AS TO THE ADMISSIBILITY OF

Application No. 11071/84
by Georg RADETZKY
against Austria

The European Commission of Human Rights sitting in private on 12 May 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 2 May 1984 by Georg Radetzky against Austria and registered on 6 August 1984 under file No. 11071/84;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to the Commission's decision of 4 May 1987 to give notice of the application to the respondent Government and to invite them in accordance with Rule 42 para. 2 (b) of the Commission's Rules of Procedure to submit observations in writing on the admissibility and merits of the application;

Having regard to the Government's observations submitted on 9 July 1987 and the applicant's observations in reply of 15 September 1987;

Having deliberated;

Decides as follows:

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&_THE FACTS&S

The applicant is an Austrian citizen born in 1942 who resides in Vienna. Before the Commission he is represented by Dr. Karl

Bernhauser, a lawyer practising in Vienna.

The facts agreed between the parties may be summarised as follows:

The applicant complains of his detention which was ordered on the ground that he had failed to pay certain fines under the Vienna Parking Fees Act (Parkometergesetz, Provincial Law Gazette No. 47/1974). This legislation enacted in 1974 subjects the parking of vehicles in certain areas of the City of Vienna to the payment of fees. The owner of the vehicle is obliged to display a parking ticket at the windscreen and is liable to a fine if he fails to do so. The 1974 Act itself does not provide for an alternative sanction of detention in case of default of payment of the fine (Ersatzfreiheits-strafe). However, the relevant proceedings are governed by the Code of Administrative Offences (Verwaltungsstrafgesetz, Fed. Law Gazette No. 172/1950) by virtue of Article II, para. 2A No. 2 of the Introductory Regulations to the laws on administrative procedure (Einführungsgesetz zu den Verwaltungsverfahrensgesetzen, ibid.).

Section 16 of the Code of Administrative Offences reads as follows:

(German)

"(1) Wird auf eine Geldstrafe erkannt, so ist zugleich die im Fall ihrer Uneinbringlichkeit an ihre Stelle tretende Freiheitsstrafe festzusetzen.

(2) Die Ersatzstrafe darf das Höchstausmass der auf die Verwaltungsübertretung gesetzten Freiheitsstrafe und, sofern keine Freiheitsstrafe angedroht und nicht anderes bestimmt ist, zwei Wochen nicht übersteigen. Im übrigen richtet sich das Mass der Ersatzstrafe nach den allgemeinen Regeln der Strafbemessung.

(3) Der Verurteilte kann die Vollziehung der Ersatzstrafe dadurch abwenden, dass vor Antritt der Freiheitsstrafe der Betrag der Geldstrafe erlegt wird."

(English)

"(1) Whenever a fine is imposed, at the same time an alternative sanction of detention must be imposed to be served in case of default of payment of the fine.

(2) The alternative penalty must not exceed the maximum sanction of detention provided for the violation of this administrative provision; in case no sanction of detention is provided for in the relevant Act and unless otherwise stated it may not exceed two weeks. Besides that the assessment of the extent of the alternative penalty is governed by the general rules for the assessment of penalties.

(3) The convicted person can avert the detention by paying the fine before the commencement of the prison sentence."
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As regards the enforcement of administrative sanctions of detention, Section 53 provides the following:

(German)

"(1) Die Behörde hat den zu einer Freiheitsstrafe Verurteilten nach Ablauf der Berufungs- oder Einspruchsfrist oder bei Zustellung der endgültigen Berufungsentscheidung

aufzufordern die Freiheitsstrafe sofort anzutreten. ...

...

(4) Ist eine Geldstrafe ganz oder zum Teil uneinbringlich oder ist dies mit Grund anzunehmen, so ist die für den Fall der Uneinbringlichkeit verhängte Freiheitsstrafe oder der dem uneinbringlichen Betrag der Geldstrafe entsprechende Teil der Freiheitsstrafe in Vollzug zu setzen."

(English)

"(1) After the lapse of the period for filing an appeal or objection, or when the final decision on an appeal is being served, the authority shall summon the person on whom a sanction of detention has been imposed, for the purpose of immediately serving the prison sentence. ...

...

(4) If a fine is uncollectable as a whole or in part, or if there are reasons to assume that it is uncollectable, the detention ordered in case of default of payment of the fine or the part of it which corresponds to the uncollectable amount of the fine shall be enforced."

The Code of Administrative Offences is one of the laws on administrative procedure to which the Austrian reservation concerning Article 5 of the Convention refers. This reservation, which was made when Austria ratified the Convention on 3 September 1958, reads as follows:

"The provision of Article 5 of the Convention shall be so applied that there shall be no interference with the measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl No. 172/1950, subject to review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution."

It is contested between the parties whether this reservation applies to sanctions of detention imposed for administrative offences created by new legislation after the declaration of the reservation such as the 1974 Parking Fees Act.

Between 1981 and 1983 the applicant was repeatedly fined for failure to comply with the provisions of this Act. Nine penal orders (Strafverfügungen) were issued against him by the Municipal Council (Magistrat) of Vienna in relation to a total of 30 offences, and fines

amounting to AS 95.480,- were imposed on him. The penal orders were each time accompanied by a warning that such an alternative sanction of detention could be imposed, although the legal basis of this measure was not indicated. Reference was, however, made to certain other provisions of the Code of Administrative Offences (invitation to the applicant under Section 42 to justify this behaviour, imposition of costs under Section 64).

The applicant did not appeal against the above penal orders. He does not contest that the penal orders as well as the corresponding summonses to serve the alternative prison sentences might have been validly served upon him according to the provisions of the Official Notifications Act (Zustellgesetz, Fed. Law Gazette No. 200/1982) by deposition in the post office (Hinterlegung). He claims that in any event they were not actually served upon him. Apparently he no

longer lived at the address indicated to the police (Meldung) and therefore he also did not receive the notifications that the various penal orders and summonses had been deposited with the post office. For this reason he allegedly learnt of their existence only when the authority arrested him on 24 January 1984.

The Municipal Council had decided on 10 and 14 November 1983 that the applicant should be detained for a period of four months nine days and sixteen hours in order to serve the alternative prison sentences. The applicant claims that these decisions were also brought to his knowledge only on 24 January 1984 when he was arrested. His lawyer was allegedly refused access to the file and did not get a copy of the decisions because they were considered as internal documents.

The applicant has, however, submitted a summons to serve the alternative prison penalty (Aufforderung zum Antritt der Ersatzarreststrafe) resulting from one of the penal orders in question, which had been issued on 3 August 1982. From this document, which is dated 10 November 1983, it appears that the authority considered the fine of AS 2800.- as uncollectable (uneinbringlich) and therefore summoned the applicant in accordance with Section 53 para. 1 of the Code of Administrative Offences to present himself to the police for the purpose of serving the alternative prison sentence which in this case was one hundred hours. He was further informed that he could avert the detention by paying the fine plus certain costs. It was finally announced that if he did not comply with the summons nor pay the fine he would be arrested.

Several penal orders of various dates in 1983 and the corresponding summonses have subsequently been submitted by the Government together with the returns of service showing that they had been deposited with the post office and not been claimed by the applicant. The Government state that the analogous documents concerning penal orders issued in 1981 and 1982 have in the meantime been destroyed.

The applicant was arrested by the police on 24 January 1984 and remained in detention until 1 February 1984. He served a total of eight days six hours and forty minutes of the alternative prison sentences. He was released after he had paid a part of the outstanding fines and had been granted permission to pay the remaining fines by instalments.

The applicant did not take any remedy against his above detention, in particular he did not lodge a constitutional complaint under Article 144 of the Federal Constitution.
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&_COMPLAINTS&S

The applicant now complains that his arrest and detention violated Article 5 para. 1 of the Convention. Detention is only allowed in the cases enumerated in subparas. a) to f) of this provision which do not include a penal sanction imposed by an administrative authority.

The applicant submits that the Austrian reservation concerning Article 5 does not apply in his case as the legal provision on which his detention was based entered into force only on 3 October 1974, i.e. after the deposit of the reservation, and regulated a matter not covered by the reservation as it did not provide for administrative detention, but only for the imposition of fines.

&_PROCEEDINGS&S

The application was introduced on 2 May 1984 and registered on 6 August 1984.

On 4 May 1987 the Commission decided to give notice of the application to the respondent Government and to invite them, in accordance with Rule 42 para. 2 (b) of the Rules of Procedure, to submit observations in writing on the admissibility and merits of the application. Certain specific questions were put to the Government in this context.

The Government submitted their observations on 9 July 1987. The applicant replied on 15 September 1987.

&_SUBMISSIONS OF THE PARTIES&S

A. The Government

The Government observe that the facts stated in the original application are incorrect and incomplete in several respects. The applicant alleged thirty administrative fines, whereas in a penal order of 25 June 1982 it was stated that he had already received fifty-six similar fines. Moreover, it is not true that the penal orders were never served upon the applicant and that he had absolutely no knowledge of these orders. All notifications were duly served in accordance with the Official Notifications Act, but they were never accepted or collected from the post office. The same applies to all the summonses to serve the alternative prison sentences. The applicant's description that he was arrested completely unexpectedly and without reasons being given for his arrest is unfounded. The applicant fetched at least one penal order - the one dated 27 August 1982 which was delivered to the same address as all the others - from the post office on 3 September 1982.

In the Government's submission the application is inadmissible for failure to exhaust the domestic remedies according to Article 26 of the Convention. Apart from the fact that the applicant did not appeal against the relevant penal orders and the imposition of the alternative sanctions of detention he failed to lodge a complaint with the Constitutional Court.

There is no reason to assume that there were no prospects of success for this legal remedy as claimed by the applicant. The applicant's account of the Constitutional Court's case-law is

incorrect. It is true that in its decision No. 5021/1965 the Constitutional Court held that the Austrian reservation concerning Article 5 of the Convention not only applied to the 1950 Code of Administrative Offences but also to the measures envisaged there, no matter which Act actually provides for them in a specific case. This applies not only to measures of deprivation of liberty authorised by substantive legislation, but also to measures authorised by procedural laws, insofar as they are in accordance with the measures authorised by the laws on administrative procedure. Under this case-law the Constitutional Court applied the reservation to measures under the Code of Financial Offences (Finanzstrafgesetz), but this view was abandoned by a decision of 3 December 1984 (No. 10291).

In its decision No. 5021/1965 the Constitutional Court also declared that the reservation applies to the alternative sanction of detention according to Section 16 of the Code of Administrative Offences. Yet it is not clear from this statement how the Constitutional Court would view the relationship between the reservation and Section 16 of the Code of Administrative Offences in conjunction with a new offence created after the reservation was made. From the existing case-law on the reservation it cannot be concluded

with certainty that lodging a complaint with the Constitutional Court would, for this very reason, lack prospects. Apart from that a constitutional appeal would certainly have had prospects of success if the applicant's allegations were correct that the penal orders were not served upon him and that he did not receive a summons to serve an alternative sanction of detention (cf. Constitutional Court decisions Nos. 3164/1957, 6352/1970 and 7921/1976).

The Government further submit that the case is in any event covered by the above reservation concerning Article 5. The alternative sanction of detention was imposed upon the applicant under Sections 16 and 53 para. 4 of the Code of Administrative Offences which was applicable in the Municipal Council's proceedings by virtue of the Introductory Regulations of the laws on administrative procedure. It is incorrect to say that the detention was based on the Vienna Parking Fees Act. Therefore, the fact that the legislation of 1974 has introduced a new administrative offence cannot be regarded as a relevant consideration. The reservation also applies to those laws which - although they were enacted after the reservation - do not result in an extension of the scope of substantive law intended to be covered by the reservation (cf. Constitutional Court decisions Nos.8234/1978 and 8428/1978, Eur. Court H.R. Campbell and Cosans judgment of 25 February 1982, Series A no. 48, p. 17 para. 37b). Fiscal regulations of the same kind as the Parking Fees Act existed at the time when the Convention entered into force in Austria. Especially in the field of fiscal legislation, because of the great variety of possible levies, an individual Act cannot be made a point of reference.

Finally, the detention complained of was imposed "in accordance with the procedure prescribed by law" and "lawful" within the meaning of Article 5 para. 1 of the Convention. The proceedings were conducted in acccordance with the legal requirements as confirmed by the case-law of the Constitutional Court (cf. decisions Nos. 7921/1976, 3164/1957 and 6352/1970).

The Government therefore ask the Commission to reject the application for failure to exhaust the domestic remedies (Article 27 para. 3 of the Convention) or, alternatively, as being manifestly ill-founded (Article 27 para. 2 of the Convention).
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B. The applicant

The applicant does not contest that the various penal orders and the summonses to serve the alternative prison sentences may have been served upon him in accordance with the provisions of the Official Notifications Act. However, they were served by way of deposition at the post office and therefore it was possible that the applicant was not actually informed of the authority's measures. The fact that, in his application to the Commission, the applicant had correctly cited some of the relevant penal orders is only due to the fact that his lawyer made enquiries in this respect after the applicant's arrest. In any event it is irrelevant, in the applicant's view, whether the penal orders were lawfully served and whether the applicant was actually informed of these penal orders as his complaint under Article 5 of the Convention relates to his subsequent arrest on 24 January 1984.

The applicant claims that in the particular circumstances it had not been possible for him to appeal against the penal orders in question. As regards the exhaustion of remedies by lodging a complaint with the Constitutional Court, he submits that such a complaint would not have had any prospects of success in view of the constant case-law of the Constitutional Court. Constitutional rights of the applicant could have been violated only if the reservation concerning Article 5 of the Convention had not been applicable. The

applicant is convinced that the Constitutional Court would have applied the reservation as it has consistently held that all substantive provisions relating to deprivation of liberty are covered by the reservation irrespective of whether they are contained in the laws on administrative procedure.

This view is clearly supported by the Constitutional Court's decision No. 5021/1965 to which the Government have referred. This decision as well the subsequent decisions Nos. 8234/1978 and 8428/1978 clearly stated that the reservation covers not only the measures of deprivation of liberty provided for in the laws on administrative procedure as such, but all measures of the same type irrespective of which law in particular they are based upon. This view was also maintained in respect of laws enacted after the entery into force of the Convention, such as the Road Traffic Act (Strassenverkehrsordnung) 1960 or the Carinthian Act for the Protection of Natural Sites (Kärntner Landschaftsschutzgesetz) 1969, because they did not bring about an extension of the substantive law which the reservation aimed at excluding from the scope of the Convention ("weil sie keine nachträgliche Erweiterung jenes materiellrechtlichen Bereiches bewirken, der durch die Abgabe des Vorbehaltes ausgeschlossen werden sollte"). The applicant claims that the situation in the present case is exactly the same as that in those cases. Here too, a new administrative offence was created after the reservation was made and a constitutional complaint would therefore not have had any prospects of success.

The fact that, in its decision No. 10291/1984, the Constitutional Court excluded the Code of Financial Offences from the scope of the reservation does not support the Government's view as that decision concerned a different problem. The Code of Financial Offences is a separate legislation which does not refer to the Code of Administrative Offences but contains its own penal and procedural provisions.
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In the applicant's view the Parking Fees Act of 1974 is not covered by the reservation as it created a new administrative offence which did not exist at the time when the reservation was made. It did not replace another similar provision and thus led to a subsequent extension of the administrative laws to which the reservation refers. The Government's view, according to which such subsequent extensions are possible under the reservation, is untenable. The Commission itself has only accepted such subsequent legislation as being covered by the Austrian reservation which, in substance, replaced legislation existing already at the date of the ratification of the Convention by Austria (cf. No. 1047/81, Dec. 15.12.61, YB 4 p. 356; No. 1731/62, Dec. 16.12.64, YB 7 p. 192; No. 1138/61, Dec. 18.6.63, Coll. 11 p. 9; No. 2432/65, Dec. 7.4.67, Coll. 22 p. 124). The extension of the reservation to entirely new administrative provisions, such as those of the Parking Fees Act, would amount to a general reservation which is inadmissible under Article 64 of the Convention.

For these reasons, the applicant maintains that Article 5 of the Convention has been violated in his case.

&_THE LAW&S

The applicant claims that his detention for failure to pay certain fines violated Article 5 para. 1 of the Convention as it had been ordered by an administrative authority and was not covered by the Austrian reservation concerning Article 5 of the Convention (cf. p. 3 above). In this respect he alleges that the basis of the detention was new legislation enacted in 1974, i.e. after the deposit of the reservation, and that furthermore this legislation did not provide for

any measures of detention, but only for the imposition of fines.

Article 5 para. 1 of the Convention secures to everyone the right to liberty and security of person and it further provides that no one shall be deprived of his liberty save in the cases specifically enumerated in subparas. a) to f) and in accordance with a procedure prescribed by law. This provision is in principle applicable to any measure of detention imposed by Austrian authorities not covered by the Austrian reservation concerning Article 5.

However, the Commission is not called upon to determine whether or not the detention complained of is covered by the Austrian reservation, and if not, whether it is justified under Article 5 para.1, as, under Article 26 of the Convention, the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant failed to lodge a complaint with the Constitutional Court in accordance with Article 144 of the Federal Constitution. He claims that such a complaint would not have offered any prospects of success in view of the Constitutional Court's constant case-law, but the Commission notes that the Court has not dealt with the question whether the reservation covers the particular legislation at issue despite the fact that this legislation was enacted after the deposit of the reservation and did not replace earlier legislation of similar content. Nor has it been shown that a complaint to the Constitutional Court (or the Administrative

Court) regarding the alleged shortcomings in the procedure, in particular the alleged failure to inform the applicant of the relevant decisions prior to his arrest, would have been hopeless.

It follows that the applicant has not shown that a complaint to the Constitutional Court on the ground of an alleged violation of his constitutional rights under Article 5 of the Convention would have been an ineffective remedy (cf. mutatis mutandis No. 712/60, Dec. 16.12.61, Retimag AG v. Federal Republic of Germany, Collection 8 pp. 29, 41 = Yearbook 4 pp. 384, 406, and No. 9675/82, Freie Rundfunk AG i. Gr. v. Federal Republic of Germany, Dec. 4.3.87, para. 5 of The Law, to be published in D.R.).

Moreover, the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal. The applicant accordingly cannot be regarded as having exhausted all domestic remedies available to him under Austrian law.

It follows that the application must be rejected under Article 27 para. 3 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)