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. 28923/95
by Salvatore LAMANNA
against Austria

The European Court of Human Rights (Third Section), sitting on 29 February 2000 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J.-P. Costa,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
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 25 August 1995 and registered on 12 October 1995,

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 a French national, born in 1939 and living in Boulogne, France.

He is represented before the Court by Ms U. Hauser, a lawyer practising in Salzburg, Austria.

A. Particular circumstances of the case

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

On 11 March 1993 the applicant was arrested by the Belgian police in Brussels on the basis of an international arrest warrant issued by the Salzburg Regional Court (*Landesgericht*) on 14 May 1992. The applicant was suspected of attempted murder, committed in Austria in May 1992. Following his extradition by the Belgian authorities, he was committed to the Salzburg Prison on 2 July 1993 and taken into detention on remand.

On 13 January 1994 the Salzburg Public Prosecutor's Office (*Staatsanwaltschaft*) referred the applicant's case to the Salzburg Regional Court, charging him with attempted murder, aggravated robbery and the unlawful possession of a weapon.

On 10 October 1994 an assize court (*Geschworenengericht*) sitting at the Salzburg Regional Court acquitted the applicant of all the charges brought against him.

The operative provisions and grounds of the judgment read as follows:

> "Salvatore Lamanna is acquitted of the charges brought against him, namely that, on 2 May 1992 in Wagrain, acting as an accomplice to his brother A. Lamanna, who was prosecuted in separate proceedings,
>
> 1. he had attempted to murder Dani and Pedro N. by stabbing Dani N.'s left thigh, left hand, upper part of the body and throat and by shooting at his head which had been grazed by a bullet, …
>
> 2. he had taken unlawfully by force, as described under point 1.), and with a weapon the luggage of Dani and Pedro N. which contained about ATS 250,000 in different currencies;
>
> 3. he had unlawfully possessed and carried a revolver; …
>
> in accordance with section 336 of the Code of Criminal Procedure (*Strafprozessordnung*).
>
> GROUNDS
>
> The acquittal is founded on the jury's verdict."

According to the jury's record (*Niederschrift*), as regards the attempted murder charge, the jury found, *in dubio pro reo,* that the applicant's defence could not be refuted. In this respect, they noted that the applicant had been alone and the weapon had been in the possession of Dani and Pedro N. who had not testified at the trial. As regards the second charge of taking property by force, the jury considered that the applicant had had no intention to commit a robbery. Finally, concerning the unlawful possession of a revolver, they noted that the weapon had been in the possession of Dani and Pedro N. and that the applicant had only taken it in the course of the fight.

Upon pronouncement of the judgment, at the same hearing, defence counsel applied for the applicant's release and for compensation for pecuniary damage caused by his detention on remand. The prosecutor opposed the claim. The applicant joined his counsel in his request for release and compensation, but did not make any further comments. Neither the applicant nor his counsel requested any evidence to be taken on the matter. The hearing was interrupted for the Court to deliberate, but the compensation decision was not announced there and then as the judgment was not yet final. On resumption, the applicant's release was ordered and the trial closed.

The decision of the assize court of 10 October 1994, dismissing the applicant's request for compensation, was served upon the applicant's counsel on 4 November 1994. In that decision, the assize court found that the conditions laid down by section 2(1)(b) of the Compensation (Criminal Proceedings) Act 1969 (*Strafrechtliches Entschädigungsgesetz; hereinafter referred to as "the 1969 Act"*) were not satisfied. In its opinion,

> "A claim to compensation under section 2(1)(b) of the Compensation (Criminal Proceedings) Act ... is conditional on the applicant being cleared of the suspicion of which he was the object in the proceedings. A person who has been detained is so cleared only if all the suspicious circumstances telling against him have been satisfactorily explained, so that they cease to constitute an argument for the suspect's guilt.
>
> Having regard to the record of the jury's deliberations, who expressly referred to the principle of '*in dubio pro reo*' when answering the first main question, it had to be assumed that the suspicion against the applicant had not been dispelled. This circumstance was decisive for the decision of the assize court to refuse the request for compensation."

On 18 November 1994 the applicant appealed to the Linz Court of Appeal (*Oberlandesgericht*), arguing that the reasoning of the assize court was wrong. Reference was also made to Article 6 § 2 of the Convention and the judgment of the European Court of Human Rights in the case of Sekanina v. Austria (25 August 1993). He did not request any evidence to be taken.

On 29 December 1994 the Linz Principal Public Prosecutor's Office (*Oberstaatsanwaltschaft*) submitted written observations. It asked the Court of Appeal to dismiss the appeal. These observations were communicated to the applicant's counsel who filed observations in reply on 11 January 1995. In these observations, counsel noted that, at the time of the applicant's acquittal, several witnesses on his behalf had not yet been heard. If they had been heard the suspicion against the applicant would have been dispelled. Besides, in a general manner, he requested the procedure to be supplemented. However, he did not explain why the witnesses would have been able to dispel the suspicion, nor did he ask for any concrete procedural steps to be taken in order to supplement the proceedings.

On 1 February 1995 the Linz Court of Appeal, sitting in private, dismissed the appeal. It rejected the applicant's objections as to the interpretation of the record of deliberations in the impugned decision. It further considered that the applicant's reference to the judgment of the European Court of Human Rights in the Sekanina case was not relevant as there had been no new and independent assessment of guilt in the present case. Moreover, the Court of Appeal noted, referring to section 6(3) of the 1969 Act, that the court of first instance had to hear the claimant and take the necessary evidence if it was not obtained during the criminal proceedings. It noted that several of the requested witnesses had not been heard by the Regional Court. However, they were not eye-witnesses, with the exception of Dani and Pedro N. who had not been available during the trial, but their statements upon questioning by the

Salzburg police authorities had been read out at the trial. Therefore, the Court of Appeal found that, in these circumstances, the Regional Court had correctly renounced the taking of further evidence.

B. Relevant domestic law and practice

1. Public oral hearings

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."

2. Acquittal

Under section 336 of the Code of Criminal Procedure, the assize court acquits the accused as soon as the jury has answered the questions on guilt in the negative.

3.. Compensation for detention pending trial

The relevant provisions of the Compensation (Criminal Proceedings) Act 1969 read as follows:

Section 2(1)(b)

"(1) A right to compensation arises: …

(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 the prosecution is excluded on other grounds, in so far as these grounds existed when he was arrested; ..."

Section 6

"(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 for 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."

As a general rule, there is no public hearing in the Court of Appeal. The Court of Appeal rules after sitting in private. Section 35(2) of the Code of Criminal Procedure provides that where, *inter alia*, the public prosecutor makes observations concerning an appeal, the appellate court must communicate those observations to the appellant and indicate to him that he is entitled to comment on them within a specified period, which must be reasonable.

In 1993 the Graz Court of Appeal filed an application with the Constitutional Court to have section 2 § 1 (b) of the 1969 Act annulled as being unconstitutional. In its judgment of 29 September 1994 (*VfSlg 13879*), the Constitutional Court dismissed the application, finding that section 2 § 1 (b) as such did not violate Article 6 § 2 of the Convention which, under Austrian law, has the force of constitutional law. In the light of the Sekanina judgment, it held that it was not the refusal of a claim for compensation which was contrary to the Convention, but the re-examination of the question of guilt after a final acquittal. In the Constitutional Court's view only the separate re-assessment of evidence on the basis of the contents of the whole court file was likely to infringe the presumption of innocence.

COMPLAINTS

The applicant complains about the Austrian court decisions dismissing his request for compensation and about the court proceedings concerned.

He submits in particular that he did not have a fair and public hearing. In this respect, he complains that the Salzburg Regional Court and the Linz Court of Appeal, in their respective decisions, erroneously interpreted the jury's verdict. Following this verdict, he had no opportunity to dispel the suspicion against him. Furthermore, in his view, the mere reference to the verdict did not constitute sufficient reasoning.

The applicant further complains that the Salzburg Regional Court and the Linz Court of Appeal did not deliver their decisions publicly.

Moreover, according to the applicant, the respective findings of the Salzburg Regional Court and the Linz Court of Appeal that the suspicion against him had not been dispelled, violated the presumption of innocence.

He invokes Article 6 §§ 1 and 2 of the Convention.

PROCEDURE

The application was introduced on 25 August 1995 and registered on 12 October 1995.

On 12 January 1999 the Court decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 6 April 1999. The applicant replied on 31 May 1999.

THE LAW

1. The applicant generally complains about the lack of a public hearing, the unfairness of proceedings and the lack of any public delivery of the judgments in the proceedings regarding his compensation claim.

Article 6 § 1, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... . Judgments shall be pronounced publicly ..."

a. As to the applicability of Article 6 § 1 the Court recalls that it has already found that proceedings under the 1969 Act concern a determination of the claimant's civil rights and obligations (cf. the Szücs and Werner v. Austria judgments, *Reports of Judgments and Decisions 1997-VII*, pp. 2479-2480, §§ 33-38, and pp. 2507-2509, §§ 35-40, respectively).

b. As to the lack of a public hearing the Government submit that the Compensation (Criminal Proceedings) Act 1969 is covered by the Austrian reservation to the Convention – even though it was not in force when the reservation was made – as the preceding law had already provided that a compensation decision was to be served on the person concerned and not announced publicly. Further, the reservation meets the requirements of Article 57 of the Convention as it specifies the provision of the Convention it refers to and clearly shows that it covers the provisions which contain regulations concerning the publicity of proceedings that deviate from Article 6 of the Convention. This can be deduced from the wording of the reservation, in particular from the reference to Article 90 of the Federal Constitution which constitutes a sufficient summary of the law concerned within the meaning of Article 57 § 2 of the Convention. Besides, the present case must be distinguished from the Belilos case (Belilos v. Switzerland judgment of 29 April 1988, Series A no. 132) as the interpretative explanation in that case was ambiguous and imprecise.

The validity of the reservation is disputed by the applicant. He submits in essence that the reservation is too vague and does not clearly indicate the national law concerned. Even assuming the validity of the reservation, it does not cover the 1969 Act. It is true that the Act succeeded another regulation concerning compensation for pre-trial detention, but the contents of the present Act are much more far reaching and, in fact, created new law. He contends that the trial hearing could not be considered to be a public hearing on his compensation claim.

Austria's reservation in respect of Article 6 of the Convention is 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."

The Court considers that there is no need to examine the validity of Austria's reservation in the present case as, in any case, the complaint about the lack of a public hearing is inadmissible for the following reasons.

The Court recalls 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 (*cf.* the Szücs and Werner v. Austria judgments, *op.cit.,* pp 2468 and 2496).

The Court notes that the facts of the present case differ from that of Szücs and Werner v. Austria in which compensation was not requested during the trial hearing but before the Review Division of the Vienna Regional Court, as well as the Vienna Court of Appeal, sitting in private, who dismissed the request. In the present case at first instance, the Court notes that the applicant requested compensation immediately after his acquittal and before the trial hearing was closed. The court heard the applicant's counsel, the Public Prosecutor and the applicant himself, after which it retired to deliberate on the compensation claim. Having deliberated, the court stated in public that it could not immediately announce its decision on the compensation claim as the acquittal had not yet become final. Thereafter, the court closed the trial hearing. Even though the part of the procedure focussing on the compensation issue was rather brief, the Court nevertheless considers that the Salzburg Regional Court held a public hearing on the question, within the meaning of Article 6 § 1 of the Convention.

The Court notes that the Linz Court of Appeal held no public hearing on the claim. The Court recalls, however, that provided that there has been a public hearing at first instance, the absence of "public hearings" at a second or third instance may be justified by the special features of the proceedings at issue. Thus proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even where the appellant was not given an opportunity of being heard in person by the appeal or cassation court (*cf*. the Bulut v. Austria judgment of 22 February 1996, Reports 1996-II, p. 358, § 41, with further references). Therefore the question arises in the present case whether a hearing was necessary in the second instance despite the fact that the applicant had already had a hearing at first instance.

The Court observes that the main task of the Linz Court of Appeal was to review the Salzburg Regional Court's decision on the basis of the applicant's appeal. The Court of Appeal noted, referring to section 6(3) of the 1969 Act, that the court of first instance had to hear the claimant and take the necessary evidence if it was not obtained during the criminal proceedings. It noted that several of the requested witnesses had not been heard by the Regional Court. However, they were not eye-witnesses, with the exception of Dani and Pedro N. who had not been available during the trial, but their statements upon questioning by the Salzburg police authorities had been read out at the trial. Therefore, the Court of Appeal found that, in these circumstances, the Regional Court had correctly renounced the taking of further evidence. The Court finds that this review did not involve questions of fact, being limited to the procedural question of whether or not the Regional Court should have taken further evidence. The Court does not consider that it was necessary to hear the applicant in person on such a procedural matter. Therefore, the Court finds that the lack of a public hearing in the proceedings before the Linz Court of Appeal did not violate Article 6 § 1 of the Convention.

It follows that the complaint concerning the lack of a public hearing must be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

c. As to the alleged unfairness of the proceedings, the Government submit that they were fair because the applicant as well as his counsel had the opportunity to comment and to file motions (for the taking of evidence) during the hearing before the assize court after the pronouncement of the acquittal. However, counsel merely filed the compensation request without giving any details or reasons, and without filing any supplementary requests. The applicant only joined his counsel's statements. Therefore there was no violation of Article 6 in this respect.

This is disputed by the applicant. He submits that he had no opportunity to have witnesses heard on the compensation claim, previous witness requests concerning his innocence having been denied before the acquittal had been pronounced. Thereafter, he had no possibility to file further requests. Besides, in his opinion it was not necessary to repeat the previously unsuccessful requests.

The Court, like the Government, finds that at first instance the applicant had the opportunity to request witnesses to be heard. However, the facts show that neither the applicant nor his counsel made any such request. Even though certain previous requests had been unsuccessful, the Court considers that they should have been renewed, as the subject of the proceedings had changed. Before the acquittal, the procedure focussed on the question whether it could be shown with sufficient certainty that the applicant had committed the crime of which he was charged. After the acquittal the hearing focussed on the question whether compensation should be granted and, therefore, whether there were not only doubts about the applicant's guilt, but whether the suspicion against him had been dispelled. Different degrees of suspicion were therefore at stake, and the applicant could have contended that further evidence was needed to dispel any remaining suspicions. The Court does not consider that an excessive burden lay on the applicant, assisted by counsel, in this respect. At least the applicant's counsel must have been aware of these different elements. In these circumstances, the Court finds that the applicant cannot complain about any unfairness in the compensation proceedings.

As to the proceedings at second instance, the Court, referring to the above consideration concerning the public hearing, cannot find that the refusal to hear witnesses, who were neither eye-witnesses nor available, violates the right to a fair trial within the meaning of Article 6 § 1 of the Convention.

It follows that the complaints of an unfair hearing must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

d. As to the applicant's complaint about the lack of a public delivery of the judgment, the Government do not contest, in the light of the Szücs and Werner v. Austria judgments of 24 November 1997 (*Reports* 1997-VII), the admissibility of the complaint.

The Court considers, in the light of the parties' submissions, that this complaint 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 this part of 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.

2. The applicant further complains under Article 6 § 2 of the Convention that the courts did not respect the presumption of innocence when dealing with his compensation claim.

Article 6 § 2 of the Convention reads as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government submit that the applicant's acquittal was an acquittal *in dubio*, a verdict which is pronounced despite the fact that suspicions against the accused persist after all the evidence has been heard where the results of the evidentiary proceedings are not clear enough to establish with near-certainty that the accused committed the offence and was guilty. The Government point out that the present case is not comparable to the Sekanina v. Austria judgment (25 August 1993, Series A no 266-A), as the essential ground for the decision in the latter case was the particular fact that the reasoning of the Linz Court of Appeal's ruling did not have a sound basis either in the acquittal judgment or in the minutes of the jury. In the present case, however, the decision was taken by the same assize court which had pronounced the applicant's acquittal. In contrast to the Sekanina case, it is therefore incorrect to say that the court did not consider itself bound by the acquittal judgment. Besides, the present case was in conformity with the ruling of the Constitutional Court which had found in 1994 (*VfSlg 13879*) that what was contrary to the Convention, in the light of the Sekanina judgment, was not the denial, as such, of a claim for compensation, but the fact that a court, after a final acquittal, returned to the question of guilt and made its own assessment in a later compensation procedure. The Government submit that there was no such re-assessment of guilt in the present case.

This is contested by the applicant. He submits that the denial of his compensation claim was not only founded on the acquittal judgment and the minutes of the jury, but also on the remaining contents of the court file. Besides, he points out that, on the one hand, it was possible to be acquitted even when doubts remained as to the accused's guilt. However, no further evidence was taken in order fully to dispel that suspicion. On the other hand, when deciding on the compensation claim, the courts do not take any further evidence to dispel the remaining suspicion, as they take into consideration the assessment of the evidence obtained before the acquittal, which is unfair.

The Court considers, in the light of the parties' submissions, that this complaint 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 this part of 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 ADMISSIBLE, without prejudging the merits, the applicant's complaints about the lack of a public delivery of a judgment and the infringement of the presumption of innocence;

DECLARES INADMISSIBLE the remainder of the application.

S. Dollé
Registrar

N.Bratza
President