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 nos. 65665/01, 71879/01 and 72861/01
by Eveline SCHLUGA
against Austria

The European Court of Human Rights (First Section), sitting on 26 September 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 applications lodged on 19 January, 29 May and 24 July 2001, respectively,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Schluga, is a Austrian national, who was born in 1963 and lives in Bregenz. She is represented before the Court by Mr W.L.Weh, a lawyer practising in Bregenz.

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

1. Proceedings complained of in application no. 65665/01

On 12 July 1994 the Bregenz District Administrative Authority (*Bezirkshauptmannschaft*) issued a penal order against the applicant for prostitution contrary to sections 4 and 18 of the Vorarlberg Morals Act (*Sittenpolizeigesetz*), an offence which carries a penalty of up to 30,000 Austrian schillings (ATS) and/or a term of up to three months' imprisonment. The authority sentenced the applicant to twenty days' imprisonment. In addition it imposed a fine of ATS 10,000.

On 21 November 1994 the District Authority issued another penal order against the applicant for having committed such offences on another occasion and sentenced her to thirty days' imprisonment. In addition it imposed a fine of ATS 20,000.

The applicant appealed against the decisions. Subsequently, the proceedings were joined.

On 4 October 1995, after having held an oral hearing, the Vorarlberg Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) upheld both penal orders but reduced the prison sentence of the one dated 21 November 1994 to twenty days.

On 19 June 1996 the Constitutional Court (*Verfassungsgerichtshof*) refused to deal with the applicant's complaint for lack of prospects of success and referred the case to the Administrative Court (*Verwaltungsgerichtshof*).

On 23 September 1996, upon the Administrative Court's request, the applicant filed supplementary submissions.

On 19 November 1996 the Independent Administrative Panel commented on the applicant's appeal.

On 3 July 2000 the Administrative Court dismissed the applicant's appeal as being unfounded. As to the applicant's complaint about the lack of a prosecuting authority in the proceedings before the Independent Administrative Panel, it referred to its case-law according to which the Panel qualified as a tribunal within the meaning of Article 6 of the Convention. Further, it noted the applicant's submission that the authority had disregarded section 12 of the Law on Administrative Offences

(*Verwaltungsstrafgesetz*), which provides that a sentence of more than two weeks' imprisonment may only be imposed in case of particularly aggravating circumstances. However, the court, referring to its case-law, found that the authorities had rightly considered that the conditions of section 12 of the Law on Administrative Offences were met, as the applicant had a number of prior convictions concerning the same offence. The decision was served on 19 July 2000.

2. Proceedings complained of in application no. 71879/01

On 27 October 1993 the Bregenz District Administrative Authority issued a penal order against the applicant for prostitution contrary to sections 4 and 18 of the Vorarlberg Morals Act and sentenced her to twenty days' imprisonment. In addition it imposed a fine of ATS 10,000.

On 1 February 1994 the District Authority issued another penal order against her for having committed such offences, sentencing her to twenty days' imprisonment. In addition it imposed a fine of ATS 10,000.

The applicant appealed against both decisions.

After having held an oral hearing in each case, the Vorarlberg Independent Administrative Panel, on 17 January and 21 March 1994, respectively, confirmed the decisions.

The applicant lodged complaints against both decisions with the Constitutional Court.

On 6 March 1995 the Constitutional Court, in joined proceedings, refused to deal with the applicant's complaint for lack of prospects of success and referred the case to the Administrative Court.

On 27 November 1995 the Administrative Court quashed both decisions and referred the matter to the Independent Administrative Panel. It found that, when fixing the sentence, the authority had failed to duly establish the aggravating circumstances it had taken into account.

On 30 April 1996 the Independent Administrative Panel upheld the penal orders but reduced the prison sentences to eighteen days' each and lifted the fines.

On 9 October 1996 the Constitutional Court again refused to deal with the applicant's complaint for lack of prospects of success and referred the case to the Administrative Court.

On 10 February 1997, upon the latter's request, the applicant filed supplementary submissions.

On 3 April 1997 the Vorarlberg Independent Administrative Panel filed a comment on the applicant's appeal.

On 13 November 2000 the Administrative Court dismissed the complaint as being unfounded, giving similar reasons as in its decision of 3 July 2000 (see above). The decision was served on 29 November 2000.

3. Proceedings complained of in application no. 72861/01

a) Proceedings under the Vorarlberg Morals Act

On 2 September 1996 the Bregenz District Administrative Authority issued a penal order against the applicant for prostitution contrary to section 4 and 18 of the Vorarlberg Morals Act and sentenced her to eighteen days' imprisonment.

After having held an oral hearing, the Vorarlberg Independent Administrative Panel, on 20 January 1997, confirmed the decision.

On 18 April 1997 the Constitutional Court declined to deal with the applicant's case for lack of prospects of success and referred the case to the Administrative Court.

On 15 June 1998, upon the latter's request, the applicant filed supplementary submissions as well as a request that suspensive effect be granted to her complaint.

On 7 August 1998 the Administrative Court dismissed the request for suspensive effect.

On 12 October 1998 the Vorarlberg Independent Administrative Panel filed a comment on the applicant's appeal.

On 18 December 2000 the Administrative Court, referring to its previous decisions concerning the applicant, dismissed the applicant's complaint as being unfounded. The decision was served on 29 January 2001.

b) Proceedings under the Aids Act

On 30 October 1995 the Bregenz District Administrative Authority issued a penal order against the applicant for having breached sections 4 and 9 of the Aids Act (*Aidsgesetz*) and imposed a fine of ATS 10,000.

After having held an oral hearing, the Vorarlberg Independent Administrative Panel, on 10 September 1996, upheld the decision.

On 27 November 1997 the Constitutional Court refused to deal with the applicant's case for lack of prospects of success and referred the case to the Administrative Court.

On 12 June 1998, upon the latter's request, the applicant filed supplementary submissions.

On 30 September 1998 the Vorarlberg Independent Administrative Panel filed a comment on the applicant's complaint.

On 18 December 2000 the Administrative Court dismissed the applicant's complaint as being unfounded. The decision was served on 24 January 2001.

COMPLAINTS

The applicant complains under Article 6 of the Convention that, in each case, the proceedings at issue lasted unreasonably long. She also complains that no prosecuting authority participated in the proceedings and in the hearing before the Vorarlberg Independent Administrative Panel and that therefore the Panel acted both as judge and prosecutor, which allegedly violates the principle of equality of arms.

Further, the applicant complains that the various sentences imposed on her under the Vorarlberg Morals Act were excessive. Moreover, she claims that the imposition of more than two weeks' imprisonment was contrary to section 12 of the Law on Administrative Offences. She argues that the authorities wrongly considered her previous convictions concerning the same offence as particularly aggravating circumstances within the meaning of this provision. The applicant invokes Articles 5, 7 and 14 of the Convention as well Article 2 of Protocol No. 4.

THE LAW

1. The applicant complains that, in each case, the administrative criminal proceedings against her were not concluded within a reasonable time as required by Article 6 § 1 of the Convention which, so far as relevant, provides as follows:

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

The Court considers that it cannot, on the basis of the 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 complaint to the respondent Government.

2. The applicant also complains under Article 6 that no prosecuting authority took part in the proceedings and in the hearing before the Independent Administrative Panel and that, therefore, the members of the Panel acted both as a judge and prosecutor. She claims that this constitutes a breach of the principle of equality of arms.

The Court recalls that, according to its established case-law, administrative offences like those at issue in the present case are to be classified as "criminal" for the purposes of Article 6, which therefore applies to administrative criminal proceedings under Austrian law (see for instance the Schmautzer v. Austria judgment of 23 October 1995, Series A

no. 328-A, p. 13, § 28 and as a recent authority *Baischer v. Austria,* no. 32381/96, 20.12.2001, § 22). Furthermore, the Independent Administrative Panel has to be regarded as a tribunal within the meaning of Article 6 of the Convention (see the *Baischer judgment*, cited above, § 25).

As to the applicant's complaint about the alleged lack of a prosecuting authority in the proceedings at issue, the Court has already found that if an appeal is filed with the Independent Administrative Panel against a penal order, the authority which issued the impugned decision assumes the function of the prosecuting authority in appeal proceedings before that panel. The applicant has not alleged, and there is no indication in the present case, that any procedural rights are conferred on the prosecution which would put it in a position more favourable than the accused's. Thus, there is no appearance of a violation of the principle of equality of arms (*Weh v. Austria* (dec.), no. 38544/97, 4.7.2002).

Further, it was found that the absence of a representative of that authority from the hearing does not give rise to objectively justified fears as regards the impartiality of the Independent Administrative Panel and that in this respect too there is no breach of Article 6 (see *Weh v. Austria*, cited above). The Court sees no reason to reach a different conclusion in the present case.

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. As regards the applicant's complaint that the sentences imposed on her under the Vorarlberg Morals Act were excessive, the Court reiterates at the outset that matters of appropriate sentencing largely fall outside the scope of the Convention, it not being its role to decide, for example, what is the appropriate term of detention applicable to a particular offence. Nonetheless it has not excluded that an arbitrary or disproportionately lengthy sentence might in some circumstances raise issues under the Convention (see *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI, with further references). In the present case, there is nothing to indicate that the sentences at issue were disproportionate.

However, the Court will examine the applicant's complaint that the imposition of more than two weeks' imprisonment was contrary section 12 of the Law on Administrative Offences under Article 7 of the Convention which, so far as material, 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Court recalls 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. However, Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal

liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II with further references).

The Court notes firstly, that the offence under sections 4 and 18 of the Vorarlberg Morals Act, of which the applicant was found guilty several times, was punishable with up to three months' imprisonment and/or a fine of up to ATS 30,000. The applicant has not contested that this penalty was already applicable when the offences were committed nor has she contested that the sentences imposed on her, namely prison terms which varied from case to case between eighteen and twenty days' imprisonment are within the statutory range of punishment.

However, she contends that - whatever the statutory range of punishment under the Vorarlberg Moral Act may be - section 12 of the Law on Administrative Offences provides as a general rule that a prison term of more than two weeks may only be imposed in case of "particularly aggravating circumstances" which, in her view, were not given in the present case.

The Court observes that the term "particularly aggravating circumstances" used in section 12 of the Law on Administrative Offences is somewhat imprecise. However, it has been clarified by the Administrative Court's case-law. That court dismissed the applicant's complaint that a number of previous convictions of the same offence could not qualify as "particularly aggravating circumstances" by referring to its case-law. Consequently, it cannot be said that the applicant could not foresee in the circumstances of the case - if need be with appropriate legal advice - that her conduct might lead to the imposition of a term of imprisonment of more than two weeks. Thus, there is no appearance of a violation of Article 7 of the Convention.

There is no appearance of a violation of any of the other Articles relied on by the applicant either.

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 join the applications;

Decides to adjourn the examination of the applicant's complaint concerning the length of the proceedings at issue;

Declares the remainder of the application inadmissible.

Erik FRIBERGH
Registrar

Christos L. ROZAKIS
President