

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

CASE OF WERNER v. AUSTRIA

(138/1996/757/956)

JUDGMENT

STRASBOURG

24 November 1997

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SUMMARY[1]

Judgment delivered by a Chamber

Austria – no public hearing or public delivery of judgments by court of first instance and court of appeal in proceedings to claim compensation for detention (Compensation (Criminal Proceedings) Act 1969 and Article 82 of the Code of Criminal Procedure) – failure to communicate principal public prosecutor's observations in those proceedings before Court of Appeal (Article 35 § 2 of Code of Criminal Procedure in force at material time)

I. ARTICLE 6 § 1 OF THE CONVENTION

A. Government's preliminary objection (failure to exhaust domestic remedies)

Question closely bound up with merits of complaint.

Conclusion: objection joined to merits (unanimously).

B. Merits of complaint

1. Applicability

Recapitulation of case-law.

Applicant had had right to be compensated for his detention pending trial, provided that the statutory requirements had been satisfied – there had therefore been a *contestation* (dispute) over a right – outcome of proceedings in relevant criminal courts directly decisive for his right – applicant's right to compensation a civil one.

Conclusion: Article 6 § 1 applicable (unanimously).

2. Compliance

(a) No public hearing or public delivery of judgments

(i) Austria's reservation

Issue not raised in Government's memorial to the Court – there was therefore an estoppel – unnecessary for Court to consider question of its own motion.

(ii) Lack of a public hearing

Recapitulation of case-law.

Applicant in principle entitled to a public hearing – established that in practice there was never a public hearing in such proceedings – applicant could accordingly not be

1. This summary by the registry does not bind the Court.

blamed for not having made an application which had no prospects of success – protection of applicant's private life did not prevail over principle laid down in Article 6 § 1 that proceedings must be public.

Conclusion: objection dismissed and violation found (unanimously).

(iii) Failure to deliver judgments publicly

Recapitulation of case-law.

The leave that could be given to third parties to obtain copies of judgments if they showed a legitimate interest did not amount to making the full texts of the judgments available to everyone – in Austria the possibility of obtaining those full texts existed only in respect of judgments of the Supreme Court, the Administrative Court and the Constitutional Court – furthermore, no need for relevant courts to make statements which would breach principle of presumption of innocence.

Conclusion: violation (unanimously).

(b) Fair hearing

Recapitulation of case-law.

Principle of equality of arms dictated that principal public prosecutor's observations should have been communicated to applicant and that he should have had opportunity to comment on them.

Conclusion: violation (eight votes to one).

II. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage: no causal link between breaches complained of and pecuniary damage.

B. Costs and expenses: reimbursement assessed on equitable basis.

Conclusion: respondent State to pay applicant specified sum for costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

8.12.1983, Pretto and Others v. Italy; 8.12.1983, Axen v. Germany; 22.2.1984, Sutter v. Switzerland; 21.2.1990, Håkansson and Sturesson v. Sweden; 26.3.1992, Editions Périscope v. France; 23.6.1993, Ruiz-Mateos v. Spain; 24.6.1993, Schuler-Zgraggen v. Switzerland; 21.9.1993, Zumtobel v. Austria; 27.10.1993, Dombo Beheer B.V. v. the Netherlands; 26.9.1995, Diennet v. France; 28.9.1995, Masson and Van Zon v. the Netherlands; 20.2.1996, Lobo Machado v. Portugal; 20.2.1996, Vermeulen v. Belgium; 23.10.1996, Ankerl v. Switzerland; 18.2.1997, Nideröst-Huber v. Switzerland; 28.5.1997, Pauger v. Austria; 29.5.1997, Georgiadis v. Greece; 24.11.1997, Szücs v. Austria

In the case of Werner v. Austria[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mrs E. PALM,
Mr L. WILDHABER,
Mr B. REPIK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 June and 20 October 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 October 1996 and by the Government of the Republic of Austria ("the Government") on 25 November 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 21835/93) against Austria lodged with the Commission under Article 25 by an Austrian national, Mr Johannes Werner, on 16 March 1993.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

Notes by the Registrar

1. The case is numbered 138/1996/757/956. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.
2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. The applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31 of Rules of Court B). The lawyer was given leave by the President to use the German language (Rule 28 § 3).

3. The Chamber to be constituted included *ex officio* Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 29 October 1996 the President decided that in the interests of the proper administration of justice this case and the case of Szücs v. Austria should be heard by the same Chamber (Rule 21 § 7). On the same day, in the presence of the Registrar, he drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr A. Spielmann, Mr N. Valticos, Mrs E. Palm, Mr L. Wildhaber and Mr B. Repik (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 2 April 1997.

On 24 January 1997 the Commission had produced various documents relating to the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing in this case and in the Szücs case took place in public in the Human Rights Building, Strasbourg, on 25 June 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr F. CEDE, Ambassador, Federal Ministry of Foreign Affairs, *Agent*,
Mrs I. GARTNER, public prosecutor, Department of Criminal Affairs and Pardons, Federal Ministry of Justice,
Mrs I. SIESS, Constitutional Service, Federal Chancellery, *Advisers*;

(b) *for the Commission*
Mr A. WEITZEL, *Delegate*;

(c) *for the applicant*
Mr G. BÜRSTMAYR, of the Munich Bar, *Counsel*;

(d) *for Mr Szücs*
Mr T. SCHREINER, of the Eisenstadt Bar, *Counsel*.

The Court heard addresses by Mr Weitzel, Mr Bürstmayr, Mr Schreiner, Mr Cede and Mrs Gartner.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. Mr Johannes Werner, an Austrian national born in 1963, lives in Vienna.

A. Detention pending trial

7. On 15 May 1991 the police arrested a Mr and Mrs Hauser (see paragraph 25 below), who were suspected of fraudulently using a credit card which did not belong to them when making purchases in various shops in Vienna to the value of about 200,000 Austrian schillings (ATS). On 17 May they were detained pending trial.

8. On 1 July 1991 the police also arrested the applicant, who was suspected of having aided and abetted Mr and Mrs Hauser by forging the signature on the credit card. On 3 July he was detained pending trial.

9. On 8 July 1991 Mr and Mrs Hauser were released, and on 19 July the applicant was released.

B. Discontinuance of the proceedings

10. On 24 February 1992 the investigating judge at the Vienna Regional Court (*Landesgericht*) decided to discontinue the proceedings in the light of a graphologist's finding that it was unlikely that the signatures on the payment slips for the purchases made with the stolen credit card were in Mr Werner's hand and of the fact that the witnesses called by the public prosecutor did not have sufficiently clear memories.

C. The claim for compensation for detention

11. In the meantime, on 4 February 1992, the public prosecutor's office (*Staatsanwaltschaft*) had asked the Regional Court to declare that the applicant and Mr and Mrs Hauser were not entitled to compensation for their detention under section 2 (1) (b) of the Compensation (Criminal Proceedings) Act 1969 (*Strafrechtliches Entschädigungsgesetz*, "the 1969 Act" – see paragraph 19 below), on the ground that the suspicion concerning them had not been dispelled.

12. On 21 April 1992 the investigating judge interviewed the applicant and Mr and Mrs Hauser and told them of the application made by the public prosecutor's office.

13. The applicant and Mr and Mrs Hauser sought compensation from the State for the pecuniary damage sustained on account of their detention.

14. On 3 June 1992 the Review Division (*Ratskammer*) of the Vienna Regional Court, sitting in private, refused their compensation claims on the ground that, contrary to the requirements of section 2 (1) (b) of the 1969 Act, the suspicion concerning them had not been dispelled. No representative of the public prosecutor's office attended the deliberations.

15. On 15 June 1992 Mr Werner and Mr and Mrs Hauser appealed against that decision to the Vienna Court of Appeal (*Oberlandesgericht*). They asked the Court of Appeal to take further evidence and, in particular, to hear witnesses.

16. On 2 September 1992 the principal public prosecutor's office (*Oberstaatsanwaltschaft*) submitted written observations. It asked the Court of Appeal to dismiss the appeal and not to take further evidence as the witnesses' statements were not capable of exculpating the appellants. These observations were not communicated to the applicant or to Mr and Mrs Hauser.

17. On 29 October 1992 the Vienna Court of Appeal, sitting in private, dismissed the appeal.

It ruled as follows:

> "In the first place, the appellants' argument that suspicion does not have to be wholly dispelled for compensation to be payable under section 2 (1) (b) of the Compensation (Criminal Proceedings) Act is contradicted by the settled case-law of the Austrian courts. It has been consistently held that suspicion must be dispelled sufficiently to establish that the detained person is not punishable, and cannot be prosecuted, on account of the conduct in respect of which his detention was ordered. Where that remains only doubtful, suspicion is not dispelled within the meaning of section 2 (1) (b) of the Act. The appellants' assertion that this case-law reverses the burden of proof is incorrect, since cogent evidence must be adduced before it can be accepted that suspicion has been dispelled.
>
> In this connection, there is no justification for giving the appellants, as they demanded, the opportunity to prove their innocence by taking further evidence, since the evidence they propose to adduce cannot be considered likely to lead to such a

result. Seeing that the suspicion concerning the appellants is based mainly on the witness statements of 16 March 1991 and that, in addition, it is not possible to determine when the other offences were committed, conclusive results cannot be expected if fresh evidence is taken in the form of the appellant Johannes Werner's time-sheets and itineraries for 18 and 19 March, together with his tachograph discs, because the offences could have been committed during the rest stops on those journeys, or before or after them, especially as there are gaps in the time-sheets submitted by Mr Werner. The witnesses it was proposed to call have already been interviewed by the police and have already been confronted with the appellants. The main reason why the prosecution was abandoned was that with the passing of time those witnesses' memories had begun to falter. However, if their memories were so defective that they could no longer be considered adequate to establish guilt, neither can they in the present proceedings form an adequate basis for awarding compensation.

The appellants did not dispute that the police inquiries had given rise to real suspicion concerning them. That suspicion was not subsequently dispelled, but on account of some remaining doubt was simply not sufficient to support a finding of guilt. The conditions which must be met under section 2 (1) (b) of the Compensation (Criminal Proceedings) Act in order to be able to claim compensation have accordingly not been satisfied and the appellants' claims must therefore fail."

No representative of the principal public prosecutor's office attended the deliberations.

II. RELEVANT DOMESTIC LAW

A. Public oral hearings

18. Article 90 § 1 of the Federal Constitution provides:

"Hearings by trial courts in civil and criminal cases shall be oral and public. Exceptions may be prescribed by law."

B. Compensation for detention pending trial

19. The relevant provisions of the 1969 Act read as follows:

Section 2 (1) (b)

"(1) A right to compensation arises:

(a) …

(b) where the injured party has been placed in detention or remanded in custody by a domestic court on suspicion of having committed an offence making him liable to criminal prosecution in Austria … and is subsequently acquitted of the alleged offence

or otherwise freed from prosecution and the suspicion that he committed the offence has been dispelled or prosecution is excluded on other grounds, in so far as these grounds existed when he was arrested;

..."

Section 6

"(1) ...

(2) A court which acquits a person or otherwise frees him from prosecution … (section 2 (1) (b) or (c)) must decide either of its own motion or at the request of the individual in question or the public prosecutor's office whether the conditions of compensation under section 2 (1) (b) or (c), (2) and (3) have been satisfied or whether there is a ground for refusal under section 3 ... If the investigating judge decides to discontinue the proceedings, the Review Division concerned shall rule.

(3) Before ruling, the court shall hear the detained or convicted person and gather the evidence necessary for its decision where this has not already been adduced in the criminal proceedings ...

(4) Once the judgment rendered in the criminal proceedings has become final, the decision, which need not be made public, must, as part of the proceedings provided for in paragraph 2, be served on the detained or convicted person personally and on the public prosecutor ...

(5) The detained or convicted person and the public prosecutor may appeal against the decision to a higher court within two weeks.

(6) The court with jurisdiction to rule on the appeal shall order the criminal court of first instance to carry out further investigations if that is necessary for a decision. If the court which has to rule is the court of first instance, the investigations shall be carried out by the investigating judge.

(7) Once the decision has become final, it is binding on the courts in subsequent proceedings."

20. If the courts consider that the conditions in sections 2 and 3 have been satisfied, the applicant must apply to the Auditor-General's Department (*Finanzprokuratur*) for his claim to be allowed. If no decision has been taken on his claim within six months or if it has been refused in whole or in part, the claimant may bring a civil action against the Republic of Austria (sections 7 and 8 of the Act).

21. As a general rule, there is no public hearing before the Review Division of the Regional Court or in the Court of Appeal in appeal proceedings (*Beschwerden*) against a decision of the Review Division. The two courts rule after sitting in private and after hearing the representative of the public prosecutor's office and the principal public prosecutor's office respectively (Articles 32 § 1 and 35 § 2 of the Code of Criminal Procedure – *Strafprozeßordnung*).

22. At the material time Article 35 § 2 of the Code of Criminal Procedure provided:

> "[Public prosecutors] may attend the deliberations of the court, provided that these do not concern a decision to be delivered at the trial [*Hauptverhandlung*], or on the sitting day [*Gerichtstag*] appointed for ruling on an ordinary appeal or an appeal on points of law; they shall not, however, be entitled to be present during the vote and the taking of the decision [*Beschlußfassung*]."

Since 1 January 1994 that Article has been worded as follows:

> "Where the public prosecutor at an appellate court makes observations concerning an appeal on points of law or an ordinary appeal against a judgment or any other judicial decision, the appellate court must communicate those observations to the accused (person concerned) and indicate to him that he is entitled to comment on them within a specified period that must be reasonable. Such communication is not necessary where the prosecutor does no more than submit, without argument, that the appeal should be dismissed or merely submits that it should be allowed or if the appellate court allows the accused's appeal."

C. Access to the file in criminal cases

23. Article 82 of the Code of Criminal Procedure provides:

> "The courts shall have discretion to decide whether a party or his duly appointed representative may, in cases other than those expressly provided for in the Code of Criminal Procedure, be given leave to inspect documents in the file or whether copies may be given to them, provided that the persons concerned can convincingly show that they need such copies in order to be able to claim compensation or to support an application for a retrial or for some other reason."

D. Public access to judgments of Austria's highest courts

24. It is the practice of the registries of the Austrian Constitutional Court and Administrative Court to make their respective court's judgments available on request. The courts also publish a selection of their decisions each year. Since an amendment to the Supreme Court Act in 1991, the judgments of the Supreme Court (*Oberster Gerichtshof*) have likewise been available to the public on request. The Supreme Court also publishes a selection of its judgments each year.

PROCEEDINGS BEFORE THE COMMISSION

25. Mr Werner applied to the Commission on 16 March 1993, at the same time as Mr and Mrs Hauser, co-applicants who subsequently withdrew their application. Relying on Article 6 § 1 of the Convention, he complained that when ruling on his claim for compensation for his detention, the Vienna

Regional Court and Court of Appeal had not held a public hearing and had not pronounced judgment publicly. He also maintained that he had not had a fair hearing in the Vienna Court of Appeal as he had been unable to reply to the principal public prosecutor's submissions or to have any witnesses examined. Lastly, relying on Article 6 § 2 of the Convention, he complained that the principle of presumption of innocence had been infringed.

26. On 2 September 1994 and 23 October 1995 the Commission declared the application (no. 21835/93) admissible as regards the complaints concerning the lack of a public hearing, the failure of the Vienna Regional Court and Court of Appeal to pronounce judgment publicly and the lack of a fair hearing in the Court of Appeal due to the applicant's having been unable to reply to the principal public prosecutor's submissions. It declared it inadmissible as to the remainder.

In its report of 3 September 1996 (Article 31) it expressed the opinion that there had been a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing (twenty-five votes to four), the Austrian courts' failure to pronounce judgment publicly (twenty-seven votes to two) and the lack of a fair hearing in the Vienna Court of Appeal (twenty-six votes to three). The full text of the Commission's opinion and of the four separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

27. In their single memorial in this case and the case of Szücs v. Austria (judgment of 24 November 1997, *Reports of Judgments and Decisions* 1997-VII) the Government asked the Court:

> "1. to declare the present applications inadmissible under Article 27 § 2 of the Convention because they are manifestly ill-founded in the absence of the violations of the Convention alleged by the applicants, in so far as they are not to be rejected for non-exhaustion of domestic remedies under Article 27 § 3 of the Convention;
>
> or
>
> 2. to hold that there was no violation of the Convention in the proceedings under the Compensation (Criminal Proceedings) Act."

28. The applicant requested the Court to find breaches of his rights, secured in Article 6 § 1 of the Convention, to

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is available from the registry.

"(a) a public hearing in the proceedings concerning the claim for compensation under the Compensation (Criminal Proceedings) Act;

(b) public delivery of the decisions of the courts before which that application came;

(c) equality of arms (fair hearing)."

The applicant also asked the Court to award him the costs and expenses he had incurred and also just satisfaction under Article 50 of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

29. Mr Werner maintained that he was the victim of breaches of Article 6 § 1 of the Convention, which provides:

"In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing … by [a] … tribunal ... Judgment shall be pronounced publicly …"

He complained that, when ruling on his claim for compensation for his detention, the Vienna Regional Court and Court of Appeal had not held a public hearing or pronounced their judgments publicly. He also alleged that he had not had a fair hearing in the Vienna Court of Appeal as the principal public prosecutor's observations had not been communicated to him.

A. The Government's preliminary objection

30. As they had done before the Commission, the Government maintained that the applicant had not exhausted domestic remedies in respect of his complaint concerning the lack of a public hearing as he had not expressly asked for such a hearing. He had accordingly waived any right that he might have had in that connection.

31. Like the Commission, the Court considers that the question whether the applicant possibly waived his right to a public hearing and the issue of the merits of the complaint raised in that regard are closely bound up with each other (see, as the most recent authority, the Pauger v. Austria judgment of 28 May 1997, *Reports of Judgments and Decisions* 1997-III, pp. 895–96, §§ 58–63). It consequently decides to join the preliminary objection to the merits of the case.

B. Merits of the complaints

1. Applicability of Article 6 § 1

32. In the applicant's submission, the impugned proceedings related to his civil rights. He had sought compensation for economic loss resulting from his detention pending trial and there had been a serious dispute over his right to be compensated. As the second stage of the proceedings had taken place in the civil courts, it would be incomprehensible to hold that Article 6 § 1 was not applicable to the earlier but essential stage in the criminal courts. Lastly, the decision of the latter courts had been directly decisive for his right to compensation.

33. The Government, on the other hand, considered that the proceedings in issue were not covered by Article 6, on the ground that, as in the case of Masson and Van Zon v. the Netherlands (judgment of 28 September 1995, Series A no. 327-A), the applicant had not had a "right" in domestic law. According to the Compensation (Criminal Proceedings) Act, the mere fact of acquitting somebody who had been held in detention or discontinuing the proceedings against him did not mean that the person concerned automatically had a right to compensation. That right existed only where all suspicion had been dispelled, a question which the relevant courts determined in the exercise of their discretion, so that it was not possible to say that a "right" existed. Furthermore, the criminal courts' decision was not directly decisive for the right in question, as the aggrieved person subsequently had to submit his compensation claim to the civil courts.

34. The Court reiterates that Article 6 § 1 applies to *contestations* (disputes) over rights which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among other authorities, the Masson and Van Zon judgment cited above, p. 17, § 44, and the Georgiadis v. Greece judgment of 29 May 1997, Reports 1997-III, pp. 958–59, § 30).

35. The Court notes that in the instant case, section 2 (1) (b) of the Compensation (Criminal Proceedings) Act (see paragraph 19 above) provides that a person who has been acquitted or otherwise freed from prosecution after his detention has a right to compensation if "the suspicion that he committed the offence has been dispelled".

In the case of Masson and Van Zon, the award of such compensation was left entirely to the discretion of the court even where the legal conditions were met (see the judgment, cited above, p. 19, § 51), and

that led the Court to hold that there had been no right under domestic law. In the present case, on the contrary, the applicant had a right to be compensated for his detention pending trial, provided that the statutory requirements were satisfied. This case is therefore more akin to the Georgiadis case, in which a similar provision of the Greek Code of Criminal Procedure created a right to compensation for a person who had been acquitted after being held in detention (see the judgment, cited above, p. 959, § 32).

Like the Commission, the Court therefore considers that a "right" existed.

36. Mr Werner also maintained that he had had a right to compensation under the Compensation (Criminal Proceedings) Act as the original suspicion concerning him had been dispelled, although the relevant criminal courts had held that that requirement had not been satisfied. There had therefore been a "*contestation*" (dispute) over a right within the meaning of Article 6 § 1.

37. The Court notes that section 6 (7) of the Compensation (Criminal Proceedings) Act provides: "Once the decision [on the award of such compensation] has become final, it is binding on the courts in subsequent proceedings" (see paragraph 19 above). Irrespective of the fact that other procedural stages might prove necessary (see paragraph 20 above), the outcome of the proceedings in the relevant criminal courts was therefore directly decisive for the applicant's right to compensation.

38. As to whether the right was a "civil" one, the Court reiterates that the concept of "civil rights and obligations" is not to be interpreted solely by reference to the respondent State's domestic law and that Article 6 § 1 applies irrespective of the status of the parties, as of the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter (see the Georgiadis judgment cited above, p. 959, § 34). For a right to be a civil one, it is sufficient that the subject matter of the action should be pecuniary and that the action should be founded on an alleged infringement of rights which are likewise pecuniary rights (see the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, § 40).

39. In the Georgiadis case the Court held that the right to compensation after the acquittal of a person who had been held in detention was a civil one (see the judgment, cited above, p. 959, § 35). It sees no reason to depart from that assessment in the instant case, in which the applicant's right to compensation concerned compensation sought for detention undergone after proceedings had been discontinued by the investigating judge (see paragraph 10 above).

40. Accordingly, like the Commission, the Court concludes that Article 6 § 1 was applicable to the proceedings in issue.

2. Compliance with Article 6 § 1

(a) No public hearing or public delivery of judgments

(i) Austria's reservation in respect of Article 6

41. At the hearing before the Court, the Government asserted that the Court could not entertain the complaints based on the fact that there was no public hearing and no public delivery of the judgments in the proceedings for compensation in relation to a criminal case, since those proceedings were covered by Austria's reservation in respect of Article 6 of the Convention, worded as follows:

> "The provisions of Article 6 of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitution Law."

42. The Court notes that the Government did not raise the issue of the reservation in their memorial to the Court. It accordingly considers that it must apply Rule 50 § 1 of Rules of Court B, which provides:

> "A party wishing to raise a preliminary objection must file a statement setting out the objection and the grounds therefor not later … than the expiry of the time-limit laid down under Rule 39 § 1 for the filing of its first memorial."

The Government are therefore estopped from raising the question whether the complaints (see paragraph 41 above) are covered by the relevant reservation and it is unnecessary for the Court to consider it of its own motion.

(ii) Lack of a public hearing

43. The applicant maintained that he should have had a public hearing in the criminal courts before which his compensation claim came as they had not only to resolve legal issues but also to establish the facts. The fact that he had made no application to that end could not be regarded as a waiver of his right to a public hearing, seeing that the relevant provisions of Austrian legislation made no provision for such a hearing.

44. The Government, on the other hand, considered that in failing to apply for a public hearing, Mr Werner had unequivocally waived his right to one, and they referred to the Håkansson and Sturesson v. Sweden case (see the judgment of 21 February 1990, Series A no. 171-A). Holding a hearing in proceedings relating to a compensation claim was in no way precluded by Austrian law, they maintained, and was even the rule where the decision was taken just after the publicly delivered one on the criminal charge. In the alternative the Government argued that a hearing had been unnecessary in the instant case as the proceedings had been concerned only with clarifying a question of law, the facts having already been established in the main

criminal proceedings; nor had one even been desirable in the applicant's interests, because the proceedings were concerned with personal matters relating to whether suspicion had been dispelled.

45. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, for example, the Diennet v. France judgment of 26 September 1995, Series A no. 325-A, pp. 14–15, § 33).

46. In this instance neither the Vienna Regional Court nor the Vienna Court of Appeal held a public hearing of the applicant's compensation claim (see paragraphs 14 and 17 above). The applicant was in principle entitled to a public hearing as none of the exceptions laid down in the second sentence of Article 6 § 1 applied (see the Håkansson and Sturesson judgment cited above, p. 20, § 64).

47. It is true that Mr Werner did not expressly ask for a public hearing to be held, and the Court must examine whether he thereby waived his right.

48. Those appearing before the Court at the hearing disagreed as to the legislative provisions applicable in the case. In this connection, the Government's argument that a public hearing in compensation proceedings was the rule cannot apply in this instance, precisely because no hearing was held on the criminal charge, the proceedings having been discontinued by the investigating judge (see paragraph 10 above). Even if the relevant provisions did not expressly rule out holding a public hearing as they did in the Diennet case (see the judgment, cited above, p. 15, § 34), the Court, like the Commission, considers it established that in practice there is never a public hearing in such proceedings under section 6 (2) of the Compensation (Criminal Proceedings) Act (see paragraph 19 above) where criminal proceedings have been discontinued by the investigating judge. That is clear both from the spirit of the Act and from the analyses of it by legal writers.

That being so, the applicant cannot be blamed for not having made an application which had no prospects of success. On this point the present case differs fundamentally from the cases of Håkansson and Sturesson (see the judgment, previously cited, pp. 20–21, § 67), Schuler-Zgraggen v. Switzerland (see the judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58), Zumtobel v. Austria (see the judgment of 21 September 1993, Series A no. 268-A, p. 14, § 34) and Pauger (see the judgment, previously cited, p. 896, § 60), in which the relevant law expressly made provision, on certain conditions, for the possibility of a public hearing.

49. As to the need for such a hearing, the Court, like the Commission, considers that the issue of criminal liability is quite distinct from that of compensation for detention, so that the compensation proceedings cannot be regarded as an "appellate stage" of the main proceedings in the criminal courts, during which detention pending trial was ordered. It also notes that there was no public hearing in the criminal proceedings either.

50. Lastly, the Government's argument concerning the need to protect the applicant's private life is unconvincing. As the Government themselves pointed out, where a person is freed from prosecution by a court in criminal proceedings, the court invariably holds a hearing and rules immediately afterwards, in public, on the issue of awarding compensation for detention undergone. Even accepting that matters are different where, as in the instant case, the proceedings were discontinued by the investigating judge, before whom proceedings are not public, the Court does not consider that protecting Mr Werner's private life should have been made to prevail over the principle laid down in Article 6 § 1 of the Convention that proceedings must be public.

51. Consequently, the Court dismisses the Government's preliminary objection and holds on the merits that there has been a breach of Article 6 § 1 on account of the lack of a public hearing in the proceedings complained of.

(iii) The failure to deliver judgments publicly

52. The applicant alleged that, contrary to Article 6 § 1, neither the Vienna Regional Court nor the Vienna Court of Appeal had pronounced judgment publicly.

53. In the Government's submission, that requirement had been satisfied in the instant case, since under Article 82 of the Code of Criminal Procedure (see paragraph 23 above), third parties were able to have access to the files and obtain copies if they could show a legitimate interest. Furthermore, the limited jurisdiction of the courts, which had to rule only on whether the suspicion concerning the applicant had been dispelled, justified not delivering the decisions in public, as in the Pretto and Others v. Italy case (see the judgment of 8 December 1983, Series A no. 71). Lastly, a private sitting had also been justified in the interests of the applicant, because it was likely to be stated in the decisions in question that the suspicion concerning him still remained, and that would infringe the principle of presumption of innocence.

54. The Court reiterates that the principles governing the holding of hearings in public (see paragraph 45 above) also apply to the public delivery of judgments (see, for example, the Pretto and Others judgment cited above, p. 11, § 21) and have the same purpose, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.

55. The Court has several times had occasion to rule on the Article 6 § 1 requirement that judgments must be pronounced publicly, holding that "in each case the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1" (see the Pretto and Others judgment cited above, p. 12, § 26 *in fine*). Thus in that case (see p. 13, § 27, of the judgment) it held, having regard to the Court of Cassation's limited jurisdiction, that depositing the judgment in the court registry, which made the full text of the judgment available to everyone, was sufficient to satisfy the requirement. In the Axen v. Germany case (see the judgment of 8 December 1983, Series A no. 72, p. 14, § 32), it held that public delivery of a decision of a supreme court was unnecessary given that the judgments of the lower courts had been pronounced publicly. Lastly, in the Sutter v. Switzerland case (see the judgment of 22 February 1984, Series A no. 74, pp. 14–15, § 34) it held that public delivery of a decision of the Military Court of Cassation was unnecessary, as public access to that decision was ensured by other means, namely the possibility of seeking a copy of the judgment from the court registry and its subsequent publication in an official collection of case-law.

56. In the instant case, in accordance with section 6 (4) of the Compensation (Criminal Proceedings) Act (see paragraph 19 above), the decisions of the Vienna Regional Court and Court of Appeal were served on the applicant and not delivered at public sittings.

57. Admittedly, as the Government maintained, a third party can be given leave, under Article 82 of the Code of Criminal Procedure (see paragraph 23 above), to inspect the files and obtain copies of the judgments they contain if he shows a legitimate interest. Such leave is, however, granted only at the discretion of the relevant courts, so that the full texts of the judgments are not made available to everyone.

58. In Austria the possibility of obtaining the full texts of judgments from the court registry in fact exists only in respect of judgments of the Supreme Court, the Administrative Court and the Constitutional Court (see paragraph 24 above) and not in respect of the judgments and decisions of courts of appeal or first instance.

59. The Government's argument as to maintaining the presumption of the applicant's innocence cannot succeed. On the one hand, the Court, like the Commission, does not see why it should be necessary for the relevant courts, in the course of proceedings brought under the Compensation (Criminal Proceedings) Act, to make statements which would breach the principle of presumption of innocence laid down in Article 6 § 2. On the other hand, it may be of importance to the person concerned that the fact that suspicion concerning him has been dispelled should be brought to the knowledge of the public.

60. That being so, in view of the fact that no judicial decision was pronounced publicly and that publicity was not sufficiently ensured by other means, the Court, like the Commission, concludes that there has been a breach of Article 6 § 1 in this respect.

(b) Fair hearing

61. The applicant maintained that, contrary to the requirement of "equality of arms", he was not informed of the principal public prosecutor's observations in the proceedings in the Vienna Court of Appeal.

62. In the Government's submission, the principle of equality of arms had been respected in the instant case as no member of the principal public prosecutor's office had attended the deliberations. Moreover, there was a difference between civil cases – like the present one – and criminal cases as regards the practical applicability of the principle. In a civil case one of the parties had to have the last word and in this instance it had been the principal public prosecutor, acting as representative of the defendant, that is to say the State. Nor had the prosecutor's observations contained anything new.

63. The Court will examine the complaint in the light of the whole of paragraph 1 of Article 6 because the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial (see the Ruiz-Mateos v. Spain judgment of 23 June 1993, Series A no. 262, p. 25, § 63). Furthermore, the principle of equality of arms – in the sense of a "fair balance" between the parties – requires that each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among other authorities, the Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19, § 33, and the Ankerl v. Switzerland judgment of 23 October 1996, Reports 1996-V, pp. 1567–68, § 38).

64. In the instant case the applicant appealed to the Vienna Court of Appeal with a view to obtaining compensation for his detention (see paragraph 15 above). In those proceedings the observations submitted to the Court of Appeal by the principal public prosecutor, representing the defendant (the State), were not communicated to him and he therefore did not have an opportunity to reply to them.

65. The right to adversarial proceedings means that each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (see the Ruiz-Mateos judgment previously cited, p. 25, § 63).

66. In this connection, it is of little consequence that the case was a civil one, since it is clear from the case-law (see, among other authorities, the Lobo Machado v. Portugal and Vermeulen v. Belgium judgments of

20 February 1996, Reports 1996-I, p. 206, § 31, and p. 234, § 33, respectively, and the Nideröst-Huber v. Switzerland judgment of 18 February 1997, Reports 1997-I, p. 108, § 28) that the requirements resulting from the right to adversarial proceedings are in principle the same in both civil and criminal cases.

67. In the instant case the principle of equality of arms dictated that the principal public prosecutor's observations should be communicated to Mr Werner and that he should have the opportunity to comment on them. As that did not happen, the applicant found himself at a substantial disadvantage *vis-à-vis* his opponent.

68. The Court also notes that, as the Government indicated in their memorial, Article 35 § 2 of the Code of Criminal Procedure (see paragraph 22 above) now provides that the Court of Appeal must automatically communicate to the opposing side any observation made by the public prosecutor's office in appeals against decisions of the Regional Court.

69. Having regard to all the foregoing factors, the Court concludes, like the Commission, that there has been a breach of Article 6 § 1 of the Convention on account of the Court of Appeal's failure to communicate the principal public prosecutor's observations to the applicant.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

70. Article 50 of the Convention provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

71. Mr Werner claimed 18,000 Austrian schillings (ATS) in respect of pecuniary damage on account of loss of earnings during his detention.

72. Like the Commission and the Government, the Court notes that there is no causal link between the breaches complained of and the alleged pecuniary damage; it is not possible to speculate as to what would have been the outcome of the proceedings if they had satisfied the requirements of Article 6 § 1.

B. Costs and expenses

73. The applicant also sought ATS 268,699 for costs and expenses incurred in the proceedings in the national courts, ATS 251,501 of which related to the criminal proceedings and ATS 17,198 to the proceedings concerning the detention compensation claim. He further claimed ATS 162,295 in respect of the proceedings before the Convention institutions.

74. The Government found these amounts excessive. As regards the domestic proceedings, they considered that only the appeal to the Vienna Court of Appeal, the costs of which amounted to ATS 8,501.40, was designed to prevent or seek rectification of a violation of the Convention. As to the Strasbourg proceedings, having regard to the complaints declared admissible by the Commission, they considered the sum of ATS 100,000 to be reasonable.

75. The Delegate of the Commission was in favour of reimbursing the costs and expenses incurred before the Convention institutions.

76. The Court reiterates that according to its case-law, to be entitled to an award of costs and expenses, the injured party must have incurred them in order to seek prevention or rectification of a violation, to have the same established by the Commission and later by the Court and to obtain redress therefor. It must also be shown that the costs and expenses were actually and necessarily incurred and that they are reasonable as to quantum (see, among other authorities, the Nideröst-Huber judgment cited above, p. 110, § 40).

77. As the Government pointed out, only the costs relating to the proceedings in the Vienna Court of Appeal were incurred in order to seek rectification of violations relating to the lack of a public hearing and the Vienna Regional Court's failure to deliver judgment publicly. The Court therefore awards the sum of ATS 8,501.40 under this head.

As to the costs entailed by Mr Werner's representation at Strasbourg, the Court, making its assessment on an equitable basis and with reference to the relevant criteria, decides to award the sum of ATS 120,000.

C. Default interest

78. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT

1. *Joins* to the merits unanimously the Government's preliminary objection and *dismisses* it unanimously after considering the merits;
2. *Holds* unanimously that Article 6 § 1 of the Convention applies to the proceedings in issue;
3. *Holds* unanimously that there has been a breach of Article 6 § 1 of the Convention on account of the lack of a public hearing in those proceedings;
4. *Holds* unanimously that there has been a breach of Article 6 § 1 of the Convention on account of the failure to pronounce the judgments in those proceedings publicly;
5. *Holds* by eight votes to one that there has been a breach of Article 6 § 1 of the Convention on account of the Vienna Court of Appeal's failure to communicate the principal public prosecutor's observations to the applicant;
6. *Holds* unanimously
   (a) that the respondent State is to pay to the applicant, within three months, 128,501 (one hundred and twenty-eight thousand five hundred and one) Austrian schillings and 40 (forty) groschen in respect of costs and expenses;
   (b) that simple interest at an annual rate of 4% shall be payable on that sum from the expiry of the above-mentioned three months until settlement;
7. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 November 1997.

For the President

Signed: Feyyaz GÖLCÜKLÜ
Judge

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the partly concurring, partly dissenting opinion of Mr Matscher is annexed to this judgment.

Initialled: F. G.
Initialled: H. P.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(*Translation*)

1. As I have already observed on many occasions (see, in particular, my separate opinion in the case of Fischer v. Austria, judgment of 26 April 1995, Series A no. 312), in certain proceedings and especially those relating to claims for compensation for detention pending trial (or in similar cases) a public hearing and public delivery of the judgment are of no value either to the individuals concerned or to the general public. In cases of that kind they are not in fact "procedural safeguards" at all.

I voted with the other, unanimous members of the Chamber in favour of finding a violation in this respect only in order to conform to the Court's settled case-law.

2. In my view, there was no breach of the principle of equality of arms or the principle that proceedings must be adversarial.

I accept that the principal public prosecutor's submissions that the appeal should be dismissed could have been communicated to the applicant; however, the applicant must have been aware of the principal public prosecutor's position, seeing that the public prosecutor had previously submitted that the compensation claim should be dismissed, and, further, even if the applicant had been in possession of the principal public prosecutor's observations, he would have had no opportunity of replying to them as the Court of Appeal decides solely on the file (applicant's appeal and principal public prosecutor's observations). In sum, the principle of equality of arms was not breached in its substance.

The principle that proceedings must be adversarial does not require a double or triple exchange of pleadings, once both parties have had an opportunity to submit their points of view. Matters are different only in criminal proceedings, in which, in accordance with a general principle that has been recognised and applied also in the Court's case-law, the accused must always have the last word. But here we are dealing with civil proceedings, in which the adversarial principle requires only that each of the parties should have an equal opportunity to submit his point of view, which was so in the instant case.