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. 26644/95
by Ludwig LERCHEGGER
against Austria

The European Court of Human Rights (Third Section) sitting on 28 September 1999 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*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 November 1994 by Ludwig Lerchegger against Austria and registered on 7 March 1995 under file no. 26644/95;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1952 and living in Stein (Austria).

The applicant previously filed an application with the European Commission of Human Rights (no. 25049/94) concerning his detention on remand. On 26 June 1996 the Commission declared that application inadmissible.

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

On 5 August 1992 the Graz Public Prosecutor's Office (Staatsanwaltschaft) filed a bill of indictment against the applicant charging him with various counts of fraud committed between 23 May 1992 and 29 June 1992 ("indictment no. 1"). Subsequently the applicant was arrested and taken into detention on remand on suspicion of having committed further fraud offences between 20 June and 20 November 1992.

On 17 December 1992 a trial was held by the Graz Regional Court (Landesgericht) with Judge B.G. sitting as a single judge on the charges contained in the indictment of 5 August 1992. Upon request by the public prosecutor, the trial was adjourned since additional charges were not ready for adjudication.

On 29 December 1992 the investigating judge, upon request by the public prosecutor, decided to separate the additional charges - concerning the offences the applicant had allegedly committed after June 1992 - from those contained in indictment no. 1 and to conduct these latter proceedings independently. On the basis of these offences a further bill of indictment was drawn up on 6 July 1993 ("indictment no. 2").

Meanwhile, on 11 March 1993 the Regional Court, being Judge B.G. sitting as a single judge, convicted the applicant of two counts of fraud set out in indictment no. 1 and sentenced him to four months' imprisonment.

On 25 August 1993 the president of the Graz Regional Court rejected the applicant's motion of 13 August 1993 challenging Judge B.G. for bias. The president noted that the applicant had accused this judge of suppression of evidence, manipulation of proceedings, defamation and intimidation. The president found that the applicant's submissions were polemical and unsubstantiated. As regards the applicant's reference to procedural measures, such as the obtaining of files from parallel proceedings, or making enquiries with certain banks and insurance companies whether persons employed there and named as witnesses had information on the subject of the criminal proceedings, such preparatory measures did not indicate a lack of impartiality on the part of a judge.

On 26 August 1993 the trial concerning indictment no. 2 commenced before a Chamber of the Graz Regional Court, presided by Judge B.G. The applicant, assisted by an ex-officio defence counsel, filed numerous requests for the taking of further evidence. The Court granted this request and, in view of the complexity of the investigations, decided to remit the case to the investigating judge.

On 25 October 1993 the Graz Public Prosecutor's Office filed a third bill of indictment against the applicant charging him with a further count of fraud and two counts of fraudulent conversion ("indictment no. 3").

On 27 December 1993 the applicant challenged all judges of the Graz Regional Court for bias. This motion was dismissed by the Graz Court of Appeal (Oberlandesgericht) on 31 January 1994. The Court of Appeal noted the applicant's allegations that the investigating judge had manipulated evidence, that the psychiatric court expert had drawn up an erroneous report, that witnesses heard had given false testimony and that the public prosecutor's office had refused to institute criminal proceedings against the investigating judge, the court expert and the witnesses. The Court of Appeal found that the applicant's allegations concerned single members of the court and were not sufficient to cast doubt on the impartiality of all members of the court. Whether or not single members of the Regional Court were biased was a matter which the president of that court had to decide, should the applicant file such motions with him.

On 10 February 1994 the trial against the applicant before the Regional Court resumed. At the beginning the public prosecutor again read out indictment no. 2, extending the charges to indictment no. 3. The applicant, assisted by defence counsel, did not oppose this extension. However, he challenged the psychiatric court expert for bias and stated that he had in the meantime laid a criminal information against the expert for defamation. He also challenged the presiding judge for bias. The court rejected both motions. Subsequently the applicant was questioned on the charges against him and several witnesses were heard. As regards the charges contained in the indictment of 25 October 1993, two employees of the C. bank were heard as witnesses. The applicant asked the witnesses several questions and explained his version of the events.

At the end of the trial the applicant made numerous further requests for the taking of evidence, which were rejected by the court. The Regional Court found, inter alia, that the applicant himself had admitted receiving 100,000 ATS from the K. bank and that it was therefore unnecessary to obtain the report of an expert in graphology as to whether the signature on the receipt was the applicant's. As regards a further charge of fraud, the Regional Court found that the witness, A., whom the applicant had requested to be heard, was not available as he had meanwhile emigrated to South Africa.

On the same day the Court convicted the applicant on eight counts of fraud, fraudulent conversion and deceit, and acquitted him of further charges of fraud and defamation. It sentenced him to four and half a years' imprisonment. The Regional Court found that the applicant was an impostor who usually pretended to be a business consultant or a pilot having substantial income and considerable private means. In reality, however, he had no income and no means and, since his release from prison in May 1992, earned his living from fraudulent acts and transactions.

As to a count of deceit, the Court found that the applicant had approached a Hungarian airline and had pretended to be the managing director of a company and a member of the Diet of Styria wishing to establish, in co-operation with them, a regular flight connection between Graz and Budapest. However, the company named by the applicant did not exist. In order to reassure his Hungarian business partners, the applicant had shown a falsified paper, allegedly established by an Austrian bank, according to which he had paid 25 million ATS for the foundation of a joint venture between his company and the Hungarian

one. Expecting future co-operation, the Hungarian company had incurred expenses and thus suffered prejudice.

As to the assessment of evidence, the court noted that in the first hearing on 26 August 1993 the applicant had requested the taking of further evidence which had been so extensive that the case had to be remitted to the investigating judge. The result of the taking of evidence had not been in the applicant's favour. Witnesses named by the applicant did not know him; others confirmed the accusations against him. As regards the count of fraud to the detriment of the K. bank, the applicant's defence that the amount paid to him by the K. bank had been commission for services rendered, and not a loan granted to him, was implausible as he could not name any service for which he could have charged such commission.

On 3 May 1994 the applicant filed a plea of nullity and an appeal against sentence with the Supreme Court (Oberster Gerichtshof). He complained, inter alia, that the indictment of 25 October 1993 had not been served on him prior to the trial on 10 February 1994, and that his right to prepare his defence had therefore been infringed. He further complained that the Regional Court had failed to take the evidence requested by him, and that his motion challenging the presiding judge for bias had been rejected.

On 7 September 1994 the Supreme Court examined the plea of nullity. It quashed the applicant's conviction and sentence regarding one of the counts of fraud which involved car rentals, as it found that the Regional Court should have made further efforts to obtain the evidence sought by the applicant. It confirmed the other convictions. As a result of quashing one of the convictions the whole sentence had to be re-examined.

As to the complaint of a failure to serve indictment no. 3 prior to the trial on 10 February 1994, the Supreme Court acknowledged its veracity. However, the public prosecutor had read out the contents of this indictment at the beginning of the trial and had thereby brought the charges mentioned therein to the notice of the applicant. The applicant had been questioned in detail by the investigating judge on these charges and had therefore been familiar with them beforehand. Moreover, the applicant had failed to show in what way the inclusion of these offences concerning facts he had known for a considerable time would have hindered his defence.

As regards the applicant's complaint that the Regional Court had failed to take certain evidence requested by him, the Supreme Court found that the Regional Court had in general acted correctly in rejecting these requests, giving detailed explanations. However it did not accept the Regional Court's decision regarding witness A. In the Supreme Court's view, the Regional Court should have tried to obtain this witness' new address in South Africa, and summoned or heard him on letters rogatory, before concluding that he was unavailable.

As regards the applicant's submissions that the Austrian courts lacked jurisdiction concerning the count of deceit to the detriment of the Hungarian airline, the Supreme Court found that the Austrian courts were competent since the applicant had also acted in Austria.

On 30 December 1994 the Regional Court, upon a request by the public prosecutor's office, discontinued the criminal proceedings concerning the charge quashed by the Supreme Court.

On 11 January 1995 the Regional Court, after an oral hearing, sentenced the applicant to four years' imprisonment.

On 26 April 1995 the Supreme Court rejected the applicant's further plea of nullity.

On 21 June 1995 the Graz Court of Appeal dismissed the applicant's appeal against sentence.

COMPLAINTS

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

a. He submits that the Austrian courts failed to take certain evidence requested by him. They based their judgments on falsified and manipulated documentary evidence and the incorrect statements of witnesses. The Regional Court failed to take evidence on the question whether the bank receipt had been falsified and whether the applicant had obtained the amount paid to him by the K. bank as commission for having brought it custom.

b. He contends that Judge B.G., sitting as a presiding judge at the trial on 10 February 1994, had been biased. This judge had already sat as the single judge in the earlier trial on 17 December 1992 and 11 March 1993. Judge B.G. had also conducted pre-trial investigations, such as making enquiries with the banks and insurance companies involved.

c. The applicant also submits that he did not have sufficient time to prepare his defence, since at the trial on 10 February 1994 the public prosecutor read out indictment no. 3 which had not been served on him before.

d. The applicant claims that he had learned only a few days before the trial on 10 February 1994 that the officially appointed defence counsel has also acted as the lawyer for one of the banks which was an injured party in the criminal proceedings against him. He was therefore not properly assisted, as required by Article 6 § 3 (c) of the Convention.

2. The applicant, referring to his conviction for deceit to the detriment of a Hungarian airline, complains under Article 7 of the Convention that he was convicted for an offence by an Austrian court which was not an offence under Hungarian law and with which the Austrian courts were not competent to deal.

THE LAW

1. The applicant raises several complaints about his conviction by the Austrian courts and the alleged unfairness of the proceedings leading thereto. He invokes Article 6 §§ 1 and 3 of the Convention which, insofar as relevant, read as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(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 (cf. the Garcia Ruiz v. Spain judgment of 21 January 1999, § 28, to be published in Reports of Judgments and Decisions 1999).

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 (see the Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, § 29).

a. The applicant submits in particular that the Regional Court refused to hear witnesses and to take certain evidence 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) leaves it to them, in principle, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system. It does not require the attendance and examination of every witness on the accused's behalf (see the Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, § 89, and the 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). However, the complete silence in a judgment as to why the court refused to hear a witness for the defence is not consistent with the concept of a fair trial envisaged by Article 6 of the Convention (see the Vidal v. Belgium judgment, loc. cit).

The Court observes that the Regional Court on 26 August 1993 remitted the case to the investigating judge in order to carry out the applicant's numerous requests for the

additional taking of evidence. At the end of the trial on 10 February 1994 the applicant, again, made further requests for the taking of evidence. In particular, he requested that evidence be sought concerning his allegation that the sum of money he had received from the K bank had been commission for services rendered and not a loan. Moreover, he requested the taking of evidence in order to show that the signature on the corresponding receipt had been falsified. The Regional Court rejected these requests, explaining in detail why such evidence was irrelevant for the proceedings. The Supreme Court carefully examined the explanations and found that the Regional Court had acted correctly in its refusal. The Court also observes that in respect of the car rental fraud, the Supreme Court quashed the applicant's conviction as it found that the Regional Court should have made further efforts to obtain the evidence sought by the applicant.

In the light of the above considerations, the Court finds no indication that the refusal to take all the evidence requested by the applicant was incompatible with Article 6, or that thereby the applicant's rights of the defence were unduly restricted or the proceedings unfair.

b. The applicant further complains that Judge B.G, the presiding judge at the trial on 10 February 1994, was biased.

The Court recalls that, when the impartiality of a tribunal for the purposes of Article 6 § 1 of the Convention is scrutinised, regard must be had not only to the personal convictions of a particular judge in a given case - the subjective approach - but also whether there were sufficient guarantees to exclude any legitimate doubts in this respect - the objective approach (see the Piersack v. Belgium judgment of 1 October 1982, Series A no. 53, p. 14, § 30, and the Bulut v. Austria judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, p. 356, § 31). As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see the Bulut v. Austria judgment, op.cit., p. 356, § 32). As regards the objective test, it must be determined whether there are ascertainable facts which may raise doubts as to a judge's impartiality. What is at stake is the confidence which the courts in a democratic society must inspire in the public. In deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, appearances may be of certain importance, although the opinion of the persons concerned are not in themselves decisive. What is decisive is whether such fears can be regarded as objectively justified (see the Kraska v. Switzerland judgment of 19 April 1993, Series A no. 254-B, p. 50, § 32).

As regards the subjective test, the Court observes that the applicant has not argued that the presiding judge, Judge B.G., acted on the basis of personal convictions conflicting with his obligation of impartiality. The applicant rather refers to ascertainable facts which in his view cast doubt on the impartiality of Judge B.G. These submissions fall to be considered under the objective approach.

The applicant argues that before the trial on 10 February 1994 Judge B.G. had already sat as the single judge on 7 December 1992 and 11 March 1993 in a trial against the applicant. However, the Court finds that the impartiality of a judge is not jeopardised by his involvement in several cases brought against the same person.

The applicant further contends that, before the trial of 10 February 1994, Judge B.G. had conducted pre-trial investigations, such as making enquiries with certain banks and insurance companies. The Court observes, however, that Judge B.G. had not acted as the

investigating judge. The Court finds that the measures referred to by the applicant involved the simple collection of information which did not, at that stage, imply forming an opinion as to the applicant's guilt (see the Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 13, § 32).

The Court cannot find that Judge B.G.'s conduct gives rise to legitimate doubts as to his impartiality.

c. The applicant also submits that he did not have sufficient time to prepare his defence since at the trial on 10 February 1994 the public prosecutor read out the additional bill of indictment no. 3 which had not been served on him before.

The Court observes that, at the beginning of the trial on 10 February 1994, the public prosecutor extended indictment no. 2 by reading out indictment no. 3, which charged the applicant with a further count of fraud and two counts of fraudulent conversion. At the hearing the applicant, represented by counsel, did not oppose this extension, nor did he ask for an adjournment in order to supplement his defence. Rather, the applicant commented on these charges and questioned the relevant witnesses.

Having regard to the conduct of the applicant, there is no indication that he, assisted by counsel, could not properly prepare his defence.

d. The applicant claims that he learned, only a few days before the trial on 10 February 1994, that the officially appointed defence counsel has also acted as the lawyer for one of the banks which was an injured party in the criminal proceedings against him. He was therefore not properly assisted by a defence counsel as required by Article 6 § 3 (c) of the Convention.

The Court recalls that the Convention is designed to guarantee not rights which are theoretical or illusory but rights which are practical and effective, and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused. Nevertheless, a State cannot be held responsible for every shortcoming on the part of an appointed lawyer. It follows from the independence of the legal profession that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The competent national authorities are required under Article 6 § 3 (c) to intervene only if the failings of counsel are manifest or are sufficiently brought to their attention in some other way (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 33, § 65, and the Daud v. Portugal judgment of 21 April 1998, Reports 1998-II, p. 750, § 38).

The Court observes that the applicant neither raised this issue at the trial, nor brought it to the knowledge of the Austrian courts on another occasion. Moreover, the Court cannot find that the issue whether defence counsel appointed for the applicant had business relations with another party to the proceedings was one which had been manifest to the Austrian courts. In such circumstances there is no indication that these courts failed to ensure that the applicant had an adequate defence.

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.

2. The applicant, referring to his conviction for deceit to the detriment of a Hungarian airline, complains that he was convicted for an offence by an Austrian court which was not an offence under Hungarian law and which the Austrian courts were not competent to deal with. He invokes Article 7 of the Convention which, insofar as relevant, reads as follows:

> "1. 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.

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. It follows that this part of the application must also be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

N. Bratza
President