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. 38275/97
by W.F.
against Austria

The European Court of Human Rights (Third Section), sitting on 11 September 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
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 19 August 1997 and registered on 22 October 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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 is an Austrian national, born in 1969 and living in Lochen (Austria). He is represented before the Court by Mr J. Postlmayr, a lawyer practising in Mattighofen (Austria).

A. The circumstances of the case

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

On 21 May 1995 the applicant was involved in a road traffic accident.

On 19 October 1995 he was found by the Braunau District Administrative Authority (*Bezirkshauptmannschaft*) to have been driving under the influence of alcohol, contrary to Sections 5 § 1 and 99 § 1 (a) of the Road Traffic Act 1960 (*Straßenverkehrsordnung*). He was sentenced to pay a fine of ATS 14,000.00. It does not appear that the applicant appealed against this decision.

On 1 August 1996 the Mattighofen District Court convicted him under Section 88 §§ 1 and 3 of the Penal Code of negligently causing bodily harm in particularly dangerous conditions (*fahrlässige Körperverletzung unter besonders gefährlichen Verhältnissen*), and sentenced him to a fine of ATS 8,000.00.

On 2 June 1997 the Ried Regional Court dismissed the applicant's appeal. The Regional Court distinguished the present case from the Gradinger case of the European Court of Human Rights (Gradinger v. Austria judgment of 23 October 1995, Series A no. 328-C) on the ground that in the Gradinger case the administrative proceedings were after the criminal proceedings, whereas in the present case the order of the criminal and administrative criminal proceedings was reversed.

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

By 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.

Article 88 § 4 Part 1 increases the sentence in respect of causing injury, where the injury is particularly serious, by up to six months’ imprisonment or a fine. By virtue of Article 88 § 4 Part 2, where the special circumstances of Article 81 § 2 apply, the maximum possible sentence is increased by up to two years’ 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 ...”.

Under an irrebutable 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.

COMPLAINT

The applicant complains that his conviction by the Mattighofen District Court violated his rights under Article 4 of Protocol No. 7.

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 criminal 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, in that he failed to appeal against the conviction for a breach of Section 5 of the Road Traffic Act 1960. In particular, they point out 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 (6)(c) was unconstitutional. The "subsidiarity" principle thereafter applied also to Section 99 (1). Until that date, Section 99 (6)(c) 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.

This is disputed by the applicant. In his view the essential legal issue is the conviction in the criminal proceedings, which was the second time that he was punished for the same offence, and not his previous conviction by an administrative authority. In this respect he also refers to the Court's decision in the case of *Schlager v. Austria* (no. 33732/96 (dec.), 21.3.2000) where the Court rejected a similar argument advanced by the Government.

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 (Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, §§ 65-69).

In the case of Schlager v. Austria (no. 33732/96 (dec.), 21.3.2000), the Court found that an appeal and subsequent constitutional complaint could not have constituted an effective remedy as regards a complaint under Article 4 of Protocol No. 7 because, even if the applicant had been successful before the Constitutional Court, the most advantageous outcome would have been the quashing of the administrative proceedings. Thus, the applicant would have been in the position of a person "finally acquitted" of the administrative offence and further criminal proceedings would have given rise to the same problems under Article 4 of Protocol No. 7 as if the applicant had not pursued a constitutional complaint.

The Court finds no reason to come to a different conclusion in the present case. 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* 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. The Government argue that the present case is comparable to the Oliveira case. In their view, the present case, like Oliveira, concerns "a typical example of a single act constituting various offences (concour 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.

The applicant contests the Government's view. He submits that the Oliveira case is not comparable to his, as in the former 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. In his case, two sentences were imposed for essentially the same offence and the present application is therefore comparable to the Gradinger case. Thus, the principle of *ne bis in idem* has been 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

J.-P. COSTA
President