CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38897/97
by Herbert ROSENAUER
against Austria

The European Court of Human Rights (First Section), sitting on 21 February 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 with the European Commission of Human Rights on 27 May 1997 and registered on 8 December 1997,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the decision of 3 May 2001 to strike the application out of the Court's list of cases,

Having deliberated, decides as follows:

THE FACTS

The applicant, Herbert Rosenauer, is a Austrian national, who was born in 1958 and lives in Timelkam. He was represented before the Court by Mr R. Gabl, 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.

On 27 March 1992 the Wels Regional Court (*Landesgericht*) instituted preliminary investigations against the applicant on suspicion of having committed continuous aggravated fraud (*gewerbsmäßiger schwerer Betrug*) and illegal gambling (*Glücksspiel*). He was suspected of having invented, managed and promulgated an "investment-game" called "the Clou", in which the players had to pay a certain sum to the applicant in order to obtain a place on the list of players. Subsequently, they had to entice other players to join the game, the promise being that each player's profit would be higher the more players were enlisted thereafter. Furthermore, the applicant was suspected of having raised loans from a number of persons by promising high interest rates, while he only intended to spend the money on gambling.

On 22 April 1992 the applicant was questioned for the first time by the investigating judge as regards these charges.

In late 1992 an expert in information technology and an expert in mathematics and statistics were appointed. In March 1993 the latter was requested to supplement his opinion. In 1993 numerous witnesses were heard. In January 1994 an expert in bookkeeping and an expert in computer technology were appointed.

From 18 March 1994 to 30 December 1994 and from 4 January 1995 to 3 March 1995 the applicant was placed in detention on remand.

In May 1995 the Public Prosecutor's Office requested all four experts to supplement their opinions.

On 4 October 1996 the preliminary investigations were concluded.

On 20 December 1996 the Public Prosecutor's Office lodged the bill of indictment. It was served on the applicant's counsel on 3 February 1997.

On 1 October 1998 the trial against the applicant started before the Wels Regional Court.

On 19 August 1999, after 101 days of court hearings, the Wels Regional Court convicted the applicant of aggravated fraud (*gewerbsmäßiger schwerer Betrug*), misappropriation (*Veruntreuung*) and negligent and fraudulent bankruptcy (*fahrlässige und betrügerische Krida*). He was sentenced to five years' imprisonment, forty-five months of which were suspended on probation. When fixing the sentence, the court found mitigating circumstances for the applicant under section 34 § 2 of the

Criminal Code (*Strafgesetzbuch*), namely that "the proceedings against the accused have lasted disproportionately long through no fault of the accused or his counsel".

The judgment was served on the applicant's counsel in March 2000. Neither the applicant nor the Public Prosecutor appealed.

B. Relevant domestic law

Section 91 of the Courts Act (*Gerichtsorganisationsgesetz*), which has been in force since 1 January 1990, provides as follows:

> "(1) If a court is dilatory in taking any procedural step, such as announcing or holding a hearing, obtaining an expert's report, or preparing a decision, any party may submit a request to this court for the superior court to impose an appropriate time-limit for the taking of the particular procedural step; unless sub-section (2) of this section applies, the court is required to submit the request to the superior court, together with its comments, forthwith.
>
> (2) If the court takes all the procedural steps specified in the request within four weeks after receipt, and so informs the party concerned, the request is deemed withdrawn unless the party declares within two weeks after service of the notification that it wishes to maintain its request.
>
> (3) The request referred to in sub-section (1) shall be determined with special expedition by a chamber of the superior court consisting of three professional judges, one of whom shall preside; if the court has not been dilatory, the request shall be dismissed. This decision in not subject to appeal."

COMPLAINT

The applicant complains under Article 6 § 1 of the Convention that the criminal proceedings against him were not terminated within a reasonable time.

THE LAW

1. By decision of 3 May 2001 the Court decided to strike the application out of its list of cases pursuant to Article 37 § 1 (a) of the Convention. It noted in particular that the applicant had failed to submit his observations in reply within the time-limit set by the Court and had not reacted to the Court's subsequent letters.

By letter of 18 May 2001 the applicant's counsel claimed that the applicant's observations in reply were sent by letter of 22 December 2000, i.e. within the time-limit set in the Court's letter of 7 December 2000. He enclosed a copy of the said observations. Subsequently, he submitted sworn affidavits by two of his employees, a junior lawyer and a secretary, who submited that they remembered having prepared and posted the applicant's observations shortly before Christmas 2000.

In these circumstances, the Court considers it justified to restore the application to its list of cases.

2. The applicant's complaint relates to the length of the proceedings, which began in March 1992 and ended in March 2000. They therefore lasted eight years.

The Government contend that the applicant failed to exhaust domestic remedies as he did not make use of an application under Section 91 of the Courts Act. They point out in particular that this remedy may be used *inter alia* where a court is dilatory with obtaining the opinion of an expert.

The applicant contests the Government's view arguing that such an application would not have significantly expedited the proceedings. In his view, major delays were due to the fact that the Regional Court had failed to set time-limits for the experts to submit their opinions. He considers that, once a court has appointed an expert, it is no longer in a position to accelerate the proceedings.

The Court recalls that, in the case of Holzinger v. Austria, it has found that a request under Section 91 of the Austrian Courts Act is, in principle, an effective remedy which has to be used in respect of complaints about the length of court proceedings (see *Holzinger v. Austria*, no. 23459/94, §§ 24-25, ECHR 2001 which relates to civil proceedings; see also *Talirz v. Austria* (dec.) no. 37323/97, 11.09.2001, relating to criminal proceedings).

The Court considers that the applicant could and should have made use of Section 91 of the Courts Act. The applicant himself points out that major delays were caused as the Regional Court had failed to set time-limits for the experts to submit their opinions. In this respect, the Court notes that, contrary to the applicant's view, Section 91 applies precisely where a court is dilatory in obtaining an expert's opinion. Moreover, there was a long delay between the service of the indictment in February 1997 and the beginning of the trial in October 1998. During this period too, the applicant could have made an application under Secion 91. However, at no stage of the proceedings did he make use of this possibility.

It follows that the applicant has not exhausted domestic remedies as required by Article 35 § 1 of the Convention and the application must, therefore, be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Decides to restore the application to its list of cases;

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President