CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41444/98
by Otto HENNING
against Austria

The European Court of Human Rights (Third Section), sitting on 4 September 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 20 March 1998 and registered on 2 June 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicant, Otto Henning, is an Austrian national, born in 1938 and living in Oberwart (Austria). He is represented before the Court by MM. Amhof, Damian & Partners, a law firm practising in Vienna.

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

On 14 December 1989, the applicant wrote a letter to the Oberwart Tax Office (*Finanzamt*) in which he asked that his income tax declarations for the years 1985 to 1987 be corrected, so that the losses declared therein be cancelled and, following a re-calculation of his income, new tax assessment orders be issued.

On 27 December 1989, the Salzburg Tax Office informed the applicant that he was suspected of tax evasion, upon which he was invited to comment in writing. On 28 December 1989, similar information was notified to the applicant relating to a separate matter.

On 3 June 1994, the Salzburg Tax Office informed the Salzburg Public Prosecutor's Office of its suspicions against the applicant and requested that he be prosecuted.

On 8 August 1994, the applicant, on being interrogated at the Oberwart District Court, stated he wished to submit his comments in writing directly to the Salzburg Regional Court by 31 August 1994. On that date and on 30 September 1994, he requested extensions of the time-limit due to illness. On 27 January 1995, he submitted his comments and observations in writing.

On 9 February 1995, the Public Prosecutor's Office issued the bill of indictment against the applicant charging him with tax evasion, in that he had made false statements in his income tax forms between 1985 and 1987.

On 31 March 1995, the presiding judge of the chamber dealing with the applicant's case informed the President of the Regional Court that he considered himself biased since he had been the deputy investigating judge in proceedings against other accused relating to the same case. On 21 June 1995, the President decided that the presiding judge should not stand down from the case. He found that, as investigating judge, the presiding judge had not interrogated any of the persons involved in the present proceedings. Nor had he taken any other actions which might indicate that he was biased.

On 22 November 1995, the Regional Court convicted the applicant, pursuant to section 33 § 1 of the Code of Tax Offences (*Finanzstrafgesetz*), of tax evasion. At the trial the court had refused the applicant's request for hearing N.G. as a witness because it found that the request related to questions of law which were not matters on which evidence could be taken. Further, it noted that N.G. had moved to Germany, acquiring German citizenship, and, in related criminal proceedings, had continuously refused

to give evidence and it had been impossible to serve a bill of indictment on him. In such circumstances N.G. was an unavailable witness. As regards the applicant's argument that he could not be punished because his letter of 14 December 1989 constituted "self-denunciation" of a tax offence resulting in exemption from punishment, the court observed that his self-denunciation had not been made in time because the tax authorities had already discovered the offence for themselves, and it had not been sufficiently detailed.

On 29 October 1996, the written version of the judgment was served on the applicant's counsel. Thereupon, on 26 November 1996, the applicant filed a plea of nullity (*Nichtigkeitsbeschwerde*).

On 29 July 1997, the Supreme Court dismissed the plea of nullity. It found that the Regional Court had acted correctly when it refused to take the evidence requested or to qualify the letter of 14 December 1989 as "self-denunciation", within the meaning of section 29 of the Code of Tax Offences. It also found that the prosecution of the applicant's offence had not become time-barred. As regards the applicant's complaint that the Regional Court had not given sufficient reasons for its judgment, the Supreme Court found that this complaint had not been formulated according to the Code of Criminal Procedure because the applicant's criticism of the judgment was based on a version of events which was quite different from the facts ascertained by the Regional Court. On the basis of the facts established in the judgment, the Regional Court's conclusions were reasonable and conclusive.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention about his conviction and the alleged unfairness of the proceedings leading thereto. He submits that the judgments of the Austrian courts were not sufficiently reasoned because they had wrongly assumed that the applicant had acted with intent and that certain conclusions were illogical. He further submits that the Austrian courts failed to hear the witness N.G,. as requested by him, and that his right not to incriminate himself had been breached because his letter of 14 December 1989 had not been considered to be a "self-denunciation", within the meaning of section 29 of the Code of Tax Offences, which would have prevented any prosecution for the matters declared therein. He also submits that the criminal proceedings against him were not concluded within a reasonable time.

Under Article 7 of the Convention, the applicant complains that the principle of *nulla poena sine lege* has been breached because the Austrian courts wrongly found that the indictment had not become time-barred and wrongly refused to qualify his letter of 14 December 1989 as a "self-denunciation".

THE LAW

1. The applicant complains that the criminal proceedings instituted against him were not concluded within a reasonable time, as required by Article 6 § 1 of the Convention.

The Court considers that it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of it to the respondent Government.

2. The applicant also complains under Article 6 of the Convention about his conviction and the alleged unfairness of the proceedings leading thereto.

Article 6 of the Convention, insofar as relevant, reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ...hearing ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

The Court recalls that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (*Garcia Ruiz v. Spain,* no. 30544/96, § 28, ECHR 1999-I).

It seems, in the Court's view, appropriate to look at the applicant's complaints about the alleged unfairness of the criminal proceedings from the point of view of paragraphs 1 and 3 of Article 6 taken together, especially as the guarantees of paragraph 3 represent aspects of the concept of a fair trial contained in paragraph 1 (Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, § 29).

a. The applicant submits in particular that the judgments of the Austrian courts were not sufficiently reasoned because they wrongly assumed that he had acted with intent and that certain of the conclusions which were drawn were illogical.

The Court recalls that Article 6 § 1 obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument (Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, § 61).

In the present case the Regional Court gave a carefully reasoned judgment and, upon the plea of nullity filed by the applicant, the Supreme Court found that the reasons given had been sufficient and relevant. The Court finds nothing in the case-file to cast doubt on that conclusion or its adequacy for Convention purposes.

b. The applicant next submits that the Regional Court refused to hear the witness N.G. as requested by him.

The Court recalls, however, that as a general rule it is for the national courts to assess the evidence before them, as well as the relevance of the evidence which the defendant seeks to adduce. More specifically, Article 6 § 3 (d), in principle, leaves to them the assessment whether it is appropriate to call witnesses, in the "autonomous" sense given to that word by the Convention. The Convention does not require the attendance and examination of every witness on the accused's behalf (Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, § 89; Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). In respect of witnesses on behalf of the accused, only exceptional circumstances could lead the Court to conclude that a refusal to hear such witnesses violated Article 6 of the Convention (Bricmont v. Belgium judgment, loc.cit).

The Court observes that the Regional Court rejected the applicant's requests for evidence, explaining why such evidence was either irrelevant or unavailable. The Supreme Court carefully examined the explanations and found that the Regional Court had acted correctly in its refusal.

The Court finds no indication in the case-file that the refusal to take all the evidence requested by the applicant was incompatible with Article 6, or that thereby the applicant's defence rights were unduly restricted or the proceedings unfair.

c. The applicant also complains that his right not to incriminate himself was breached because his letter of 14 December 1989 was not considered to be a "self-denunciation", within the meaning of section 29 of the Code of Tax Offences, which would have prevented any prosecution for the matters declared therein.

The Court recalls that the right of any "person charged" to remain silent and the right not to incriminate himself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 of the Convention. Their rationale lies, inter alia, in protecting the "person charged" against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged" (John Murray v. the United Kingdom judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 49, § 45; Saunders v. the United Kingdom judgment of 17 December 1996, *Reports* 1996-VI, p. 2064, § 68).

The Court observes however that the applicant submitted his letter of 14 December 1989 voluntarily to the Tax Office and there is no indication that he was forced to do so by authorities. In these circumstances, there is no indication of a breach of the applicant's right not to incriminate himself.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

3. Lastly, invoking Article 7 of the Convention and a breach of the principle of *nulla poena sine lege*, the applicant alleges that the Austrian Courts wrongly found that the indictment was not time-barred and wrongly refused to qualify his letter of 14 December 1989 as a "self-denunciation".

Article 7 § 1 of the Convention provides as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

However, in the light of all the material in its possession, the Court finds no evidence whatsoever that the applicant was convicted of an offence which did not constitute a criminal offence under national or international law at the time it was committed.

Accordingly, the Court finds that the complaint is wholly unsubstantiated and discloses no appearance of a violation of the applicant's rights under Article 7 of the Convention.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaint about the length of the proceedings;

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President