CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 27569/02
by Franz FISCHER
against Austria

The European Court of Human Rights (First Section), sitting on 6 May 2003 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr G. BONELLO,
Mrs F. TULKENS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having regard to the above application lodged on 15 July 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Franz Fischer, is an Austrian national, who was born in 1974 and lives in Wilhelmsburg. He was represented before the Court by Mr S. Gloss, a lawyer practising in St. Pölten.

A. The circumstances of the case

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

On 29 May 2001 the European Court of Human Rights delivered a judgment in a case which had been introduced by the applicant (*Franz Fischer v. Austria*, no. 37950/97, unreported). It found a violation of Article 4 of Protocol No. 7 in that the applicant had consecutively been tried and punished for two offences containing the same essential elements, first by the administrative authority for the offence of drunken driving under section 5 (1) and 99 (1) (a) of the Road Traffic Act and, after that decision had become final, by the Criminal Court for causing death by negligence with the special element under Article 81 § 2 of the Criminal Code of "allowing himself to become intoxicated", whereby intoxication is irrebuttably presumed where a person's blood alcohol level is above 0.8 grams per litre.

On 30 May 2001 the applicant filed an application with the Supreme Court under Article 363a of the Code of Criminal Procedure (see below), requesting a retrial.

On 30 October 2001 the applicant requested the Supreme Court to hold a hearing.

On 22 November 2001 the Supreme Court dismissed the application without holding a hearing.

The Supreme Court found that the requirements of Article 363a of the Code of Criminal Procedure were not met, as the *Franz Fischer v. Austria* judgment had not established that there had been a violation of Article 4 of Protocol No. 7 "on account of a decision of a criminal court". In reaching this conclusion the Supreme Court had regard to the Court's reasoning whereby the question whether or not the *non bis in idem* principle was violated concerned the relationship between the two offences at issue but not the order in which the two sets of proceedings were conducted, and that the Contracting State remained free to determine which of the two offences was to be prosecuted.

The Supreme Court's decision was served on 17 January 2002.

B. Relevant domestic law

Under the heading "retrial" (*Erneuerung des Strafverfahrens*) the Code of Criminal Procedure (*Strafprozeßordnung*) provides as follows:

Article 363a

"1. If it is established in a judgment of the European Court of Human Rights that there has been a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Bundesgesetzblatt* [Official Gazette] no. 210/1958) or of one of its Protocols on account of a decision or order of a criminal court, a retrial shall be held on application in so far as it cannot be ruled out that the violation might have affected the content of a criminal court's decision in a manner detrimental to the person concerned.

2. All applications for a retrial shall be decided by the Supreme Court. ..."

Article 363b

"1. On an application for a retrial, the Supreme Court shall deliberate in private only where the Procurator General or the judge rapporteur proposes that a decision be taken on one of the grounds set out in paragraphs 2 and 3.

2. Where the Supreme Court deliberates in private, it may refuse an application
...
if it unanimously considers the application to be manifestly ill-founded.

..."

COMPLAINT

The applicant complained under Article 6 of the Convention that the Supreme Court had failed to hold a public oral hearing in the proceedings concerning his application under Article 363a of the Code of Criminal Procedure.

THE LAW

The applicant complained that the proceedings concerning his application for a retrial following the Court's *Franz Fischer v. Austria* judgement of 29 May 2001 had not fulfilled the requirements of Article 6, which, so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal..."

The Court will first examine whether Article 6 applies to the proceedings at issue. In this connection, the Court reiterates that according to established case-law, Article 6 does not apply to proceedings for the reopening of criminal proceedings, given that someone who applies for his case to be reopened and whose sentence has become final is not "charged with a criminal offence" within the meaning of the said Article (see *Dankevich v. Ukraine* (dec.), no. 40679/98, 25 May 1999, unreported; *Sonnleitner v. Austria* (dec.), no. 34813/97, 6 January 2000, unreported; and *Kucera v. Austria* (dec.), no. 40072/98, 20 March 2001, unreported, each with further references).

Likewise, Article 6 has been found not to apply to proceedings on a plea of nullity for the preservation of the law, brought with the aim of setting aside a final conviction following the finding of a violation by the Court, as in such proceedings the person concerned was not "charged with a criminal offence" (*Oberschlick v. Austria*, nos. 19255/92 and 21655/93, Commission decision of 16 May 1995, Decisions and Reports 81, p. 5).

The Court considers that proceedings under Article 363a of the Austrian Code of Criminal Procedure, concerning an application for a retrial following the finding of a violation by the European Court of Human Rights, are akin to proceedings for the reopening of criminal proceedings. They are brought by a person whose conviction has become final and do not concern the "determination of a criminal charge" but the question whether or not the conditions for granting a retrial are met. The Court, therefore, concludes that Article 6 does not apply to the proceedings in question.

As far as the applicant may be understood to be complaining that Austria has failed to comply with the Court's *Franz Fischer v. Austria* judgment of 29 May 2001, the Court observes that it has no jurisdiction to examine whether a High Contracting Party has complied with its obligations under a judgment given by it, the supervision of the execution of judgments being entrusted to the Committee of Ministers by virtue of Article 46 § 2 of the Convention.

It follows that the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President