CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 51941/99
by Walter MEISCHBERGER
against Austria

The European Court of Human Rights (First Section), sitting on 3 October 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application lodged on 10 May 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Walter Meischberger, is an Austrian national, who was born in 1959 and lives in Vienna. He is represented before the Court by Mr J. Hintermayr, a lawyer practising in Linz.

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

On 13 October 1994 the Innsbruck Public Prosecutor's Office opened preliminary proceedings against N.M. on suspicion of tax evasion.

On 28 October 1994 it extended these proceedings to four other suspects including the applicant. The applicant was represented by counsel in these and the subsequent proceedings.

On 11 December 1996 the indictment against the applicant and four co-accused was preferred. The applicant was charged with aiding and abetting salary tax evasion contrary to sections 11 and 33 § 2 (b) of the Tax Offences Act (*Finanzstrafgesetz*), in that he had, in June 1994, as the representative of football player P.S. incited N.M., who was then the president of the Tirol Football Club, to declare P.S.'s salary at a relatively low level and to pay him 3 million Austrian schillings (ATS) without declaring them, thus, avoiding salary tax to be paid.

On 5 August 1997 the Innsbruck Regional Court (*Landesgericht*), sitting with two professional and two lay judges, held the trial against the applicant and his co-accused. It was presided over by judge A. The hearing started with the questioning of the accused. As regards the facts concerning the applicant, the main accused, N.M., admitted that money had been given cash without being mentioned in the football club's salary tax declaration, but stated that he believed that it was for P.S. to include this amount in his income tax declaration and not for the football club as employer to pay salary tax. Moreover, he contested that he, P.S. and the applicant had ever talked about "black money". The applicant pleaded not guilty. His defence followed by and large the same lines as N.M.'s. Following the hearing of the accused, the Public Prosecutor submitted an expert opinion concerning questions of tax law. Subsequently, a number of witnesses were heard, including two called by the applicant. Further, the applicant submitted an expert opinion on questions of tax law.

At the close of the hearing the court convicted the applicant of aiding and abetting salary tax evasion contrary to sections 11 and 33 § 2 (b) of the Tax Offences Act and imposed a fine of ATS 500,000 on him, part of which was suspended on probation.

The trial against the applicant was surrounded by a media campaign led by the periodical "News". At that time the applicant was a prominent member of the Austrian Freedom Party (*Freiheitliche Partei Österreichs*) and also a member of Parliament for that party. "News" accused him *inter alia* of tax evasion in the context of the facts which were the subject of the criminal proceedings against him. According to his own submissions, the applicant introduced numerous proceedings under the Media Act in order to counter these allegations, some of which were apparently successful. On 6 August 1997, i.e. the day after the trial, the applicant issued a press release via the Austrian Press Agency in which he accused "News" of having massively influenced the proceedings against him, including the submission of an expert opinion prepared upon its request. Injunction proceedings brought by "News" and its chief editor remained unsuccessful. The Supreme Court found in judgments of 19 March and 16 July 1998 that "News" had led an intense defamatory campaign against the applicant for a couple of months. The statements made by the applicant were based on facts and were, in view of the protracted massive attacks by "News", still acceptable.

On 10 October 1997 the applicant filed a request for rectification of the trial minutes.

On 20 October 1997 the Innsbruck Regional Court partly granted the applicant's request and made a number of additions to the minutes. In particular it added the statement of counsel for the applicant that "News" was trying to influence the proceedings and that the expert opinion submitted by the Public Prosecutor had been established upon its request. Further, it made a number of amendments to the statement of one of the witnesses called by the applicant. It dismissed the applicant's request for further additions as regards this witness's statement as irrelevant.

On 29 October 1997 the written version of the Innsbruck Regional Court's judgment of 5 August was served on the applicant.

On 30 October 1997 the applicant filed a second request for rectification of the minutes, in which he requested numerous changes and additions as regards the contents of his own statements and those of his co-accused P.S. and N.M.

On 27 November 1997 the Innsbruck Regional Court dismissed this request, noting that the minutes fulfilled the requirements of section 271 of the Code of Criminal Procedure, according to which they had to contain all relevant procedural decisions as well as a the statements of the accused and the witnesses.

On 26 November 1997 the applicant filed a plea of nullity and an appeal. He complained that the judgment did not contain sufficient reasoning and wrongly applied the law in that the payment of ATS 3 million was subject to income tax but not to salary tax.

On 16 December 1998 the Supreme Court, sitting with five judges, presided over by judge B., held a hearing on the applicant's and his co-accused's pleas of nullity and their appeals. The applicant's counsel was present at the hearing.

The Supreme Court noted at the outset that one of the applicant's co-accused had complained that section 33 § 2 (b) of the Tax Offences Act referred to the provisions of the Income Tax Act 1972 (*Einkommens-steuergesestz* 1972) and was, thus, no longer applicable at the time of the offences, as meanwhile the Income Tax Act 1988 had entered into force. It observed that if this assertion was correct it would affect the convictions of all five co-accused. However, the Supreme Court found that section 33 § 2 (b) of the Tax Offences Act contained a so-called dynamic reference, i.e. at any given time it referred to the Income Tax Act in the version in force at that time. Moreover, it had to be read in conjunction with section 111 of the Income Tax Act 1988 according to which the provisions of that Act replaced the corresponding provisions of the Income Tax Act 1972 referred to in any other law. Thus, the legal basis for all co-accused's conviction was sufficiently clear.

Turning to the applicant's plea of nullity, the Supreme Court found that the reasons given in the Regional Court's judgment were sufficient and conclusive while the applicant's submissions contained in essence an inadmissible challenge of the Regional Court's assessment of evidence. It also confirmed the Regional Courts legal view.

The Supreme Court's decision was served on the applicant on 1 February 1999.

COMPLAINTS

1. The applicant raises various complaints under Article 6 of the Convention. Firstly, he complains that the proceedings were not concluded within a reasonable time.

Further, he alleges that both, presiding judge A. at the Regional Court and presiding judge B. at the Supreme Court, were biased against him. In particular he claims that judge A. had a preconceived view of his guilt. He submits a declaration in lieu of an oath by his counsel dated 10 November 1998, according to which N.M. informed him on that day that his defence counsel had a conversation with judge A. about a week before the trial in which they discussed details of N.M.'s sentence. He further submits a statement by judge A. of 3 March 1999 who, upon being confronted with N.M.'s allegations, stated that the latter's counsel had come to see him before the trial and asked for a mild sentence, but that he did neither comment on this request nor make any statement as to the possible

outcome of the proceedings. As to judge B., the applicant submits that he is a member of the Association of Social-democratic Academics, and thus a political opponent. Moreover, a media campaign was led against him which influenced the courts.

Furthermore, the applicant alleges that the Public Prosecutor put pressure on his co-accused N.M. In this connection he relies again on the declaration in lieu of an oath by his counsel of 10 November 1998, according to which N.M. stated that the Public Prosecutor had come to see him before the trial and had requested him to repeat his confession made before the investigating judge and to state that he and his co-accused had talked about "black money". Finally, the applicant alleges that the Public Prosecutor introduced an expert opinion at a late stage of the trial, thus depriving him of the possibility to comment on it.

2. The applicant complains under Article 7 of the Convention that his conviction had no legal basis as section 33 § 2 (b) of the Tax Offences Act refers to the provisions of the Income Tax Act 1972 which was no longer in force when he committed the impugned acts in June 1994, as it had been replaced by the Income Tax Act 1988.

3. Finally, the applicant complains that the Supreme Court could not review his conviction as required by Article 2 of Protocol No. 7 as the trial minutes were incomplete and the Supreme Court had, thus, no sufficient basis for examining his complaints.

THE LAW

1. The applicant raises various complaints under Article 6 of the Convention which, so far as material, reads as follows:

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

a. Firstly, the applicant complains about the length of the criminal proceedings against him.

The Court considers that it cannot, on the basis of the case 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 this part of the application to the respondent Government.

b. Secondly, the applicant alleges that both, presiding judge A. of the Innsbruck Regional Court as well as presiding judge B. of the Supreme Court were biased against him.

As regards the alleged bias of the presiding judge of the Supreme Court, the Court notes that the applicant has failed to exhaust domestic remedies. He did not claim that he was unaware of B.'s political views at the time of

the hearing before the Supreme Court. However, he did not challenge judge B. for bias.

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

As regards the alleged bias of presiding judge A. of the Regional Court, the Court notes that the applicant did not challenge him for bias either. However, in this connection he relies on depositions made by his co-accused N.M. on 10 November 1998, i.e. long after the trial and it appears open to doubt whether he would have been able to raise this issue before the Supreme Court. In any case, even assuming exhaustion of domestic remedies, the Court finds that the complaint is inadmissible for the following reasons.

The Court recalls that the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 21, §§ 46-47). The applicant alleges subjective bias of judge A. However, the personal impartiality of a judge must be presumed until there is proof of the contrary (*ibid*.). The evidence adduced by the applicant, consisting in nothing more than the allegations by his co-accused which, moreover, have no direct bearing on the applicant's case does not suffice to furnish such proof.

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

c. To the extent that the applicant alleges that the media campaign surrounding the trial was prejudicial to the fairness of the proceedings at issue, the Court reiterates that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion, and, consequently, jurors called upon to decide the guilt of an accused. At the same time, the Court notes that the press coverage of current events is an exercise of freedom of expression guaranteed by Article 10 of the Convention. If there is a virulent press campaign surrounding the trial, what is decisive is not the subjective apprehensions of the suspect concerning the absence of prejudice required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified (see for instance *Daktaras v. Lithuania* (dec.), no. 42095/98, 11 January 2000, with further references).

In the present case, the proceedings against the applicant were surrounded by a media campaign due to his position in the Austrian Freedom Party. The media, in particular the periodical "News" massively

accused him of tax evasion. However, the applicant was not without defence against these allegations. He brought a number of proceedings under the Media Act, some of which were apparently successful, and issued a press release following his conviction. It also has to be taken into account that the charges against the applicant were decided upon by a court sitting not only with lay judges but with an equal number of professional judges, who are less prone to be influenced by the media coverage of a case. Their opinion must have had even more weight as the applicant's case concerned rather technical questions of tax law. In these circumstances, the Court considers that the applicant's fears of prejudice by the courts on the ground of the media campaign in question were not "objectively justified".

There is thus, no indication of a lack of impartiality caused by the media campaign, or, in general, of a violation of the principle of a fair trial within the meaning of Article 6 § 1 of the Convention in connection with this part of the application.

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

d. Furthermore, the applicant alleges that the public prosecutor put pressure on his co-accused N.M.

Assuming exhaustion of domestic remedies, the Court finds that the applicant's allegations do not suffice to show that the proceedings considered as a whole were unfair. It notes, in particular that N.M., despite the pressure allegedly put on him, forwarded his defence at the trial and denied in particular that he and his co-accused had agreed to pay "black money". The applicant himself pleaded not guilty. There is no appearance that his defence rights were restricted to an extent that would be incompatible with Article 6 § 1 of the Convention.

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

e. Finally, as regards the applicant's allegation that his defence rights were curtailed in that the public prosecutor introduced an expert opinion at a late stage of the trial, the Court notes that the applicant has not raised this issue in his plea of nullity and has therefore failed to exhaust domestic remedies.

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

2. The applicant complains that his conviction had no sufficient legal basis. He relies on Article 7 of the Convention which, so far 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. ...."

The applicant alleges that section 33 § 2 (b) of the Tax Offences Act refers to the provisions of the Income Tax Act 1972 which was no longer in

force when he committed the impugned acts. In the present case, the Supreme Court examined this issue, which had not been raised by the applicant but by one of his co-accused, noting that it, if the latter's assertion proved to be true, it would affect all co-accused convictions. Thus, the Court is satisfied that the domestic authorities had an opportunity to remedy the alleged breach of the Convention through their own legal system (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p.1210, § 65). Consequently, the requirement of exhaustion of domestic remedies as laid down in Article 35 § 1 of the Convention has been complied with.

The Court reiterates that Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II, with further references).

In the present case, the Supreme Court noted that the reference contained in section 33 § 2 (b) of the Tax Offences Act referred to the provisions of the Income Tax Act in the version in force. Moreover, it had to be read in conjunction with section 111 of the Income Tax Act 1988 according to which the provisions of that Act replaced the corresponding provisions of the Income Tax Act 1972 referred to in any other law.

At the time of the commission of the offence, in June 1994, the applicant would therefore have been in a position to foresee, if need be with appropriate legal advice, that section 33 § 2 (b) of the Tax Offences Act referred to the provisions of the Income Tax Act 1988. Consequently, there is no appearance of a violation of Article 7 of the Convention.

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

3. Finally, the applicant complains that he did not benefit from a review of his conviction by a higher tribunal as guaranteed by Article 2 of Protocol No. 7 which, so far as relevant, reads as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

The Court reiterates that the Contracting Status dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 is to be exercised. Thus, the review by a higher court of a

conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Krombach v. France,* no. 29731/96*,* § 96, ECHR 2001-II).

The Court notes at the outset that the applicant had a review on points of law of his conviction by the Supreme Court. Nevertheless, the applicant alleges that the trial minutes were incomplete and the Supreme Court had, thus, no sufficient basis for examining his complaints. In this connection, the Court observes that the applicant had a possibility to request a rectification of the minutes. He made two such requests one of which was successful. The fact that the Regional Court dismissed his second request does not suffice to show that the review by the Supreme Court was rendered ineffective. There is no appearance of a violation of Article 2 of Protocol No. 7.

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

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaint concerning the length of the criminal proceedings against him;

Declares the remainder of the application inadmissible.

Erik FRIBERGH
Registrar

Christos L. ROZAKIS
President