



## Bank manager's 15-month detention on remand was justified

In today's Chamber judgment in the case [Elsner v. Austria \(Nos. 1-6\)](#) (application nos. 15710/07, 31805/07, 36230/07, 40937/07 17239/08 and 41402/08), which is not final<sup>1</sup>, the European Court of Human Rights held, unanimously, that there had been **no violation of Article 5 § 3 (right to liberty and security)** of the European Convention on Human Rights.

The case concerned the complaint by Helmut Elsner, a former bank manager and a well-known figure in Austria, that his detention on remand in criminal proceedings against him was unlawful and excessively long, and that public statements by politicians amounted to finding him guilty before his conviction by a court.

### Principal facts

The applicant, Helmut Elsner, is an Austrian national who was born in 1935 and lives in Vienna. In the mid-1990s, he was the director of the board of management of the *Bank für Arbeit und Wirtschaft AG* ("Bank for Employment and Commerce", BAWAG), whose majority shareholder at the time was the Austrian Trade Union Federation. Under Mr Elsner's management, speculative transactions were conducted in the Caribbean which led to massive losses, with BAWAG risking insolvency in 2000, and eventually to the bank being sold to a consortium led by a U.S. private equity firm in 2007. Details of those transactions became public in October 2005, when one of BAWAG's former partners filed for bankruptcy.

Preliminary investigations were opened against Mr Elsner and several co-suspects on suspicion of breach of trust and fraud. In September 2006, the investigating judge issued an arrest warrant against Mr Elsner, who was then living in the South of France. He was arrested by the French police, but subsequently released on bail. According to the arrest warrant, there was a serious suspicion of his having committed the alleged offences, in particular of having abused his power as managing board director and having caused losses of 1.7 billion euros (EUR).

The warrant was further based on the risk of Mr Elsner's absconding, in view of the fact that, while he had attended interviews by the investigating authorities previously, he had not appeared for the last one in August 2006. According to the warrant, the account of Mr Elsner's lawyer, who submitted that his failure to appear had been due to his heart disease, was contradicted by statements by two witnesses who had seen Mr Elsner driving his car and the account was not supported by any clear statements in the medical certificates. The investigating judge had moreover been made aware of the imminent publication of an article in a news magazine, which stated that Mr Elsner had used his illness as a pretext for attempting to evade court proceedings in Austria. In the judge's view, the publication of the article would make clear to Mr Elsner that the

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<sup>1</sup> Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

Austrian authorities would react, thus increasing the risk of him absconding. In October 2006, Mr Elsner was indicted for the alleged offences.

After the French courts had granted the Austrian authorities' request for Mr Elsner's extradition and further medical reports had been obtained which declared him fit to travel, he was transferred to Vienna on 13 February 2007, where he was placed in detention on remand. Subsequently a heart bypass operation was carried out on him. He remained in detention throughout the criminal proceedings.

Mr Elsner filed a number of complaints against the arrest warrant and requested for it to be lifted. The Austrian courts dismissed his complaints, finding on each occasion that there was a risk of him absconding, in particular in view of the fact that he probably still had financial means at his disposal sufficient for starting a new life elsewhere, that he risked a long term of imprisonment in case of conviction and that he had already taken steps to evade justice in Austria. The Austrian courts also dismissed his subsequent requests for release, following his transfer to Austria, and extended his detention on a number of occasions, finding that the risk of him absconding persisted, his heart condition notwithstanding, for essentially the same reasons as given earlier; moreover the courts noted that he had strong links abroad. They also dismissed his complaint, in January 2008, that the trial court had failed to comply with its obligation to conduct the proceedings speedily, observing that that the proceedings were particularly complex. Mr Elsner filed a total of eight fundamental rights complaints against the relevant court decisions, which were dismissed by the Supreme Court on each occasion.

Mr Elsner was convicted of fraud, breach of trust and falsification of balance sheets in May and July 2008; ultimately the Supreme Court upheld the conviction of breach of trust and sentenced him to seven-and-a-half years' imprisonment in December 2010.

In parallel, while in pre-trial detention, Mr Elsner brought successful defamation proceedings against the publisher of the news magazine which had run the article about his having used his illness as a pretext for evading court proceedings. Noting that his health problems had not merely been a pretext but had indeed existed, the Vienna Regional Court in July 2007 found the impugned statements to have constituted defamation and ordered the magazine to pay compensation.

There was wide media coverage of the financial difficulties of BAWAG and the criminal proceedings against Mr Elsner. Several Austrian politicians and public officials were quoted in the media commenting on his arrest and on the proceedings; in particular, the Minister of Finance at the time, the president of the Chamber of Commerce and the president of the Trade Union Federation all welcomed Mr Elsner's arrest in September 2006.

## Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 3 (right to liberty and security) of the European Convention on Human Rights, Mr Elsner complained about the unlawfulness and excessive length of his pre-trial detention. Further relying on Article 6 § 2 (presumption of innocence), he alleged that the public statements by politicians and public officials amounted to finding him guilty without his being convicted by a court.

The case originated in six applications which were lodged with the European Court of Human Rights between 6 April 2007 and 28 July 2008.

Judgment was given by a Chamber of seven, composed as follows:

Nina **Vajić** (Croatia), *President*,  
Anatoly **Kovler** (Russia),  
Christos **Rozakis** (Greece),  
Peer **Lorenzen** (Denmark),  
Elisabeth **Steiner** (Austria),  
Khanlar **Hajiyev** (Azerbaijan),  
George **Nicolaou** (Cyprus), *Judges*,

and also Søren **Nielsen**, *Section Registrar*.

## Decision of the Court

### Article 5 § 1

The Court rejected Mr Elsner's complaint that his detention had been unlawful as manifestly ill-founded and declared it inadmissible. On the basis of the materials in the case file, the Court found it established that the entire period of his detention had been authorised and extended by the domestic courts in accordance with the relevant provisions of the domestic Code of Criminal Procedure. The Austrian courts had acted within their jurisdiction in issuing the detention orders, which were valid under domestic law. Mr Elsner had not claimed that those detention orders were otherwise incompatible with the requirements of Article 5 § 1.

### Article 5 § 3

As regards Mr Elsner's complaint that the length of his detention had been excessive, the court considered that the period to be taken into consideration lasted one year, three months and eight days, starting in February 2007, when he was remanded in custody in Austria and ending in May 2008, when he was for the first time convicted of fraud.

Having regard in particular to the events detailed in the arrest warrant, the Court found that without a doubt there had been a reasonable suspicion that Mr Elsner had committed criminal offences. The Austrian courts had further relied on one specific ground for ordering and maintaining his detention on remand, namely, that there was a risk that he might abscond. They had carefully examined the relevant arguments and given a number of specific reasons justifying the assumption of a risk that Mr Elsner might abscond and repeatedly examined whether such a risk still persisted. The Court agreed with the Austrian courts that the mere fact that following his operation Mr Elsner had been in intense medical care had not as such eliminated all risk of him absconding.

The Court could further not find that the competent national court failed to act with the necessary special diligence in conducting the proceedings. The case had been particularly complex given the nature of the charges, the number of people accused and the necessity to obtain comprehensive expert opinions on the business activities of the bank both in Austria and abroad. At the time Mr Elsner had been taken into detention on remand the criminal investigation against him and his co-accused had already been concluded; the trial had started in July 2007 and, after more than 100 court hearings, the trial court had delivered the first judgment in May 2008.

The length of Mr Elsner's detention could therefore be regarded as reasonable and the reasons had been relevant and sufficient within the meaning of Article 5 § 3. There had accordingly been no violation of this Article.

### Article 6 § 2

The Court took note of the Austrian Government's argument that Mr Elsner had failed to exhaust domestic remedies as regards his complaints under Article 6 § 2, as he had not filed an action under the domestic media act (*Mediengesetz*), which provided for a claim for compensation in the event of a breach of the principle of the presumption of innocence against the author of the statement in question and for the publication of the respective judgment in the media. The Court considered that such a remedy was particularly suited to afford appropriate redress in respect of statements contrary to Article 6 § 2 as it led to a finding by a competent court that a breach of that provision had occurred.

Mr Elsner did not question the effectiveness of those remedies but argued that it was unreasonable to expect him to institute such proceedings while in detention. The Court was not persuaded by that argument, as Mr Elsner, while in detention on remand, had filed numerous requests for release from detention through his lawyer and had instituted successful defamation proceedings against a news magazine. It was difficult to see why he could not have brought an action in the other cases in which he considered that the principle of presumption of innocence had been breached.

The Court therefore rejected Mr Elsner's complaint under Article 6 § 2 as inadmissible.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.