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. 71888/01
by Elisabeth LAMPRECHT
against Austria

The European Court of Human Rights (Third Section), sitting on 25 March 2004 as a Chamber composed of:

Mr I. CABRAL BARRETO, *President*,
Mr L. CAFLISCH,
Mr J. HEDIGAN,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mrs E. STEINER,
Mrs A. GYULUMYAN, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 18 April 2001,

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, Mrs Elisabeth Lamprecht, is an Austrian national who lives in Linz. She was represented before the Court by Mr H. Blum, a lawyer practising in Linz.

A. The circumstances of the case

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

The applicant introduced proceedings for the preservation of evidence (*Beweissicherungsverfahren*) against a building company, P.

On 3 February 2000 the Linz District Court (*Bezirksgericht*) ordered the applicant to pay part of the defendant's costs relating to the preservation of evidence, namely 7,416.96 Austrian schillings (ATS).

The defendant appealed against the costs order (*Kostenrekurs*). This appeal was not transmitted to the applicant.

On 21 December 2000 the Linz Regional Court (*Landesgericht*), sitting *in camera*, partly granted the defendant's appeal and ordered the applicant to reimburse costs of altogether ATS 8,459.64.

No main proceedings were brought, as meanwhile, in April 2000, the parties had concluded an out-of-court settlement. Under the terms of this settlement the P. company paid the applicant ATS 25,000 as compensation for damages and ATS 20,693.98 as reimbursement for cash expenses incurred in the proceedings for the preservation of evidence.

B. Relevant domestic law

Proceedings for the preservation of evidence are regulated in the Code of Civil Procedure (*Zivilprozeßordnung*).

Article 384

> "(1) An application for evidence to be taken or for witnesses and experts to be heard can be lodged, for the purposes of securing the presentation of the evidence, at any time in the proceedings and even before the proceedings have begun if there is cause to fear that the evidence will otherwise be lost or its examination made difficult.
>
> (2) Those measures can also be ordered where the conditions of [Article 284] paragraph 1 are not satisfied if the present condition of an item of evidence is to be ascertained and the applicant has a legal interest in having it ascertained."

Article 388

> "(3) The party applying for the measure shall be liable for the costs of the taking of evidence without prejudice to any claim for damages on their part. The other party to the proceedings shall be reimbursed the necessary costs of his or her participation in the taking of evidence without prejudice to the decision in the main proceedings."

COMPLAINT

The applicant complained under Article 6 § 1 of the Convention that, in the proceedings on the defendant's appeal against the costs order, the principle of equality of arms had been violated since she had not been informed of the appeal and had not been given the possibility to react thereto.

THE LAW

The applicant complained about a violation of the principle of equality of arms in proceedings relating to a costs order. She relied on Article 6 § 1 of the Convention which, so far as material, reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Government argued that Article 6 § 1 did not apply to the costs proceedings as it did not apply to the underlying proceedings for the preservation of evidence. Proceedings for the preservation of evidence serve to secure the use of evidence in pending or future proceedings, but do not involve a decision on the merits. They are akin to proceedings concerning preventive or provisional measures, such as interim injunctions. However, unlike proceedings for an interim injunction which serve to secure the enforcement of claims that have already been specified and, thus, involve at least some examination of the claim, this is not the case in proceedings for the preservation of evidence. All they require is that there is cause to fear that evidence would otherwise be lost or its examination made difficult. Thus, they do not involve any determination of civil rights and obligations.

Further, the Government submitted that the costs order issued in the context of proceedings for the preservation of evidence was not final but was subject to review in the main proceedings. This followed from Article 388 § 3 of the Code of Civil Procedure and also from the general rules on pre-trial costs. If proceedings on the merits were conducted, these costs were borne by the losing party. If no main proceedings were conducted, the claimant could request compensation for the costs of the proceedings for the preservation of evidence in separate proceedings.

The applicant maintained that Article 6 § 1 applied to the proceedings for the preservation of evidence, including a costs order issued in their course. Such proceedings concerned civil rights as the Code on Civil Procedure was applicable, and they were conducted before the ordinary courts. A costs order issued in their course was enforceable and the applicability of Article 6 could not depend on the question whether or not proceeedings for the preservation of evidence were followed by main proceedings. In the present case, there were no main proceedings as the parties concluded an out-of-court settlement.

The Court notes that the parties concluded a settlement of their dispute. Thus, the question arises whether the applicant can still claim to be a victim of the alleged violation within the meaning of Article 34 of the Convention. However, the settlement did not encompass the costs incurred by the defendant in the proceedings for the preservation of evidence. Consequently, the proceedings concerning the latter's appeal against the costs order were continued. The applicant can, therefore, still claim to be a victim of the alleged unfairness of these proceedings.

As a next step, the Court must examine whether Article 6 § 1 applies to the costs proceedings at issue. It recalls that it has found Article 6 to be

applicable to costs proceedings where the legal costs which formed their subject matter were incurred during the resolution of a dispute involving the determination of civil rights and obligations. In such circumstances the Court considered the costs proceedings, even though separately decided, as a continuation of the substantive litigation and accordingly as part of the "determination of ... civil rights and obligations" (see *Robins v. the United Kingdom*, judgment of 23 September 1997, *Reports of Judgments and Decisions* 1997-V, p. 1809, § 29 and, as a more recent authority, *Beer v. Austria*, no. 30428/96, §§ 12-13, 6 February 2001).

In the present case, the costs order was issued in the context of proceedings for the preservation of evidence. Such proceedings merely aim at preserving evidence, usually with a view to pending or future proceedings, but do not involve a determination of the merits of the case. Moreover, as the Government pointed out, it follows from Article 388 § 3 of the Code of Civil Procedure that the costs order itself is of a provisional character. It is subject to later revision either in the main proceedings or, if no such proceedings are conducted, in separate proceedings. The proceedings for the preservation of evidence, including the costs order, are therefore comparable in the circumstances to proceedings relating to an interim injunction.

The Court has previously held that interlocutory proceedings relating to an interim injunction, in which no decision on the merits of the case is made, do not involve a determination of civil rights and obligations (see *APIS a.s. v. Slovakia* (dec.), no. 39754/98, 13 January 2000, unreported, and *Moura Carreira and Lourenço Carreira v. Portugal* (dec.), no. 41237/98, ECHR 2000-VIII, both with further references).

In conclusion the Court finds that Article 6 does not apply to the proceedings for the preservation of evidence. Consequently, it does not apply to the costs proceedings either.

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.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President