COUNCIL OF EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

Application No. 7720/76
by H[redacted] P[redacted] P[redacted]
against Austria

The European Commission of Human Rights sitting in private on 8 May 1978, the following members being present:

MM. J. E. S. FAWCETT, President
C. A. NØRGAARD, Second Vice-President
E. BUSUTTIL
L. KELLBERG
B. DAVER
T. OPSAHL
J. CUSTERS
C. H. F. POLAK
G. JÖRUNDSSON
R. J. DUPUY
B. KIERNAN
N. KLECKER

Mr. H. C. KRÜGER, Secretary to the Commission

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

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Having regard to the application introduced on 15 September 1976 by H[redacted]-P[redacted] P[redacted] against Austria and registered on 22 November 1976 under file No. 7720/76;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated,

Decides as follows:

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THE FACTS

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

The applicant is an Austrian citizen, born in 1945 and at the time of introducing this application he was detained at Hollabrunn in a so-called "Institution for Dangerous Recidivists" (Anstalt für gefährliche Rückfallstäter).

The applicant has submitted one previous application with the Commission, No. 6693/74. He then complained amongst other things that he had been unlawfully detained on remand and that he had been required to perform work for a low remuneration during that detention.

On 24 October 1973 the applicant was convicted of various offences of theft by the Linz Regional Court (Landesgericht Linz). He was sentenced to three years qualified imprisonment. On the basis of Art. 1(2) of the Act on Labour Camps the Court also ordered that the applicant should be detained in a labour camp (Arbeitshaus) following his release from prison.

The applicant lodged an appeal (Berufung) against the judgment, but it was rejected on 3 January 1974.

The applicant served his penalty until 7 December 1975 on which date he, according to the original judgment should have been taken to a labour camp. However, on 1 January 1975, while he was still in prison, the new Penal Code entered into force together with a number of transitional laws. The new legislation abolished the labour camps and replaced them by a number of specialised institutions, including institutions for the detention of dangerous recidivists (Art. 23 of the new Penal Code).

Art. V of the Act on the Adaptation of the Execution of Penalties to the new Penal Code (Strafvollzugsanpassungsgesetz) provides that orders for the detention in a labour camp which have been pronounced under Art. 1(2) of the old Act on Labour Camps are to be carried out, for a maximum of five years, in an institution for dangerous recidivists if it has been determined that the conditions of Art. 23 of the new Penal Code are also met. These conditions are:

1. that the person concerned is convicted of certain criminal offences after the completion of his 24th year of age, and that his sentence is more than two years detention;

2. that he has a record of at least two previous convictions for such criminal offences, and each time has got a sentence of more than six months detention; that he has spent at least 18 months after the completion of his 18th year of age as a convicted prisoner before committing the new offence; and that not more than five years had passed since the last penalty when the new offence was committed;

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3. that it is to be feared that the person concerned will continue, because of his inclination for criminal acts or for other reasons, to commit such criminal offences with serious consequences.

On 24 October 1974 the Steyr Regional Court (Kreisgericht), acting as the competent Court for surveying the execution of penalties (Strafvollzugsgericht) gave a decision in the applicant's case on the basis of the above-mentioned Art. 23 of the new Penal Code. The decision which was taken after a closed meeting transformed the order for the applicant's detention in a labour camp into an order for a detention in an institution for dangerous recidivists. The Court noted that the applicant had spent more than 18 months in prison after his 18th year of age, that he had repeatedly been convicted of crimes against property and that, following the judgment of 24 October 1973, he was to be considered as a habitual burglar. It was therefore to be feared that he would continue to commit crimes against property with serious consequences. The conditions laid down in Art. 23 of the Penal Code were consequently fulfilled.

The applicant lodged an appeal against this decision and submitted inter alia that he had not had any possibilities to make any comments on the case before the above decision was taken.

On 4 December 1974, however, the Linz Court of Appeal (Oberlandesgericht) rejected the appeal after a closed meeting during which the Attorney General (Oberstaatsanwaltschaft) was heard. The Court of Appeal found that the Court of First Instance had made all necessary inquiries and determined all facts which were conditional for the applicant's detention in an institution for dangerous recidivists. Insofar as the applicant had contended that the new Penal Code was not yet in force, the Court referred to Art. V of the Act of 30 July 1974 on the Adaptation of the Execution of Penalties, which expressly provided that the arrangement in the present case had to be final not later than on 31 December 1974. From this provision it furthermore appeared that after 31 December 1974 detention in a labour camp should be replaced by detention in an institution for dangerous recidivists when a detention had been ordered in accordance with Art. 1(2) of the old Act on Labour Camps and when, in addition, the conditions of Art. 23 of the new Penal Code were fulfilled as well. This was true in the present case and the decision of the District Court was consequently correct.

The applicant then lodged a constitutional appeal.

On 28 February 1975, however, the appeal was dismissed since the Constitutional Court had no competence to act within the field of jurisdiction of ordinary courts. The Constitutional Court was particularly called upon to decide on complaints against final decisions of administrative authorities which allegedly violated constitutionally guaranteed rights.

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On 29 April 1975 the District Court at Steyr gave a new decision in the case, according to which the applicant's detention in an institution for dangerous recidivists was still necessary. From the decision it appears that both the prison Governor and the Public Prosecutor were of the view that the detention was necessary. The Court stated that if such detention was no longer necessary the applicant should be conditionally released from detention. However, the conditional release should only be ordered if it could be assumed that, in view of the conduct and development of the detainee in the institution, his person, health, former life and the prospects of his sincere progress, the danger which the measure was intended to prevent, no longer existed.

As to the applicant himself, the Court noted that he was 29 years of age and that, by his eleven convictions, he had shown an inclination for committing crimes against property. Following his last conviction in October 1973 he was to be considered as a habitual burglar. A previous detention in a labour camp, which followed on a conviction in 1971, had furthermore not been able to improve the applicant. Subsequent to that judgment the applicant had also twice been convicted of various other crimes. In view of this, and in spite of his good behaviour and work during his serving the last sentence, it could not be assumed that the applicant had completely overcome his inclination for crimes. For these reasons it was still necessary to keep the applicant in an institution for dangerous recidivists.

The applicant appealed from this decision too, but on 18 June 1975 the Linz Court of Appeal rejected the appeal. The Court noted that since 1961 the applicant had repeatedly been convicted of burglary and also of robbery and of having depended on a prostitute's earnings. Considering this unfavourable conduct in freedom, the applicant's good behaviour during the serving of his sentence and his wish to betterment could not be given any decisive importance.

The applicant next filed a plea of nullity for the safeguard of the rule of law (Nichtigheits-beschwerde zur Wahrung des Geretzas). The plea was subsequently lodged by the Prosecutor General. It was inter alia submitted that the decision of the District Court Steyr of 29 April 1975 and that of the Linz Court of Appeal of 18 June 1975 were not in harmony with Art. 24(2) of the Penal Code and Arts. 17(2) and 163 of the Act on the Execution of Penalties. Art. 24(2) of the Penal Code stipulated that when a person had been ordered into a special institution for dangerous recidivists after having served his sentence, it was for the Court to examine, before the person was transferred there, whether a detention in such an institution was still necessary. It was further submitted that, insofar as the convicted person's state of health and nature did not appear sufficiently enlightened, the Court had to hear the doctor or psychologist of the prison and if need be, any other medical or psychological experts. This followed from Art. 17(2) of the Law on the Execution of Penalties.

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In the present case however, the Courts had mainly referred to the previous crimes committed by the applicant without hearing a competent expert. This could not alone prove, however, whether, after having served his sentence, the applicant still had to be detained in an institution for dangerous recidivists in order to protect society from the consequences of further criminal acts which the applicant could commit. This was in particular so since the applicant had been behaving well in prison and showed a wish to better himself. The lack of inquiries and discussion as well as detailed reasons why the Courts thought that a successful and resocialising time spent in prison could have no significance had in this case led to a defectively substantiated decision which had had negative effects for the applicant.

On 26 November 1975, however, the Supreme Court of Appeal (Oberster Gerichtshof) concluded that the appeal was unfounded. The decision was served on the applicant on 7 January 1976. The Court noted that there was no provision which obliged courts to hear a psychiatric expert in proceedings such as those in the applicant's case. Both the District Court and the Court of Appeal were of the conviction that it was necessary to detain the applicant in an institution for dangerous recidivists as his sentences had so far had no effect on him, although he had showed both a good behaviour during the serving of his last sentence and a will to embetterment. Facts which were positive for the applicant had furthermore not been overlooked by the Courts but expressly considered in the reasons given in their judgments.

It appears that the applicant has unsuccessfully tried to have lodged a plea of nullity to safeguard the rule of law in respect of the decision of the Steyr District Court from 24 October 1974 and that of the Linz Court of Appeal dated 4 December 1974. By letter of 21 September 1976 the Federal Ministry of Justice informed the applicant that the Prosecutor General did not intend to lodge such a plea.

The applicant thereafter appealed to the Constitutional Court against this letter but his appeal was rejected on 30 November 1976 since the Court was not competent to examine it.

It further appears that on 9 September 1976 the District Court at Korneburg refused a further request from the applicant that he be released from the institution for dangerous recidivists. On 12 October 1976 an appeal was dismissed by the Court of Appeal (Oberlandesgericht) in Vienna.

The applicant has also complained to various other authorities in respect of his detention. The complaints have all been without success since the authorities concerned have lacked competence in the matter.

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The applicant has furthermore tried to have criminal proceedings for abuse of office instituted against Judge Zitta, who was presiding when the Steyr District Court decided the applicant's case on 24 October 1974.

In a decision of 25 March 1977, which was not appealable, the District Court at Wels dismissed the applicant's request. It was true that Art. 17(1) of the Act on the Execution of Penalties had been violated by the District Court since it had not heard the applicant. This was obviously only an omission and there could be no talk of Judge Zitta being suspected of having abused his office.

Complaints

The applicant complains that as from 7 December 1975 he was unlawfully detained in a special institution for dangerous recidivists by virtue of Art. 23 of the Penal Code. He says that he was never convicted to undergo such punishment and that the conviction of 24 October 1973 could not justify his being detained under Art. 23 of the Penal Code. The detention allegedly violated Art. 5(1) of the Convention.

The applicant further complains about the proceedings in which it was decided to transform the order for detention in a labour camp into an order for detention in an institution for dangerous recidivists. He argues that the proceedings on 24 October 1974 in the District Court at Steyr violated the Convention in the following way:

- Art. 6(3)(a) in that he was not informed about the request made by the Public Prosecutor for the transformation of his penalty, the facts and law involved and so forth. He could therefore not defend himself against the reproaches made against his person.

- Art. 6(3)(b) in that he was kept ignorant of the date of the hearing so that he had no possibilities of profitting from the right guaranteed by this provision.

- Art. 6(3)(c) in that, because of his ignorance of the relevant court proceedings, he had no possibilities of defending himself either in person or through a lawyer of his own choice.

- Art. 6(3)(d) in that, by reason of his being unaware of the hearing he could neither have witnesses called nor an expert as envisaged in Art. 17 of the Act on the Execution of Penalties.

- Art. 6(1) in that, for instance, the proceedings were held in camera. The principle of equality and impartiality was in his view also violated since he could not make any statement in reply to that made by the Public Prosecutor. This was allegedly also in violation of Art. 17 of the Act on the Execution of Penalties (cf. above).

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In the applicant's submission the proceedings before the Linz Court of Appeal amounted to a further violation of Art. 6 of the Convention. They were again held in camera and the Attorney-General in Linz was heard by the Court while the applicant himself had no possibility to come with any counter-arguments to his defence. There was therefore no equality of arms. In addition to Art. 6 the proceedings in the Court of Appeal submittedly also violated Art. 13 of the Convention.

The applicant also contends that the principle of ne bis in idem which in his view is guaranteed by Art. 7 of the Convention was violated by the District Court at Steyr on 24 October 1974.

The applicant submits that no procedure has so far fulfilled the conditions of the Convention and he alleges a violation of Art. 13 of the Convention as the Austrian authorities have refused to treat his complaints effectively. Various authorities have simply stated that they were not competent in the matter.

The applicant finally also alleges violations of Arts. 5(3), (4), (5); 6(2) and 14 of the Convention.

THE LAW

1. The applicant has first complained that his detention in an institution for dangerous recidivists was unlawful and not covered by his original conviction. He alleges a violation of Art. 5(1) of the Convention.

This provision secures everyone's right to liberty and security of person, and forbids deprivation of liberty save in the cases enumerated in sub-paragraphs (a) to (f) and if it has been ordered in accordance with a procedure prescribed by law. Sub-paragraph (a) of the above provision authorises the lawful detention of a person after conviction by a competent court.

The applicant was convicted of various crimes by the Regional Court of Linz on 24 October 1973. The Court pronounced a prison sentence and ordered in addition the applicant's detention in a labour camp after completion of his sentence. If this measure had been carried out in its original form it would certainly have been covered by the provisions of Art. 5(1)(a) of the Convention as interpreted in the Commission's constant case-law (cf. eg the decisions on the admissibility of applications No. 2742/66, Yearbook 9, p. 550 and No. 2306/64, Collection of Decisions 21, p. 23). In the applicant's case, however, the detention in an institution for dangerous recidivists was ordered as the detention in a labour camp was no longer possible since this institution had been abolished in connection with the reform of the Austrian penal law which entered into force on 1 January 1975. The new penal law introduced a number of security measures which could be ordered in addition to a prison sentence, including the detention of dangerous recidivists in special institutions upon completion of their sentence (Art. 23 of the Penal Code). The Act on the Adaptation of the Execution of Penalties to the new Penal Code contained a transitory regulation (Art. V) according to which the detention in a labour camp which had been ordered under the former law should be carried out in an institution for dangerous recidivists if the conditions laid down in Art. 23 of the new Penal Code were also met. The Regional Court of Steyr determined on 24 October 1974, and the Linz Court of Appeal confirmed on 4 December 1974, that this was the situation in the applicant's case, and consequently it was ordered that he should be detained in an institution for recidivists upon completion of his sentence.

The applicant appears to complain that a new penal measure was imposed on him by the District Court of Steyr. The Commission refers in this respect to its findings in Application No. 7034/75 concerning the same legislation that, since after 1 January 1975 all penalties should be enforced in the forms prescribed by the new Penal Code, it was obviously necessary to determine which penalty of the new regime should replace each of the penalties provided for by the former Penal Code. The Commission therefore accepts that the transitional legislation was generally characterised by a system of modification of enforcement rather than the imposition of new penalties.

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In the above case the Commission further held that, in the particular case of the transformation of detention in a labour camp into detention in an institution for recidivists, it is important that both measures have approximately the same function in that they constitute a security measure for the protection of society. The Commission considers, however, that where the conditions laid down in Art. 23 of the Penal Code differ from those in Art. 1(2) of the former Act on Labour Camps, the conditions in Art. 23 of the Penal Code must in any case be met in addition to the less stringent conditions in Art. 1(2) of the Labour Camp Act on which the original order was based. In this respect the Commission refers to the decisions of the District Court of Steyr and the Linz Court of Appeal in which the Courts expressly stated that the circumstances of the applicant's case also fulfilled the conditions laid down in Art. 23 of the Penal Code and that therefore the applicant's detention in an institution for dangerous recidivists should be ordered.

The Commission therefore concludes that the applicant's detention in an institution for dangerous recidivists was detention after conviction within the meaning of Art. 5(1)(a) of the Convention. This complaint is therefore manifestly ill-founded and must be rejected under Art. 27(2) of the Convention.

2. The applicant has also complained about the procedure followed by the Austrian courts when deciding that his detention in a labour camp should be replaced by detention in an institution for dangerous recidivists. He has alleged violations of various provisions of Art. 6 of the Convention.

The Commission observes that this procedure does not come under Art. 6 of the Convention, as this Article is only applicable where the case concerns the determination of civil rights and obligations, or of a criminal charge. The above proceedings, however, did not concern the applicant's civil rights and obligations, nor a criminal charge against him, but only the question in which way a judgment which had already been pronounced should be carried out.

The Commission has therefore limited its examination to Art. 5(4) of the Convention. This provision secures to everyone who is deprived of his liberty by arrest or detention a right to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The proceedings in the present case took place before the court competent for surveying the execution of sentences before the applicant was actually transferred to the institution. After the transfer, the applicant had again the possibility of taking proceedings by which a court could determine whether his further detention was necessary. The Commission is therefore satisfied that the conditions laid down in Art. 5(4) of the Convention have been met in the present case. It follows that this part of the application is also manifestly ill-founded within the meaning of Art. 27(2) of the Convention.

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3. The Commission understands that the applicant further complains that the proceedings concerning his commitment to an institution for dangerous recidivists in the transitional cases differ from the regular proceedings under the new legislation in that no public hearing in the presence of the person concerned and his defence counsel is required.

Also in this respect the Commission refers to its decision on Application No. 7034/75 where the same issue arose. It then considered this complaint under Art. 14 of the Convention in conjunction with Arts. 5(1) and 5(4).

Art. 14 provides that the rights set forth in the Convention shall be secured without discrimination on any ground.

The Commission is of the view that proceedings by which a court orders that a previous order for a person's detention in a labour camp shall be carried out by his detention in an institution for dangerous recidivists cannot be directly compared with proceedings for the original commitment to such institution. In the Commission's opinion it would appear that only the proceedings leading to the original order for the applicant's detention in a labour camp were comparable with the latter proceedings. Now, this order was apparently issued following a public trial of the applicant's criminal case in regard to which it has not been alleged that any of the guarantees of Art. 6 of the Convention were not respected. Although the procedure had been amended under the new penal law the Commission is unable to find discrimination with regard to the proceedings.

It follows that this complaint too is manifestly ill-founded within the meaning of Art. 27(2) of the Convention.

4. The applicant has further alleged that the principle ne bis in idem was violated by the District Court of Steyr on 24 October 1974. He has invoked Art. 7 of the Convention.

Art. 7 of the Convention provides inter alia that no heavier penalty shall be imposed on a person than the one that was applicable at the time the criminal offence was committed.

The Commission notes in the first place that neither Art. 7 nor any other Article of the Convention guarantees either expressly or by implication the principle of ne bis in idem. In the present case, it is furthermore clear, that the applicant was in no way faced with a new trial regarding the crimes committed by him, as the District Court Steyr was merely transforming the kind of the applicant's detention. The Commission understands that the applicant is in fact contending that the said transformation amounted to the infliction of a punishment which did not exist at the time of his committing the crimes of which he was convicted in 1973. The Commission recalls in this respect, however, that it has already stated that the character of the detention in an institution for dangerous recidivists

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is not essentially different from that of a detention in the former labour camps. Art. 7 does not exclude that a penalty already imposed is carried out in a modified form if no heavier conditions are applied than would have been permissible at the time of the commission of the crime. As this was not the case in the circumstances of the present case (cf. Application No. 7034/75), the Commission finds that the applicant's complaint under Art. 7 is manifestly ill-founded within the meaning of Art. 27(2) of the Convention.

5. The applicant has finally alleged a violation of Art. 13 of the Convention which guarantees to everyone an effective remedy before a national authority.

However, the applicant has submitted no evidence to support his allegation. An examination by the Commission of this complaint as it has been submitted, including an examination made ex officio, does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the above Article.

It follows that the remainder of the application is likewise manifestly ill-founded within the meaning of Art. 27(2) of the Convention.

For these reasons, the Commission

DECLARES THIS APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H. C. KRUGER) — (J. E. S. FAWCETT)