CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 54272/00
by Gabriel LIEDERMANN
against Austria

The European Court of Human Rights (First Section), sitting on 18 March 2004 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr K. HAIJYEV, *judges*
and Mr S. QUESADA, *Deputy Section Registrar*,

Having regard to the above application lodged on 21 May 1999,

Having regard to the partial decision of 5 December 2002,

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, Mr Gabriel Liedermann, is an Austrian national who was born in 1958 and lives in Vienna. He is a practising lawyer by profession and presents his own case before the Court.

A. The circumstances of the case

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

On 14 June 1997 the car, of which the applicant is the registered owner, was parked illegally in a street in the nineteenth district of Vienna. Two sets of proceedings ensued.

1. Proceedings relating to the applicant's obligation to disclose the driver of the car

On 26 September 1997 the Vienna Municipal Authority (*Magistrat der Stadt Wien*) ordered the applicant pursuant to section 103 § 2 of the Motor Vehicles Act (*Kraftfahrzeuggesetz*) to disclose the full name and address of the person who had driven the car on 14 June.

The applicant replied that he had not left the car to anybody on that date.

On 28 January 1998 the Vienna Municipal Authority issued a penal order (*Straferkenntnis*) in which it sentenced the applicant under sections 103 § 2 and 134 § 1 of the Motor Vehicles Act to pay a fine of 1,200 Austrian schillings (ATS) with 29 hours' imprisonment in default. It found that he had failed to give the requested information.

The applicant appealed on 20 February 1998, submitting in particular that any obligation to give more detailed information than he had given would be incompatible with his right not to incriminate himself as well as with the presumption of innocence as guaranteed by Article 6 of the Convention. In submissions of 24 March 1998 the applicant added that meanwhile on 2 March the Vienna Municipal Authority had issued a penal order for illegal parking against him (see below). He argued that the information he had actually given had, thus, had the effect of incriminating him.

On 2 April 1998 the Vienna Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) dismissed the applicant's appeal. Referring to the wording of section 103 § 2 of the Motor Vehicles Act, it found that the applicant, by stating that he had not left the car to anyone at the material time, had failed to give the information requested. As to the applicant's argument that the obligation to disclose who had been driving his car at a certain time violated his right not to incriminate himself, the Panel observed that the relevant sentence in section 103 § 2 had constitutional rank. In this connection it also referred to the Constitutional Court's judgment of 29 September 1988 (see below – relevant domestic law and practice).

Subsequently, the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He argued that if the Independent Administrative Panel's view was correct he would be obliged to incriminate himself by stating that he had driven the car.

On 29 September 1998 the Constitutional Court refused to deal with the applicant's complaint. Having regard to its judgment of 29 September 1988, it considered that the applicant's complaint did not offer sufficient prospects of success. This decision was served on the applicant on 25 November 1998.

The applicant did not lodge a complaint with the Administrative Court.

2. Proceedings relating to the traffic offence

On 18 August 1997 the Vienna Municipal Authority issued a provisional penal order against the applicant, finding that he had parked his car contrary to section 24 § 1 (a) and 99 § 3 (a) of the Road Traffic Act (*Strassenverkehrsordnung*) on 14 June 1997 and imposed a fine of ATS 700 with 17 hours' imprisonment on him.

The applicant filed an objection. Subsequently, on 26 September 1997 the Vienna Municipal Authority ordered him pursuant to section 103 § 2 of the Motor Vehicles Act to disclose the full name and address of the person who had driven the car on 14 June 1997 (see above).

On 2 March 1998 the Vienna Municipal Authority issued a penal order against the applicant, finding that he had illegally parked his car on 14 June 1997. He had thereby violated sections 24 § 1 (a) and 99 § 3 (a) of the Road Traffic Act and was liable to pay a fine of ATS 700 with 17 hours' imprisonment in default.

The applicant appealed on 24 March 1998.

On 2 July 1998 the Independent Administrative Panel dismissed the applicant's appeal. It noted, *inter alia*, that the applicant had not contested that he had parked the car. It found that the imposition of a fine for failure to disclose the driver of the car did not in all circumstances prevent the authority from imposing a fine for the traffic offence in respect of which the request to disclose the driver had been made.

On 23 February 1999 the Constitutional Court refused to deal with the applicant's complaint for lack of sufficient prospects of success. This decision was served on the applicant on 16 April 1999.

Again, the applicant did not lodge a complaint with the Administrative Court.

B. Relevant domestic law and practice

1. The Federal Constituion

By virtue of Article 130 of the Federal Constitution (*Bundesverfassungsgesetz*), the Administrative Court has jurisdiction to hear, *inter alia*, applications alleging that an administrative decision is unlawful. Pursuant to Article 131 the application may be brought by any

person claiming a violation of his or her rights by the administrative decision, provided that all other remedies have been exhausted.

2. The Administrative Court Act

Pursuant to section 33a of the Administrative Court Act (*Verwaltungsgerichtshofsgesetz*), in the version in force at the material time, the Administrative Court could decline to deal with an application against a decision of the Independent Administrative Panel, if the fine imposed did not exceed ATS 10,000 and if no important legal problem was at stake. An important legal problem arises in particular, if the Independent Administrative Panel deviated from the Administrative Court's case-law, if case-law on the issue does not exist, or if the Administrative Court's case-law on the issue is not uniform.

Section 42 of the same Act provides that, save as otherwise provided, the Administrative Court must either dismiss an application as ill-founded or quash the impugned decision if it is unlawful, by reason of its contents, because of a lack of jurisdiction by the authority which gave it, or on account of a breach of procedural rules.

Section 63 (1) of the same Act provides that, if the Administrative Court quashed the impugned decision the administrative authorities are bound by its legal view.

3. The Motor Vehicles Act

Section 103 (2) of the Motor Vehicles Act as amended in 1986 (*Kraftfahrgesetz)* provides as follows:

> "The authority may request information as to who had driven a certain motor vehicle identified by the number plate .... at a certain time or had last parked such a motor vehicle ... at a certain place before a certain date. The registered car owner ... must provide such information, which must include the name and address of the person concerned; if he or she is unable to give such information, he/she must name a person who can do so and who will then be under an obligation to inform the authority; the statements made by the person required to give information do not release the authority from its duty to review such statements where this seems appropriate in the circumstances of the case. The requested information is to be provided immediately or, in case of a written request, within two weeks after the request has been served; where such information cannot be provided without keeping pertinent records, such records shall be kept. The authority's right to require such information shall take precedence over the right to refuse to give information."

The ultimate sentence of this provision was enacted as a provision of constitutional rank after the Constitutional Court had, in its judgments of 3 March 1984 and 8 March 1985 quashed previous similar provisions on the ground that they were contrary to Article 90 § 2 of the Federal Constitution which prohibits *inter alia* that a suspect be obliged on pain of a fine to incriminate himself.

In its judgment of 29 September 1988 (*VfSlg. 11.829*) the Constitutional Court found that the first to third sentences of section 103 § 2 of the Motor Vehicles Act as amended in 1986 were, like the previous provisions, contrary to the right not to incriminate oneself which flowed from Article 90 § 2 of the Federal Constitution and from Article 6 of the European Convention of Human Rights but were saved by the ultimate sentence of that provision which had constitutional rank. In reaching that conclusion the Constitutional Court had examined whether the ultimate sentence of section 103 § 2 was contrary to the guiding principles of the constitution, but had found that this was not the case.

Section 134 § 1 of the Motor Vehicles Act, in the version in force at the material time, provided that a fine of up to ATS 30,000 with up to six weeks' imprisonment in default could be imposed on a person who violates the regulations of this Act.

4. The Road Traffic Act

Section 24 § 1 (a) of the Road Traffic Act (*Strassenverkehrsordnung*) provides that it is prohibited to stop or park a vehicle within any area delimited by the traffic sign "stopping and parking prohibited".

Section 99 § 3 (a) of the Road Traffic Act in the version in force at the material time, provided that anyone who, as driver of a vehicle, violated the regulations of this Act committed an administrative offence and was liable to a fine of up to ATS 10,000 with up to two weeks' imprisonment in default.

COMPLAINT

The applicant's remaining complaint is that, in the proceedings against him, his right to remain silent and the privilege against self-incrimination as contained in Article 6 § 1 of the Convention were violated.

THE LAW

The applicant complained about a violation of his right to remain silent and the privilege against self-incrimination. He relied on Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

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

The Government argued that the applicant had failed to exhaust domestic remedies, as he did not lodge a complaint with the Administrative Court.

They refer to a number of judgments concerning the modalities of disclosing the name and address of the driver pursuant to section 103 § 2 of the Motor Vehicles Act given by the Administrative Court in 2001.

The applicant contested the Government's view. He asserted that the Administrative Court would have refused to deal with his complaint pursuant to section 33a of the Administrative Court Act, as the fine did not exceed ATS 10,000 and the Administrative Court would most probably have found that the case did not raise an important legal problem. Further, he submitted that the Administrative Court, even when accepting cases concerning section 103 § 2 of the Motor Vehicles Act for adjudication, usually dismissed them as being ill-founded. He referred to a number of cases, in which the Administrative Court had confirmed convictions (e.g. a case concerning the failure to indicate the complete address of the driver, a case in which the claim to have rented the car to someone else had been found to be incredible, a case concerning a German citizen's claim that he had committed an error of law). The applicant concluded that given the lack of prospects of success, on the one hand, and the rather substantial court fees payable, on the other hand, he could not be expected to raise a complaint with the Administrative Court.

The Court reiterates that Article 35 § 1 of the Convention provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *Akdivar v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 68).

In the present case, the Court considers that a complaint to the Administrative Court constitutes in principle an effective remedy, as that court may quash a decision by an administrative authority, upon the application of a person claiming that the decision violated his or her rights (see above, relevant domestic law).

This conclusion is not invalidated by the fact that in cases involving a fine not exceeding ATS 10,000 the Administrative Court may refuse to deal with a case unless it raises an important legal issue. The Court notes that the applicant has not claimed that the Administrative Court did not accept any cases concerning the application of section 103 § 2 of the Motor Vehicles Act for adjudication. Furthermore, the Court finds that the applicant has failed to show that a complaint would not have had reasonable prospects of

success, as none of the cases referred to by him concerned a case comparable to the present one, in which a car owner was first fined for stating that he had not left the car to anyone and then prosecuted for the underlying traffic offence on the basis of this statement. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar*, cited above, p. 1212, § 71). The applicant should thus have filed a complaint with the Administrative Court in both sets of proceedings.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the remainder of the application inadmissible.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President