CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 33979/96
by Erwin EDELMAYER
against Austria

The European Court of Human Rights (Third Section), sitting on 21 March 2000 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J.-P. Costa,
Mrs F. Tulkens,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mr K. Traja,
Mr M. Ugrekhelidze, *judges*,
and Mrs S. Dollé, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 16 July 1996 and registered on 26 November 1996,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1977. He lives in Neustift im Felde and is represented before the Court by Mr. F. Müller, lawyer, of Kirchberg am Wagram.

A. Particular circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 16 September 1995 the applicant caused a road traffic accident in which one of his passengers, B., was injured. He was breathalysed, and on 10 October 1995 he was ordered by the Tulln District Authority (*Bezirkshauptmannschaft*) to pay a fine for driving his car whilst under the influence of drink. The fine was ordered pursuant to sections 5 and 99 § 1 of the Road Traffic Act 1960 (*Straßenverkehrsordnung*).

On 11 October 1995 criminal proceedings were brought against the applicant by reference to an information laid by the Absdorf gendarmerie which had arrived on the same day. Thereby the applicant was convicted by the Kirchberg am Wagram District Court (*Bezirksgericht*) on 25 October 1995 for causing injury by negligence as regards B., contrary to Article 88 §§ 1 and 3 of the Criminal Code (*Strafgesetzbuch*). Because of the aggravating circumstances of the severity of the injury caused and the applicant's intoxication (Article 81 § 2), the applicable maximum sentence automatically increased to up to six months' imprisonment and the alternative maximum sentence to up to 360 day-rates. The applicant was also convicted as regards his second passenger, E., of putting a person at risk of physical injury, contrary to Article 89 of the Criminal Code. The applicant was fined 60 day-rates (ATS 9,000.00), the payment of half of which was suspended for three years. In these and the subsequent proceedings the applicant was represented by counsel.

The applicant did not appeal against the conviction of 25 October 1995, but the Public Prosecutor's Office (*Staatsanwaltschaft*) filed an appeal against sentence (*Strafberufung*). In his reply to the prosecution's appeal, the applicant referred to the case of Gradinger which had recently been decided (see the Gradinger v. Austria judgment of 23 October 1995, Series A no. 328-C). Relying on Article 4 of Protocol No. 7, he alleged that his conviction amounted to "double punishment". He claimed that this constituted a ground of nullity which the appellate court had to examine of its own motion.

By judgment of 26 March 1996 the Krems Regional Court (*Landesgericht*) accepted the prosecution's appeal against sentence in part: it removed the suspension of payment of part of the fine. As to the applicant's arguments under Article 4 of Protocol No. 7, the court noted that the judgments of the European Court bind the entire State apparatus. However, it was for the legislator to ensure that domestic law was compatible with the Convention, for example (in the present case) by inserting a "subsidiarity" clause in Article 81 § 2 of the Criminal Code or in the relevant administrative provisions.

The Regional Court also declined to remit the case to the Constitutional Court (*Verfassungsgerichtshof*) as there was no question of whether the provisions in the present case were in conformity with the Constitution, and in any event the Constitutional Court was not competent to make laws. It concluded that there had been no prohibited double punishment, no violation of the principle of *ne bis in idem*, and that the applicant's allegation of nullity was not made out.

B. Relevant domestic law and practice

1. The Road Traffic Act

Section 5 of the Road Traffic Act 1960 provides that it is an offence for a person to drive a vehicle if the proportion of alcohol in his blood or breath is equal to or higher than 0.8 grams per litre or 0.4 milligrams per litre respectively.

Section 99 of the 1960 Act provides, so far as relevant, that:

> "(1) It shall be an administrative offence (*Verwaltungsübertretung*), punishable with a fine of not less than ATS 8,000 and not more than ATS 50,000 or, in default of payment with one to six weeks' imprisonment, for any person:
> (a) to drive a vehicle when under the influence of drink ...
>
> (6) An administrative offence is not committed where: ...
> (c) facts constituting an offence under sub-sections (2), (3) or (4) also constitute an offence falling within the jurisdiction of the [ordinary] courts ... ."

2. The Criminal Code

Under Article 88 § 1 of the Criminal Code, it is an offence, punishable by up to three months' imprisonment or a fine, to cause physical injury by negligence. By virtue of Article 88 § 3, where the special circumstances of Article 81 § 2 apply, the maximum possible sentence is increased from three months' to six months' imprisonment.

Article 81 § 2 applies where a person commits the offence

> "after allowing himself, even if only negligently, to become intoxicated ... through the consumption of alcohol, but not to an extent which excludes ... responsibility ...".

By virtue of an irrebuttable presumption applied by the criminal courts, a driver with a blood alcohol level of 0.8 grams per litre or higher is deemed to be "intoxicated" for the purposes of Article 81 § 2.

Article 89 of the Criminal Code creates an offence of negligently putting at risk the physical safety of another in circumstances including intoxication, as set out in Article 81 § 2.

3. Appeal against a conviction by a District Court

In accordance with section 464 of the Code of Criminal Procedure (*Strafprozessordnung*), an appeal on points of law and of fact and against sentence (*Berufung wegen Nichtigkeit, Schuld und Strafe*) lies against the judgment of a District Court.

According to section 477 of the Code of Criminal Procedure, the appellate court has to limit its review to the issues raised in the appeal. However, where in the course of examining an appeal, it comes to the conclusion that substantive law has been wrongly applied to the detriment of the convict amounting to a ground of nullity it has to proceed of its own motion.

COMPLAINTS

The applicant alleges a violation of Article 4 of Protocol No. 7 to the Convention.

THE LAW

The applicant alleges a violation of Article 4 of Protocol No. 7 to the Convention by virtue of the criminal proceedings which followed the administrative criminal proceedings in the case. Article 4 of Protocol No. 7 provides, so far as relevant, as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

1. The Government submit that the applicant has not exhausted domestic remedies, as required by Article 35 of the Convention, in two respects. First, they claim that he failed to appeal against the fine for the breach of Section 5 of the Road Traffic Act 1960. In particular, they claim that when the penal order was made against the applicant, he must have been aware of the fact that section 99 § 6c of the Road Traffic Act was unconstitutional as, at the date of the penal order, the Commission had already adopted its report under former Article 31 of the Convention in the Gradinger case. They add that, in a decision of 5 December 1996 (G9/96), the Constitutional Court found that the exclusion of cases such as the present from the principle of "subsidiarity" in Section 99 § 6c was unconstitutional. The "subsidiarity" principle thereafter applied also to Section 99 § 1. Until that date, Section 99 § 6c had provided that certain administrative offences were not committed if the facts also fell within the jurisdiction of the ordinary courts, but the exception did not extend to cases such as the present. Secondly, they note that the applicant did not appeal against the criminal conviction.

The applicant claims that it must be open to a person who accepts his guilt to be allowed to accept the punishment imposed on him by the State authority which first institutes proceedings, adding that if the Government wish to avoid a person being punished twice for the same offence, it is for them to take the necessary steps by amending the law or by ensuring the official discontinuance of proceedings. He considers that it is not open to the Government to claim that the applicant should have appealed on the basis of the Commission's report of 19 May 1994, when they failed to take any steps to put their court system in line with the conclusions of that report.

In connection with his failure to appeal in the criminal proceedings, the applicant underlines that the courts are required to consider grounds of nullity of their own motion, and adds that he did in any event refer to the alleged violation of Article 4 of Protocol No. 7 in his reply to the prosecution's appeal against sentence. Moreover the decision of the Krems Regional Court, which found no violation of Article 4, is a final decision and not open to appeal.

The Court recalls that under Article 35 the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule of exhaustion of domestic remedies (see generally in connection with the exhaustion of domestic remedies, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210-11, §§ 65-69).

In the present case, the Court notes, as the applicant points out, that the administrative criminal proceedings preceded the criminal proceedings. When the applicant was fined on 10 October 1995, there was therefore no reason for him to be formally aware that criminal proceedings would follow. Thus, even if a constitutional complaint were an effective remedy as regards Article 4 of Protocol No. 7, the applicant would not have been aware of the need to pursue it on the date of the penal order.

In any event, the Court does not accept that an appeal and subsequent constitutional complaint could have constituted an effective remedy in the present case, concerned as it is with the right not to be "tried or punished again in criminal proceedings ... for an offence for which [a person] has already been finally acquitted or convicted ...". In particular, if the applicant had been successful before the Constitutional Court, the most advantageous outcome would have been the quashing of the administrative proceedings. Whilst from a domestic perspective it may be the case that nothing would then have stood in the path of criminal proceedings, the Court considers that the applicant would nevertheless have been in the position of a person "finally acquitted" of the administrative offence. Further criminal proceedings would have given rise to the same problems under the provision as if the applicant had not pursued a constitutional complaint.

As to the applicant's failure to appeal against the conviction in the criminal proceedings, the Court recalls that the purpose of the rule on exhaustion of domestic remedies is to enable the State to have the opportunity to redress the alleged damage by domestic means within the framework of its own legal system before proceedings are brought in an international court (see the above-mentioned Adkivar and Others judgment, p. 1210, § 65). Moreover, the rule of exhaustion must be applied with some degree of flexibility and without excessive formalism. In reviewing whether it has been observed, it is essential to have regard to the particular circumstances of each individual case (*ibid*, p. 1211, § 69). It is true that, in the present case, the applicant did not appeal against his conviction. However, he raised the matter of Article 4 of Protocol No. 7 in his reply to the prosecutor's appeal. The appellate court did not reject his complaint as being inadmissible for procedural reasons but dealt with its merits, giving him the clear reply that no ground of nullity based on that provision could be made out (cf. no. 12794/87, Dec. 9.7.88, D.R. 57, p. 251). In the light of the appellate court's finding that the applicant's criminal conviction was compatible with the domestic law interpretation of Article 4 of Protocol No. 7, the applicant cannot be said to have failed to exhaust domestic remedies by not appealing himself.

It follows that the application cannot be rejected for non-exhaustion of domestic remedies.

2. As to the merits, the Government submit that the Court, in its Oliveira v. Switzerland judgment (30 July 1998, *Reports of Judgments and Decisions* 1998-V), had – contrary to its Gradinger v. Austria judgment (23 October 1995, Series A no. 328-C) – considered the legal qualification as the criterion for determining the "offence" within the meaning of Article 4 of Protocol No 7. In their view, the present application like the Oliveira case concerns "a typical example of a single act constituting various offences (*concours idéal d'infractions*)", i.e. a case where one criminal act constitutes two separate offences which does not infringe Article 4 of Protocol No 7. Besides, unlike the Gradinger case, there was no inconsistency in the two relevant authorities' assessment of the present applicant's blood alcohol level.

The applicant contests the Government's view. He submits that the Oliveira case is not comparable to his, as in the former case the criminal court had quashed the fine imposed by the police magistrate and stated that, if the fine had already been paid, it was to be deducted from the second fine. However, in his case two sentences were imposed for driving under the influence of alcohol, one by the administrative authority and the one by the criminal courts. The Krems Court of Appeal had even imposed the full payment of the fine which had been partially suspended by the Wagram District Court. Thus, the present application is comparable to the Gradinger case and the principle of *ne bis in idem* was indeed violated.

The Court considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

S. Dollé
Registrar

N. Bratza
President