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

FIRST SECTION

Application no. 41767/09
Osvaldo Marcelo BATISTA LABORDE
against Austria
lodged on 30 July 2009

STATEMENT OF FACTS

The applicant, Mr Osvaldo Marcelo Batista Laborde, is a Uruguayan national, who was born in 1966 and lives in Graz. He is represented before the Court by Mr K. Bernhauser, 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.

On 31 January 2008 the Graz Regional Court (*Landesgericht für Strafsachen Graz*) convicted the applicant of partly attempted and partly realised drug trafficking and sentenced him to twelve and a half years imprisonment.

He was found, together with L.V., to have assisted in the shipping of more than 270 kilograms of cocaine from Callao in Peru. The transport route via the Bahamas, the United States of America, Belgium and Germany to Austria had only been interrupted by the seizure of the drugs by the authorities of the United States of America in the port of Charleston.

The applicant was further found to have organised the shipping, again together with L.V., of 140 kilograms cocaine from Callao in Peru via the Dominican Republic, the Bahamas, the United States of America and Belgium to Bremerhaven in Germany, while the further transport by road to Austria had been organised by the investigators of the Austrian Ministry for Interior Affairs.

Finally, the applicant and L.V. were found to have attempted by those shipments to provide the above mentioned quantities of illegal substances to contacts in Europe for further distribution.

1. The facts of the drug trafficking deal as presented in the domestic judgments

According to the judgment's reasoning, L.V. maintained a wide net of contacts to various individuals and groups in different parts of the world and used his knowledge of criminal organisations to deliver occasional information to the United States Federal Bureau of Investigation. In 2002 and 2003, L.V. tested with various individuals the possibility of cooperation in relation to lawful, but also unlawful, business ventures. One of these possible projects was cooperation between South American and South-Eastern European contacts to enable drug transports of considerable quantities. In the year 2003 the following structure of possible transport cooperation was envisaged: in South America, the group of LE.M. would provide counterfeit cigarettes and large quantities of cocaine to a Serbian-Montenegrin buyers' group headed by Z.A. for further distribution in Europe. N.T. was considered the trusted person on the European side, whereas the applicant acted as a trusted person for the South-American group. L.V. became the liaison between the two groups. In January 2004, L.V. travelled to South America to discuss details of the development of the planned cooperation.

Already in December 2003, the Austrian office of the United States Drug Enforcement Administration (DEA) informed the Austrian authorities that an informant had contacted an international group that was interested in European infrastructure to traffic counterfeit cigarettes and cocaine. The information also contained details on possible traffic quantities and routes. Thereupon, on 21 January 2004, a conference was organised in Miami, United States of America, with the participation of members of the DEA Vienna, DEA Chicago, DEA Sao Paolo, DEA Miami, of the British custom authorities, of the Regional Police Office Styria (*Landesgendarmerie-kommando Steiermark*) and the Austrian Federal Police Office/Department for Undercover Work (*Bundeskriminalamt/VE-Büro*). It was planned to initiate a contact between the DEA's informant and L.V.; the DEA's informant was well known to the authorities and had already maintained a relationship with L.V. before.

Subsequently, the Austrian police authorities initiated undercover investigations, primarily into the European partners of the deal.

In February 2004, N.T. met with the DEA's informant and an undercover police office at a hotel near Graz in Austria. The undercover officer offered the infrastructure, the storage and the further transport of counterfeit cigarettes and cocaine. N.T. mentioned in the course of this meeting that the product in question would in all probability be 200 kilograms cocaine from Uruguay, for which he was looking for storage in the region before the cocaine could be transferred to Croatia. The undercover officer proposed a location near Preding, a village in Styria. N.T. investigated the proposed location and the storage facility before leaving the country.

In the course of a meeting held in Zagreb in April 2004 with N.T., L.V. and the undercover officers, L.V. announced the delivery of 800 cases of counterfeit cigarettes and 15 kilograms of cocaine for the Croatian partners. After this first delivery, a second would follow with 200 kilograms cocaine, again for the Croatian market, going from Peru via Bremerhaven to Graz.

The DEA informant was L.P., aka "Marc". Marc was not a police officer, but was supervised by special agent S.F. of the DEA. It was on the basis of Marc's contacts and information that the DEA and the police authorities had even initiated their undercover activities as regards the planned trafficking of the cocaine and counterfeit cigarettes. At the end of June 2004, L.V., NP.C. and the undercover officers came together in a hotel in Vienna, where NP.C. informed the undercover officers that a delivery of 400 kilograms cocaine would be shipped on 29 June 2004; 200 kilograms of which would need to be stored in Styria. L.V. left Vienna, went to Preding, where he met N.T., again together with the undercover officers. N.T. requested from the undercover officers, as the providers of the storage facilities, a security payment in return of the handover of the cocaine. The undercover officers agreed to that payment. A next meeting on 29 June 2004 in Unterpremstätten in Styria served as another trust-building exercise. NP.C. again requested a security for the benefit of the South-American group, whereas N.T. wanted to ensure necessary security measures for the benefit of the South-Eastern European group. The parties involved, including the undercover officers and the DEA's informant, agreed to the payment of 400,000 euros (EUR) into a safe deposit box. The money was provided by the Austrian National Bank (*Nationalbank*), and N.T. was shown the money to assure the trustworthiness of the undercover officers.

In September 2004, a container with 997 boxes of counterfeit cigarettes was delivered to the undercover officers and placed in a fictitious storage facility. Again in September 2004, L.V. informed the undercover officers that a container with cocaine was on its way to Europe. In October 2004, CH.P. in South America requested the undercover officers by way of L.V. and the DEA's informant to help with the transport of the cocaine from Bremerhaven to Graz. It was also planned that the undercover officers should contact the shipping company directly and lodge a prior agreed camouflage order of 10,000 square metres of wood floor. The undercover officers sent the order by fax to the transport company in South America. The undercover officer J. contacted the transport company also by phone and assured them that the transport from Bremerhaven to Graz would be seen to from his side, as long as the original bills of lading for the container would be provided.

On 3 November 2004 the first container indeed left the port in Callao in Peru with a planned arrival in Bremerhaven on 4 or 5 December. On board were 270,4 kilograms of cocaine of best quality, consisting of 232,5 kilograms of cocaine in pure form. However, the cocaine was seized and secured in the port of Charleston in the course of a police intervention of the United States security authorities. The empty container was sent on to Bremerhaven. On 23 November 2004 a second container was shipped with 140 kilograms of cocaine. The container arrived in Graz, Austria, on 12 January 2005 and was unloaded by police officers. The judgment stated that the applicant, and his two co-accused L.V. and N.T., knew of the shipping of the containers and the cocaine and organised the transport. They had further planned to have the drugs stored in Unterpremstätten, before their distribution to the group headed by N.T. and to other distributors for sale in Europe.

On 23 November 2004 L.V. met with an undercover officer and the DEA's informant, handed over the bill of lading of the first container and announced the shipping of the second container.

On 28 November 2004 the applicant left Uruguay for Spain via Portugal, and finally arrived in Vienna on 5 December 2004. The objective of the trip was the presence of a representative of the South American group at the handover of the original fright papers.

On 1 December 2004 L.V. met with an undercover officer and the DEA's informant and stated that a certain "Marcelo" was on his way to Vienna with the bill of lading for the second container. On 6 December 2004 L.V. met the applicant who handed over the original bill of lading for the second container. L.V. passed the documents on to an undercover officer in the evening of the same day and explained in detail where the cocaine was hidden in the shipped wood poles.

On 7 December 2007 L.V., his wife and the applicant met for a dinner in a Viennese restaurant. On 10 December 2004, and at the opening of the first container by N.T., L.V., B.A. and the undercover officers, the police arrested N.T. and L.V. in Styria and the applicant in his hotel in Vienna. On 30 December 2004 the second container arrived in Graz and was seized by the Regional Police Authority in Styria.

2. The relevant reasoning of the domestic judgments

The Regional Court attributed importance to the witness statements of the undercover officers that had explained – according to the reasoning of the judgment – credibly and with great detail the structure and organisation of the groups involved, the details of the deal and the conversations held in the course of the development of the crime. The court emphasised that it had been the undercover officers' responsibility to realise the planned infrastructure (the storage, for example) and not to pretend drug-buys. In view of the international dimension of the drug deal and the inclusion of an obviously important South American drug trafficking group, the court found it only natural that trust-creating measures had to be shown and demonstrated by the undercover officers, such as *inter alia* the payment of EUR 400,000 as a safety deposit.

The applicant's involvement was, *inter alia*, confirmed by the investigation results of a police officer in Montevideo who could establish the early contacts between L.V. and the applicant in South America.

Concerning the witness S.F., the special agent from the DEA, the judgment read as follows:

> "S.F. also gave detailed explanations concerning the investigations he had initiated and referred to the meeting he had organised at the end of January 2004 in Miami, confirming that the agents had linked L.V. to a major cocaine-smuggling operation from the outset of the investigations. Together with the informant/Marc, S.F. devised a plan to jointly make contact with L.V. and his associates and establish a kind of cooperation structure to bring cocaine from South America to Austria and at the same time afford opportunities to take action."

Furthermore, the witness's statement allowed the conclusion that the American and the Austrian authorities collaborated closely on the project, thoroughly documented the progress of the project and conclusively presented the events to the authorities. S.F. also testified that L.V. had

identified the applicant as being the "Marcelo" who provided the original bill of lading for the containers. The applicant's involvement in the deal was, according to the judgment, confirmed by further witness statements, *inter alia* also from L.V., that placed the applicant in Montevideo near the main actors of the South American group and repeated that the applicant had been sent to Vienna to provide the original fright papers and to make all necessary decisions on site upon delivery of the containers.

When fixing the sentence, the Regional Court stated as mitigating circumstances the lack of criminal records of the applicant in Austria, the length of the proceedings and the fact that the criminal acts had remained an attempt. The high quantities of illegal drugs involved were however considered an aggravating circumstance.

On 23 June 2008 the applicant, represented by counsel, lodged a plea of nullity and an appeal against the sentence (*Nichtigkeitsbeschwerde und Berufung*). In the appeal the applicant complained *inter alia* that the first instance court had disregarded as a mitigating circumstance that the offences had been prompted by the actions of domestic and US-American police authorities. He referred in this regard to the above quoted passage of the judgment. He further stated that the DEA had had approached the German police authorities with their plan to help realise a major drug deal that had however declined the proposal as being unlawful. Only then did the DEA propose the plan to the Austrian authorities. The applicant alleged that neither the South American group nor the presumed European buyers had had the intention to organise a drug transport to Austria. That plan had been created by the Agent S.F. together with Austrian officials from the Ministry of Interior Affairs (*Bundesministerium für Inneres*) in violation of Austrian law. Those acts by the police authorities exceeded a simple provocation, especially considering that the offences of which the applicant was convicted, would not have been realised, had the Austrian authorities not deposited EUR 400,000 as a safety deposit.

On 21 January 2009 the Supreme Court (*Oberster Gerichtshof*) dismissed the applicant's plea of nullity.

On 1 April 2009 the Graz Court of Appeal (*Oberlandesgericht Graz*) followed the applicant's appeal and decreased his sentence to twelve years imprisonment. It found firstly that the commercial character of the offences (*gewerbsmässige Begehungsweise*) had to be considered as an additional aggravating circumstance. As regards the significance given by the first instance court to the length of the proceedings, the Court of Appeal stated that it had, while acknowledging the length of the proceedings as a mitigating circumstance, not clearly quantified the reduction of the sentence related to that mitigating circumstance. Finally, concerning the provocation of the criminal offence that violated the fairness principle of Article 6 of the Convention, the Court of Appeal noted in respect of the co-convicted N.T. as follows:

> "The objection of unlawful incitement, in breach of the principle of a fair trial under the first sentence of Article 6 § 1 ECHR, is well founded, as there was incitement to commit an offence, attributable to the State. This is especially true since the prosecuting authorities failed to prove that the appellant, although disposed to commit an offence, had not been induced – in particular via the provision of the intermediate storage facility for the drugs by the undercover investigators and the support they provided for transporting the drugs to that storage facility – to commit and continue to

> commit the specific punishable acts of which he was accused. The unlawful incitement should also be remedied by means of an explicit, measurable reduction in sentence."

Applying this reasoning to the applicant's appeal, the Court of Appeal further found that:

> "The consequent breach of the right to a fair trial also in the case of the accused Batista Laborde is likewise remedied by the appellate court by means of a reduction of sentence. This was taken into account to some extent by the first-instance court – albeit not in quantitative terms – in respect of the excessive length of the proceedings. The sentence of thirteen years' imprisonment, which was otherwise commensurate with the degree of culpability and the seriousness of the offence (regard being had to the corrected factors considered in determining sentence and the assessment thereof), is reduced by six months for each of the two breaches of the Convention, resulting in a sentence of twelve years' imprisonment."

That judgment was served on the applicant's counsel on 29 April 2009.

B. Relevant domestic law and practice

1. Plea of nullity and appeal against the sentence

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.

2. Jurisprudence of the Supreme Court

The Austrian Supreme Court (*Oberster Gerichtshof*) established in its jurisprudence that Article 6 of the Convention did not constitute an obstacle to convict an accused of an offence – after according proof of guilt and even if the committing of the offence had been unlawfully provoked by state organs. In this regard, a Convention violation under that head could not be considered a substantial impediment of prosecution. The Supreme Court observed further concerning the question whether a conviction could arise from a situation violating Article 6 of the Convention that the procedural guarantees of that provision could not become substantial legal reasons for an exemption from punishment.

However, the Austrian Criminal Code (*Strafgesetzbuch*) contained rules for the judge on how to fix a sentence and what circumstances to weigh against each other in this exercise. The Supreme Court referred in particular to the explicit rule in the Criminal Code's section 34 § 2 that allowed for the length of proceedings to be considered a mitigating circumstance in the course of the sentencing. It concluded that the legislator wanted to reward an accused's cooperation and to compensate a violation of Article 6 of the Convention with a particular mitigating reason. Therefore, in the Supreme Court's opinion, the spirit of the law allowed for the conclusion that a breach of fundamental procedural rights that could not be remedied in the course of the proceedings themselves had to be redressed in the sentencing. The existence of unlawful incitement by state agents could therefore be appropriately acknowledged and justly redressed in the sentencing considering that the accused would not have otherwise realised the –

nevertheless – condemned conduct (Supreme Court, judgment of 11 January 2005, no. 11Os126/04).

The Supreme Court confirmed this jurisprudence in a later judgment in which it clarified that, to relieve an accused of a victim status within the meaning of Article 34 of the Convention, the acknowledgment of unlawful incitement must result in an explicit and measurable mitigation of the sentence. Consequently, the objection of unlawful incitement could also be brought forward in the appeal proceedings against the sentence. It concluded that, even though incitement of a criminal offence by state agents was acknowledged in the Austrian law as unlawful, the consequence was not an exemption from punishment but an expressly and measurable mitigation of the sentence (Supreme Court, judgment of 23 July 2008, no. 13Os73/08x).

COMPLAINT

The applicant complains under Article 6 § 1 of the Convention of unfairness of the proceedings in that the offences, of which he had been convicted, would not have taken place without the authorities' unlawful incitement.

QUESTIONS TO THE PARTIES

1. May the applicant still claim to be a victim of a violation of the Convention within the meaning of Article 34?

2. If so, did the applicant have a fair hearing in the determination of the criminal charges against him in accordance with Article 6 § 1 of the Convention in view of his allegations of incitement?