 2011 the applicant lodged a motion to have the criminal investigations against him discontinued. He referred to the expert opinion and its inconclusive results and claimed that the suspicions raised against him therefore lacked any basis.

On 6 June 2011 a meeting took place at the Ministry for Justice in which the competent public prosecutor reported on her intention to discontinue the proceedings against the applicant as regards the offences under the Prohibition Act. However, as regards the suspicion of falsification of evidence pursuant to section 293 of the Criminal Code, the investigations would continue and it was intended to request the German federal police

(*Bundeskriminalamt – BKA*) in Wiesbaden to undertake the recommended forensic examination of the tape.

Accordingly, on 24 June 2011, the applicant was informed that the proceedings against him with regard to suspicions under the Prohibition Act were discontinued.

On 5 August 2011 the Wiener Neustadt Regional Court (*Landesgericht Wiener Neustadt*) dismissed the applicant's motion for discontinuation of the investigations of 1 June 2011. The court firstly established as relevant facts that in the first police interview one of the protagonists had admitted to the police to have said "Sieg heil" during the election event and to have been prompted by the applicant to do so and paid for his compliance. However, subsequently, that protagonist and other witnesses contested to have said or heard the statement. H.-C.S. and other party members present at the election rally massively incriminated the applicant and claimed that he had incited the protagonists to act as described. On the tape itself it could be heard that the applicant told the protagonists that "now they could say what was important to them", then a response stating "but, what shall I say; not in front of the camera; imagine, I say something wrong...". It followed a loud, heavy breathing sound and then H.-C.S.'s complaint and request of a police officer. In view of the expert's recommendation of a further forensic examination of the tape, the court concluded that the continuation of the investigation was justified. On 22 August 2011 the applicant appealed against that decision. However, on 5 December 2011 the Vienna Court of Appeal (*Oberlandesgericht Wien*) dismissed the applicant's appeal as unfounded. With regard to the complaint of an overly long duration of the investigation pending against the applicant the Court of Appeal found that the importance and complexity of the case justified its duration to date.

On 14 March 2012 the applicant asked the Senior Public Prosecutor's Office (*Oberstaatsanwaltschaft*) by informal letter whether it could accelerate the proceedings, especially regarding the envisaged, but not realised commission of an examination of the tape by the German federal police in Wiesbaden. Thereupon, on 20 March 2012 the Wiener Neustadt public prosecutor stated in a memo that the German federal police in Wiesbaden had confirmed on the phone that they needed a formal request by letter rogatory for the envisaged examination of the tape. On 21 March 2012 the Wiener Neustadt public prosecutor therefore drew up an according letter rogatory addressed to the Wiesbaden public prosecutor in Germany.

On 11 June 2012 the Wiesbaden public prosecutor informed the Wiener Neustadt public prosecutor with regard to the letter rogatory that the German federal police was not able to carry out the requested forensic examination due to the lack of a player for the IMX format, which was only used by professional broadcasters. The Austrian authorities could re-send the tape together with a player if they so wished, however, due to the high demand of the services of the examiners, a proper inspection could only be planned from July 2013 onwards. Finally, contact information was provided of a specialist at the National Center for Media Forensics at the University of Colorado, USA.

On 20 September 2012 the Wiener Neustadt public prosecutor commissioned a new expert opinion asking whether the IMX tape was an original or a copy, whether there were indications of subsequent editing of

the tape (sound and/or image) and whether an original state of the tape could be reconstructed. The expert opinion, that was undated, concluded that it was impossible to verify whether the tape was an original or a copy since digital sound recordings could be copied discretionarily. A subsequent editing of digital data would not distinguish itself from a conscious choice of content at the recording itself. And finally, there was no acoustic indication of information lacking. The expert recommended not allowing sound recordings as evidence without verifiable reference to real time events.

On 7 November 2012 the Lower Austria Regional Police conducted the – according to the applicant first – interview with the applicant. The expert was also present. The applicant stated *inter alia* not to have heard the impugned remarks.

On 22 May 2013 the Wiener Neustadt public prosecutor informed the applicant of the discontinuation of the criminal investigations against him. The reasoning referred to the expert opinions summarising that a potential manipulation of the recording could already have happened during the recording itself or that, even if the impugned statements would have been made at the event, they would not necessarily also have been recorded. The statements of the interviewed parties and witnesses were so contradictory that a clarification of the facts seemed impossible. It was therefore not possible to state with the necessary certitude whether the tape had been manipulated or the impugned statement even uttered in the vicinity of H.-C.S. Consequently, the proceedings against the applicant needed to be discontinued.

B. Relevant domestic law

1. The Prohibition Act

Section 3g of the National Socialist Prohibition Act (*Verbotsgesetz*) reads as follows:

"Whoever performs activities inspired by National Socialist ideas in a manner not coming within the scope of Section 3a to 3f shall be liable to punishment by a prison sentence between 1 and 10 years, and if the offender or his activity is particularly dangerous, by a prison sentence of up to 20 years, unless the act is punishable under a different provision stipulating a more serious sanction".

2. The Code of Criminal Procedure

Section 101 § 1 of the Code of Criminal Procedure (*Strafprozeßordnung*) currently in force foresees that the public prosecutor leads the investigative proceedings (*Ermittlungsverfahren*) and decides on their continuation or termination. Section 210 §§ 1 and 2 stipulate that if the established facts render it probable that the proceedings will lead to a conviction and if there are no reasons for the public prosecutor to discontinue the investigation, he or she shall issue an indictment. With the indictment the main proceedings (*Hauptverfahren*) begins which are led by the competent court. The public prosecutor then becomes a party of the proceedings.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention of the length of the criminal investigations pending against him.

2. He further complains under Article 13 of the Convention that he did not have an effective remedy available to him to accelerate the proceedings pending with the public prosecutor.

QUESTIONS TO THE PARTIES

1. Was the length of the criminal proceedings in the present case in breach of the “reasonable time” requirement of Article 6 § 1 of the Convention?

2. Did the applicant have at his disposal an effective domestic remedy for his complaint under Article 6 § 1 as required by Article 13 of the Convention?