

AS TO THE ADMISSIBILITY OF

Application No. 18724/91
by Werner PROKSCH
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTIL
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 1 August 1991 by Werner Proksch against Austria and registered on 26 August 1991 under file No. 18724/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1945. He is represented before the Commission by Mr. W.L. Weh, a lawyer practising in Bregenz. The facts of the case as submitted by the applicant may be summarised as follows.

Particular circumstances of the case

The applicant is the representative of a company ("Hypo-Rent") for the purposes of Austrian Administrative criminal law. On 19 August 1987 Hypo-Rent bought a parcel of land with planning permission for two separate shops of under 400 square metres each. Hypo-Rent entered into a leasing contract with a legally separate firm, F.M. Zumtobel. It appears that the contract requires Zumtobel to construct in accordance with planning conditions. On 17 September 1987 the applicant was served notice that the building, which was proceeding, was not in accordance with the conditions in the planning permission. On 20 November 1987 it was established that a partition wall between the two shops had not been erected, with the result that a shopping centre of over 1,000 square metres had been constructed. Such a shopping centre would have needed special planning consent.

On 8 April 1988 the Mayor of Innsbruck issued a penal order (Straferkenntnis) finding the applicant to have constructed a building, namely a shopping centre, without the requisite special planning

consent. He was fined AS 40,000, with 40 days' detention in default. The applicant appealed to the Provincial Government of Tyrol (Tiroler Landesregierung) which, on 26 May 1988, rejected his appeal. The applicant further appealed to the Administrative and Constitutional courts. The Constitutional Court (Verfassungsgerichtshof) rejected his complaint on 26 September 1988.

The Administrative Court (Verwaltungsgerichtshof) gave its decision on 6 December 1990. It referred, first, to its own case-law and that of the Constitutional Court that Article 5 para. 1 of the Code of Administrative Offences 1950 is not incompatible with Article 6 of the Convention. Accordingly, the Administrative Court declined to go into the applicant's complaints under Article 6 para. 2 of the Convention that the effect of Article 5 para. 1 of the Code of Administrative Offences was to reverse the presumption of innocence.

The Administrative Court then proceeded to note that the failure to construct the partition wall between the two independent shops had the effect of producing a different building, which needed special consent as a shopping centre. The fact that the actual construction had been undertaken by a different firm under a contract with Hypo-Rent did not affect the applicant's responsibility. It also found that the contract with the firm of F.M. Zumtobel merely provided for Zumtobel to fulfil planning conditions for the name and account of Hypo-Rent, and it added that the applicant had been unable to show that it would have been impossible for him to prevent the breach of the planning consent. The administrative complaint was rejected.

Relevant Domestic Law

Code of Administrative Offences: Article 5 para. 1

(Original)

"Wenn eine Verwaltungsvorschrift über das Verschulden nicht anderes bestimmt, genügt zur Strafbarkeit fahrlässiges Verhalten. Fahrlässigkeit ist bei Zuwiderhandeln gegen ein Verbot oder bei Nichtbefolgung eines Gebotes dann ohne weiteres anzunehmen, wenn zum Tatbestand einer Verwaltungsübertretung der Eintritt eines Schadens oder einer Gefahr nicht gehört und der Täter nicht glaubhaft macht, maß ihn an der Verletzung der Verwaltungsvorschrift kein Verschulden trifft."

(Translation)

"Unless a provision of administrative law states otherwise, negligent behaviour is sufficient to establish guilt. Negligence is to be assumed in the case of failure to observe a prohibition or a prescription where damage or danger is not an element of the administrative offence, and the defendant does not convincingly show that no fault lies with him for the contravention of the provision of administrative law".

COMPLAINTS

The applicant alleges violation of Article 6 of the Convention. He alleges, first, that the Austrian system of review by the Administrative and Constitutional courts of the decisions of administrative authorities does not satisfy the requirements of Article 6, and that the Austrian reservation to Article 5 of the Convention does not apply in this case. He also considers that the effect of Article 5 para. 1 of the Code of Administrative Offences is to place the burden of proof upon a defendant, and thus to infringe the presumption of innocence contrary to Article 6 para. 2 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 1 August 1991 and registered on 26 August 1991.

On 1 July 1992 the Commission (Second Chamber) decided to bring the application to the notice of the respondent Government without requesting observations.

THE LAW

1. The applicant alleges violation of Article 6 para. 2 (Art. 6-2) of the Convention by virtue of the operation of Article 5 para. 1 of the Code of Administrative Offences in this case.

Article 6 para. 2 (Art. 6-2) of the Convention provides as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Article 5 para. 1 of the Code of Administrative Offences first lays down a statement of substantive law that in the administrative criminal offences to which it applies, negligent behaviour is sufficient to establish guilt. It then continues with a presumption that negligence is to be assumed where the offence is one of failure to do or to fail to do an act where, provided the case is not one of a specified category, a defendant cannot establish that no fault lies with him.

The Commission recalls that the European Court of Human Rights has given guidance as to the interpretation of this type of presumption in the case of *Salabiaku* (Eur. Court H.R., *Salabiaku* judgment of 7 October 1988, Series A no. 141-A, pp. 14-18, paras. 26-30). The Court recalled that the Convention does not prohibit presumptions of fact or law in principle, but does require Contracting States to remain within certain limits as regards criminal law (p. 15, para. 28) which take into account the importance of what is at stake and maintain the rights of the defence (p. 16, para. 28).

Notwithstanding the operation of Article 5 para. 1 of the Code of Administrative Offences, it remains for the prosecuting authorities to establish the elements of an administrative offence. Thus if the offence is of failure to construct a wall in circumstances where an individual is under a duty to erect a wall, the prosecution must establish that the wall was not erected and that the individual was under the duty. The presumption in Article 5 para. 1 then relates to the mental element required for a conviction: it specifies that negligence is sufficient to found a conviction, and that negligence is assumed where, as here, a requirement to do something has not been fulfilled and the defendant cannot show that he was not at fault.

The Commission finds that the second sentence of Article 5 para. 1 of the Code of Administrative Offences is no more than a statutory repetition of the common sense proposition that where a person does a prohibited action, or fails to do something which he is under a duty to do, the conclusion can reasonably be drawn that he has contravened the provision at issue, unless he can show that he was not at fault.

The applicant in the present case tried to allege that he was not at fault because the actual construction works had been undertaken by a separate firm under a contract with Hypo-Rent. The Administrative Court rejected this argument as the firm which did the construction works in any event did them for the name and account of Hypo-Rent, and the applicant had not been able to show that he had lost control of the building.

In any event, as Hypo-Rent had the benefit of the planning consent which contained the conditions, there is no reason why the applicant - on behalf of Hypo-Rent - should not remain responsible for breaches of a condition of that consent.

The Commission finds no indication in the present case that the provisions of Article 5 para. 1 of the Code of Administrative Offences operated contrary to the provisions of Article 6 para. 2 (Art. 6-2) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also alleges violation of Article 6 para. 1 (Art. 6-1) of the Convention, which guarantees, inter alia, a fair hearing before an independent and impartial tribunal in the determination of a criminal charge.

The Commission has already given notice of the application to the respondent Government but has not requested the parties to submit their observations. The Commission has now adopted its Reports in cases similar to the present one (cf., for example, No. 15523/90, *Schmautzer v. Austria*, Comm. Rep. 19.5.94, pending before the European Court of Human Rights), and finds it appropriate now to resume the proceedings in the present case in the light of those Reports.

For these reasons, the Commission

by a majority
DECLARES INADMISSIBLE the complaint that the presumption of innocence was violated; and

unanimously
DECIDES TO ADJOURN its examination of the remainder of the application.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO)

(A. WEITZEL)