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. 33732/96
by Josef SCHLAGER
against Austria

The European Court of Human Rights (Third Section), sitting on 21 March 2000 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*,
and Mrs S. Dollé, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 2 October 1996 and registered on 8 November 1996,

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, born in 1975, is an Austrian national residing in Mattighofen. In the proceedings before the Court he is represented by Mr. Postlmayr, a lawyer practising in Mattighofen.

A. Particular circumstances of the case

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

On 2 July 1995 the applicant, while driving his car, caused an accident with another car, the driver of which was injured. A test carried out after the accident showed that the applicant had a blood alcohol level of 1,14 grams per litre.

On 23 August 1995 the Braunau District Authority (*Bezirkshauptmannschaft*), referring to section 5 § 1 and section 99 § 1 of the Road Traffic Act 1960 (*Straßenverkehrsordnung*), found the applicant guilty of driving whilst under the influence of drink and imposed a fine of ATS 10,000 on him, with nine days' imprisonment in default. The applicant did not appeal against the decision.

On 17 April 1996 the Braunau District Court (*Bezirksgericht*), referring to Article 88 §§ 1 and 3 taken in conjunction with Article 81 § 2 of the Criminal Code (*Strafgesetzbuch*), convicted the applicant of negligently causing bodily harm (*fahrlässige Körperverletzung*) whilst under the influence of drink, and sentenced him to 200 day-fines of ATS 140 each, with 100 days' imprisonment in default.

On 5 August 1996 the Ried Regional Court (*Landesgericht*) dismissed the applicant's appeal on points of law (*Berufung wegen Nichtigkeit*). It found that the Gradinger judgment of the European Court of Human Rights, relied on by the applicant, concerned a violation of Article 4 of Protocol No. 7 in a case of a conviction for driving whilst under the influence of drink by the administrative authorities after a final decision of the criminal court that there was no case to answer under Article 81 § 2 of the Criminal Code. However, it did not necessarily prohibit a court from applying this provision (in the present case taken in conjunction with Article 88 § 3 of the Criminal Code) following a final conviction by the administrative authorities. Upon the applicant's appeal against sentence (*Berufung wegen Strafe*), the Regional Court reduced the fine to 150 day-fines of ATS 140 each, with 75 days' imprisonment in default.

B. Relevant domestic law

1. The Road Traffic Act

Section 5 of the Road Traffic Act 1960 provides that it is an offence for a person to drive a vehicle if the proportion of alcohol in his blood or breath is equal to or higher than 0.8 grams per litre or 0.4 milligrams per litre respectively.

Section 99 of the 1960 Act provides, so far as relevant, that:

> "(1) It shall be an administrative offence (*Verwaltungsübertretung*), punishable with a fine of not less than ATS 8,000 and not more than ATS 50,000 or, in default of payment with one to six weeks' imprisonment, for any person:
> (a) to drive a vehicle when under the influence of drink ...
>
> (6) An administrative offence is not committed where: ...
> (c) facts constituting an offence under sub-sections (2), (3) or (4) also constitute an offence falling within the jurisdiction of the [ordinary] courts ... ."

2. The Criminal Code

Under Article 88 § 1 of the Criminal Code, it is an offence, punishable by up to three months' imprisonment or a fine, to cause physical injury by negligence. By virtue of Article 88 § 3, where the special circumstances of Article 81 § 2 apply, the maximum possible sentence is increased from three months' to six months' imprisonment.

Article 81 § 2 applies where a person commits the offence

> "after allowing himself, even if only negligently, to become intoxicated ... through the consumption of alcohol, but not to an extent which excludes ... responsibility ...".

By virtue of an irrebuttable presumption applied by the criminal courts, a driver with a blood alcohol level of 0.8 grams per litre or higher is deemed to be "intoxicated" for the purposes of Article 81 § 2.

COMPLAINTS

The applicant alleges a violation of Article 4 of Protocol No. 7 to the Convention.

THE LAW

The applicant alleges a violation of Article 4 of Protocol No. 7 to the Convention by virtue of the criminal proceedings which followed the administrative proceedings in the case. Article 4 of Protocol No. 7 provides, so far as relevant, as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

1. The Government submit that the applicant has not exhausted domestic remedies as required by Article 35 of the Convention. They claim that he failed to appeal against the fine for the breach of Section 5 of the Road Traffic Act 1960. In particular, they claim that when the penal order was made against the applicant, he must have been aware of the fact that section 99 (6)(c) of the Road Traffic Act was unconstitutional as, at the date of the penal order, the Commission had already adopted its report under former Article 31 of the Convention in the Gradinger case. They add that, in a decision of 5 December 1996 (G9/96), the Constitutional Court found that the exclusion of cases such as the present from the

principle of "subsidiarity" in Section 99 § 6c was unconstitutional. The "subsidiarity" principle thereafter applied also to Section 99 § 1. Until that date, Section 99 § 6c had provided that certain administrative offences were not committed if the facts also fell within the jurisdiction of the ordinary courts, but the exception did not extend to cases such as the present.

The applicant claims that it must be open to a person who accepts his guilt to be allowed to accept the punishment imposed on him by the State authority which first institutes proceedings, adding that if the Government wish to avoid a person being punished twice for the same offence, it is for them to take the necessary steps by amending the law or by ensuring the official discontinuance of proceedings. He considers that it is not open to the Government to claim that the applicant should have appealed on the basis of the Commission's report of 19 May 1994, when only the Court's decision of 23 October 1995 entailed a change in national law.

The Court recalls that Article 35 of the Convention requires the exhaustion of remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. The burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (see generally in connection with the exhaustion of domestic remedies, the Akdivar and others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, §§ 65-69).

In the present case, the Court notes, as the applicant points out, that the administrative criminal proceedings preceded the criminal proceedings. When the applicant was fined on 23 August 1995, there was therefore no reason for him to be formally aware that criminal proceedings would follow. Thus, even if a constitutional complaint were an effective remedy as regards Article 4 of Protocol No. 7, the applicant would not have been aware of the need to pursue it on the date of the penal order.

In any event, the Court does not accept that an appeal and subsequent constitutional complaint could have constituted an effective remedy in the present case, concerned as it is with the right not to be "tried or punished again in criminal proceedings ... for an offence for which [a person] has already been finally acquitted or convicted ...". In particular, if the applicant had been successful before the Constitutional Court, the most advantageous outcome would have been the quashing of the administrative proceedings. Whilst from a domestic perspective it may be the case that nothing would then have stood in the path of criminal proceedings, the Court considers that the applicant would nevertheless have been in the position of a person "finally acquitted" of the administrative offence. Further criminal proceedings would have given rise to the same problems under the provision as if the applicant had not pursued a constitutional complaint.

In the light of the Court of Appeal's finding that the applicant's conviction was compatible with the domestic law interpretation of Article 4 of Protocol No. 7, the applicant cannot be said to have failed to exhaust domestic remedies by not appealing against the administrative conviction.

It follows that the application cannot be rejected for non-exhaustion of domestic remedies.

2. As to the merits, the Government submit that the Court, in its Oliveira v. Switzerland judgment (30 July 1998, *Reports of Judgments and Decisions* 1998-V), had – contrary to its Gradinger v. Austria judgment (23 October 1995, Series A no. 328-C) – considered the legal qualification as the criterion for determining the "offence" within the meaning of Article 4 of Protocol No 7. In their view, the present application like the Oliveira case concerns "a typical example of a single act constituting various offences (concours idéal d'infractions)", i.e. a case where one criminal act constitutes two separate offences which does not infringe Article 4 of Protocol No 7. Besides, unlike the Gradinger case, there was no inconsistency in the two relevant authorities' assessment of the present applicant's blood alcohol level.

The applicant contests the Government's view. He submits that the Oliveira case is not comparable to his, as in the former case the criminal court had quashed the fine imposed by the police magistrate and stated that, if the fine had already been paid, it was to be deducted from the second fine. However, in his case two sentences were imposed for driving whilst under the influence of alcohol. Thus, the present application is comparable to the Gradinger case and the principle of *ne bis in idem* was indeed violated.

The Court considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

S. Dollé
Registrar

N. Bratza
President