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

COURT (PLENARY)

CASE OF LUTZ v. GERMANY

(Application no. 9912/82)

JUDGMENT

STRASBOURG

25 August 1987

In the Lutz case*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,
Mr. N. VALTICOS,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 February and 24 June 1987,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 January 1986, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 9912/82) against the Federal Republic of Germany lodged with the Commission

* Note by the Registrar: The case is numbered 8/1986/106/154. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

under Article 25 (art. 25) by a national of that State, Mr. Uli Lutz, on 14 June 1982.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 2 (art. 6-2).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, Mr. Lutz stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. On 28 January 1986, the President of the Court decided that in the interests of the proper administration of justice this case and the Englert and Nölkenbockhoff cases should be considered by the same Chamber (Rule 21 § 6).

The Chamber of seven judges to be constituted included, as ex officio members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 19 March 1986, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. F. Matscher, Mr. J. Pinheiro Farinha, Mr. L.-E. Pettiti, Sir Vincent Evans and Mr. R. Macdonald (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. After assuming the office of President of the Chamber (Rule 21 § 5), Mr. Ryssdal consulted - through the Deputy Registrar - the Agent of the German Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure. On 2 April, he directed that the Agent and the applicant's lawyer should have until 1 July 1986 to file memorials and that the Delegate should be entitled to reply in writing within two months (Rule 37 § 1). At the same time, he gave the applicant's lawyer leave to use the German language in the proceedings (Rule 27 § 3).

The President twice extended the first of these time-limits - on 3 July until 31 October, and on 10 November until 21 November 1986.

5. The Government's memorial was lodged with the registry on 13 November 1986. The applicant informed the Registrar on the same day that he would not be filing a memorial.

6. On 29 November, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

7. On 15 December, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

8. The next day, having consulted - through the Deputy Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer

for the applicant, the President directed that the oral proceedings should open on 23 February 1987 (Rule 38). On 6 February, he granted the members of the Government's delegation leave to speak in German (Rule 27 § 2).

9. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mrs. I. MAIER, Ministerialdirigentin,
Federal Ministry of Justice, *Agent*,
Mr. P.-G. PÖTZ, Ministerialdirigent,
Federal Ministry of Justice,
Mr. H. STÖCKER, Ministerialrat,
Federal Ministry of Justice,
Mr. E. GÖHLER, Ministerialrat,
Federal Ministry of Justice, *Advisers*;

- for the Commission

Mr. A. WEITZEL, *Delegate*;

- for the applicant

Mr. N. WINGERTER, Rechtsanwalt,
Mr. V. HOHBACH, Rechtsanwalt, *Counsel*.

The Court heard addresses by Mrs. Maier for the Government, by Mr. Weitzel for the Commission and by Mr. Wingerter and Mr. Hohbach for the applicant, as well as their replies to its questions.

10. On various dates between 3 February and 11 May 1987, the Commission, the Government and the applicant produced a number of documents either at the Court's request or of their own motion.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

11. Mr. Uli Lutz, a German national born in 1959, lives in Heilbronn-Horkheim.

12. On 10 October 1980, he was riding a motor cycle and was involved in a road accident. According to the police report (Verkehrs-Ordnungswidrigkeiten-Anzeige), he had attempted to overtake a car, although the traffic situation was unclear (unklare Verkehrslage). The result had been a collision which caused damage to both vehicles.

When he was questioned, the applicant made the following statement:

"At about 4.30 p.m. today, I was driving southwards along Hohenloher Strasse, Heilbronn-Horkheim.

Near the junction with Amsterdamer Strasse, I noticed a red car - which had its left indicator flashing - about to pull away from the kerb.

I was about to overtake on the left of this vehicle when it not only moved forward onto the road but turned further to the left in order to make a U-turn.

[It] was making its U-turn and was on the point of moving into the opposite carriageway (Gegenfahrspur) when I was still about ten yards behind it. As I was not expecting it to make a U-turn, I was intending to overtake it on the left.

By the time I realised that this was no longer possible, I had already moved over quite far to the left and I tried to brake but could not avoid colliding with the car, which by now was at right angles to the flow of traffic.

I was wearing a crash helmet when the accident occurred; I was not injured."

13. On 9 December 1980, on the basis of the police report, the Heilbronn Police Authority (Amt für öffentliche Ordnung) imposed on Mr. Lutz a fine (Geldbusse) of DM 125, to which were added costs of DM 14, for "joint responsibility for a road accident due to overtaking in an unclear traffic situation such that a collision was caused with another road-user".

The decision was based on section 24 of the Road Traffic Act (Strassenverkehrsgesetz - see paragraph 38 below) and Regulations 1(2), 5 and 49 of the Road Traffic Regulations (Strassenverkehrs- Ordnung). Regulation 1(2) reads:

"All road-users have a duty to conduct themselves in such a manner as not to harm or jeopardise others or inconvenience or annoy them more than may be inevitable in the circumstances."

Regulation 5 provides that motorists must overtake on the left (paragraph 1), that they may overtake only if they can see that they will not thereby interfere with oncoming traffic (paragraph 2) and that no overtaking is allowed in an unclear traffic situation (paragraph 3(1)).

By Regulation 49(1)(1) and 49(5), it is a "regulatory offence" (Ordnungswidrigkeit) to contravene Regulations 1(2) and 5(1) to (3); under section 24(2) of the Road Traffic Act, such an offence is punishable by a fine.

14. The driver of the car was likewise fined for a "regulatory offence".

15. Two days later, Mr. Lutz, who was represented by Mr. Wingerter, lodged an objection (Einspruch) against the decision of 9 December 1980. The appropriate authority in Heilbronn forwarded the objection to the public prosecutor’s office on 23 January 1981, and the latter transmitted it to the Heilbronn District Court (Amtsgericht) on 5 February.

On 24 July 1981, the court informed the applicant that it intended to discontinue the proceedings as they were time-barred and order costs

against the Treasury (Staatskasse), while the applicant would have to bear his own necessary costs and expenses (notwendige Auslagen).

On 12 August, Mr. Wingerter replied that his client naturally agreed to the stay of proceedings, but not to an order requiring him to bear his own necessary costs and expenses; and he referred among other things to "the presumption of innocence, secured in the Convention on Human Rights".

16. On 24 August 1981, the District Court stayed the proceedings on the ground that they were time-barred. Its decision read as follows:

> "In the 'regulatory offence' matter (Bussgeldsache)
>
> against ... Uli Lutz
>
> concerning a breach of the Road Traffic Regulations,
>
> ...
>
> the proceedings shall be stayed.
>
> The costs of the proceedings shall be borne by the Treasury. The defendant shall bear his own necessary costs and expenses.
>
> Reasons:
>
> On 9 December 1980, the Heilbronn Police Authority took a decision to impose a fine (Bussgeldbescheid) on the defendant for a breach of the Road Traffic Regulations. The defendant appealed against this decision. By an order made on 27 January 1981, the public prosecutor's office in Heilbronn forwarded the case to the Heilbronn District Court for a decision. After the case had been submitted, prosecution of the 'regulatory offence' became time-barred under section 26(4) of the Road Traffic Act. The proceedings must therefore be stayed by reason of there being a technical bar to prosecution (Verfolgungshindernis), in accordance with Article 206a of the Code of Criminal Procedure, taken together with section 46 of the Act on 'regulatory offences' (Gesetz über Ordnungswidrigkeiten) [see paragraph 19 below].
>
> The decision on costs is based on Article 467 of the Code of Criminal Procedure, taken together with section 46 of the Act on 'regulatory offences'.
>
> In accordance with Article 467 § 2 [sic], second sentence, of the Code of Criminal Procedure, taken together with section 46 of the Act on 'regulatory offences', the court declines to order the Treasury to bear the defendant's necessary costs and expenses. As the file stands, the defendant would most probably have been convicted of an offence against the Road Traffic Regulations (Nach Lage der Akten wäre der Betroffene mit hoher Wahrscheinlichkeit wegen eines Verstosses gegen die StVO verurteilt worden). That being so, it would be unjust (unbillig to award his necessary costs and expenses against the Treasury."

17. On 10 September 1981, the applicant challenged this decision in so far as he had been ordered to bear his own costs and expenses.

On 25 September, the Heilbronn Regional Court (Landgericht) dismissed the appeal (sofortige Beschwerde) as being unfounded.

The court held that Article 6 § 2 (art. 6-2) of the Convention did not apply to the case. As it had already explained at length in an earlier decision, Article 6 (art. 6) protected the individual only from possible hazards in civil or criminal trials. This was clear beyond a peradventure from the wording of the provision itself. There was no reason to give Article 6 § 2 (art. 6-2) a broad interpretation such as would extend its application to other proceedings. The Article (art. 6-2) consequently could not apply to proceedings in connection with "regulatory offences", as these had been excluded from the category of criminal offences, and procedure relating to them was quite distinct from criminal procedure. On the basis that Article 6 § 2 (art. 6-2) was not applicable, the District Court had therefore been right to order the defendant to bear his own necessary costs and expenses (under Article 467 § 3, second sentence, sub-paragraph 2, of the Code of Criminal Procedure) because had the prosecution not been statute-barred, "the defendant would almost certainly (mit annähernder Sicherheit) have been found guilty of an offence". He had himself admitted to the police that he was not expecting the car which was moving out to the left onto the road in front of him to make a U-turn; and that he had consequently attempted to overtake it but had been unable to avoid a collision despite his efforts to brake. Mr. Lutz had thus broken the basic rule in Regulation 1(2) of the Road Traffic Regulations and, in particular, had disregarded his duty under Regulation 5(3)(1) not to overtake where the traffic situation was unclear. The court held that in such circumstances it would have been unjust to award the defendant’s necessary costs and expenses against the Treasury, especially as the prosecution had become time-barred only during the course of the court proceedings, so that until that moment the defendant was rightly being proceeded against.

18. Mr. Lutz then applied to the Federal Constitutional Court (Bundesverfassungsgericht), but on 2 February 1982 a bench of three of that court’s judges refused to entertain the application, holding that it had insufficient prospects of success.

In the Constitutional Court’s view, the decisions of the District Court and the Regional Court did not offend the presumption of innocence, which was founded on the principle of the rule of law and was embodied in Article 6 § 2 (art. 6-2) of the Convention. However strong the suspicions, the presumption of innocence precluded taking measures against a defendant (Beschuldigter) that amounted in effect to a penalty (Strafe) in anticipation of a penalty (im Vorgriff auf die Strafe). This rule was not infringed where the necessary costs and expenses of a party who had been proceeded against in respect of a "regulatory offence" were not awarded against the Treasury in the event of the proceedings being discontinued. The judgment continued:

> "The decision not to order the Treasury to pay the costs and expenses of the party concerned obviously cannot be regarded as a punishment (Bestrafung) or even be

equated with such. Furthermore, the decision as to costs and expenses pursuant to Article 467 § 3, sub-paragraph 2, of the Code of Criminal Procedure and section 46(1) of the Act on 'regulatory offences' does not make any finding that the person concerned is guilty: it derives merely from the suspicion falling on him, which had given rise to his being prosecuted for a 'regulatory offence'. The reasons for the order as to costs in the impugned decisions are therefore rightly confined to the finding that the defendant would most probably have been found guilty."

II. RELEVANT DOMESTIC LAW

A. Act on "regulatory offences"

19. The subject of "regulatory offences" is governed by the Act of 24 May 1968 on "regulatory offences" (Gesetz über Ordnungswidrigkeiten), in its version of 1 January 1975 ("the 1968/1975 Act"). The purpose of this legislation was to remove petty offences from the sphere of the criminal law. Included in this category were contraventions of the Road Traffic Act. Under section 21 of the Road Traffic Act (in its old version), commission of such contraventions had given rise to liability to a fine (Geldstrafe) or imprisonment (Haft). Section 3(6) of the Act of 24 May 1968 (Einführungsgesetz zum Gesetz über Ordnungswidrigkeiten) classified them as "Ordnungswidrigkeiten" and henceforth made them punishable only by fines (Geldbussen) not deemed to be criminal by the legislature.

The 1968/1975 Act had been preceded in the Federal Republic by the Act of 25 March 1952 on "regulatory offences" and, to a certain extent, the Economic Crime Act of 26 July 1949 (Wirtschaftsstrafgesetz). It was most recently amended by a statute of 7 July 1986, which entered into force on 1 April 1987.

1. General provisions

20. Section 1(1) of the 1968/1975 Act defines a "regulatory offence" as an unlawful (rechtswidrig) and reprehensible (vorwerfbar) act, contravening a legal provision which makes offenders liable to a fine. The fine cannot be less than DM 5 or, as a general rule, more than DM 1,000 (section 17(1)). The amount of the fine is fixed in each case by reference to the seriousness of the offence, the degree of misconduct attributable to the offender and, save for minor (geringfügig) offences, the offender's financial circumstances (section 17(3)).

If the act constitutes both a "regulatory" and a criminal offence, only the criminal law is applicable; however, if no criminal penalty (Strafe) is imposed, the act may be punished as a "regulatory offence" (section 21).

2. The prosecuting authorities

21. "Regulatory offences" are to be dealt with by the administrative authorities (Verwaltungsbehörde) designated by law, save in so far as the 1968/1975 Act confers the power of prosecution of such offences on the public prosecutor and the trial and punishment of them on the courts (sections 35 and 36). Where an act has come before him as a criminal matter, the public prosecutor may also treat the act as a "regulatory offence" (section 40).

22. The administrative authorities will remit the matter to the public prosecutor if there is reason to suppose that a criminal offence has been committed; he will refer the matter back to them if he does not take proceedings (section 41). In the case of a "regulatory offence" having a close connection with a criminal offence in respect of which the public prosecutor has instituted proceedings, the prosecutor may extend the criminal proceedings to cover the "regulatory offence" as long as the administrative authorities have not fixed any fine (section 42).

The public prosecutor’s decision to treat or not to treat an act as a criminal offence is binding on the administrative authorities (section 44).

3. Procedure in general

23. Subject to the exceptions laid down in the 1968/1975 Act, the provisions of the ordinary law governing criminal procedure - in particular the Code of Criminal Procedure, the Judicature Act (Gerichtsverfassungsgesetz) and the Juvenile Courts Act (Jugendgerichtsgesetz) - are applicable by analogy (sinngemäss) to the procedure in respect of "regulatory offences" (section 46(1)). The prosecuting authorities (see paragraph 21 above) have the same rights and duties as the public prosecutor in a criminal matter unless the 1968/1975 Act itself states otherwise (section 46(2)). Nevertheless, a number of measures permissible in criminal matters cannot be ordered in respect of "regulatory offences", notably arrest, interim police custody (vorläufige Festnahme) and seizure of mail or telegrams (section 46(3)). The taking of blood samples and other minor measures within the meaning of Article 81(a) § 1 of the Code of Criminal Procedure remain possible.

24. The prosecution of "regulatory offences" lies within the discretion (pflichtgemässes Ermessen) of the competent authority, which may terminate the prosecution at any time while the case is pending before it (section 47(1)).

Once the case has been brought before a court (see paragraphs 29-30 below), power to direct a stay of proceedings rests with the court; any such decision requires the agreement of the public prosecutor and is final (section 47(2)).

25. As regards the judicial stage (if any) of the proceedings (see paragraphs 30-32 below), section 46(7) of the 1968/1975 Act vests jurisdiction in divisions (Abteilungen) of the district courts and in chambers (Kammern/Senate) of the regional courts, of the courts of appeal (Oberlandesgerichte) and of the Federal Court of Justice (Bundesgerichtshof).

4. Preliminary procedure

26. Investigations (Erforschung) into "regulatory offences" are a matter for the police authorities. In this connection, the police authorities enjoy a discretion (pflichtgemässes Ermessen); save in so far as the 1968/1975 Act provides otherwise, they have the same rights and duties as in the investigation of criminal offences (section 53(1)).

27. Prior to any decision being taken, the person concerned (Betroffener) has to be given the opportunity of commenting, to the competent authorities, on the allegation made against him (section 55).

In the case of a minor offence, the administrative authorities may give the person concerned a warning (Verwarnung) and impose on him an admonitory fine (Verwarnungsgeld); save for any exception laid down under the applicable law, the amount of an admonitory fine ranged from DM 5 to 40 at the relevant time, and since 1 April 1987 has ranged from DM 5 to 75 (section 56(1)). However, sanctions of this kind are possible only if the person concerned consents and pays the fine on the spot or within one week (section 56(2)).

28. If necessary, the administrative authorities will officially designate a lawyer to act for the person concerned in the proceedings before them (section 60).

Measures taken by the administrative authorities during the preliminary procedure can in principle be challenged before the courts (section 62).

5. Administrative decision imposing a fine

29. Save in so far as the 1968/1975 Act provides otherwise - as in the case of the matter being settled by payment of an admonitory fine -, a "regulatory offence" is punishable by an administrative decision imposing a fine (Bussgeldbescheid; section 65).

The person concerned may lodge an objection (Einspruch) within a period which on 1 April 1987 was increased from one week to two weeks (section 67). Unless they withdraw their decision, the administrative authorities will then forward the file to the public prosecutor, who will submit it to the competent District Court and thereupon assume the function of prosecuting authority (sections 68 and 69).

6. Judicial stage (if any) of the procedure

30. Under section 71, if the District Court finds the objection admissible (section 70) it will, unless the 1968/1975 Act states otherwise, examine the objection in accordance with the provisions applicable to an objection against an order of summary punishment (Strafbefehl): in principle, it will hold a hearing and deliver a judgment (Urteil) which may impose a heavier sentence (Article 411 of the Code of Criminal Procedure).

However, the District Court’s ruling may take the form of an order (Beschluss) if the court considers that a hearing is not necessary and provided the public prosecutor or the person concerned does not object (section 72(1)). In that event, it may, inter alia, acquit the person concerned, settle the amount of a fine or terminate the prosecution, but it cannot increase the penalty (section 72(2), now renumbered (3)).

31. The person concerned has the option of attending the hearing but is not bound to do so unless the District Court so directs (section 73(1) and (2)); he may be represented by a lawyer (section 73(4)).

The public prosecutor’s office may be represented at the hearing; if the District Court considers the presence of an official from that office to be appropriate, it will inform the latter accordingly (section 75(1)).

The District Court will give the administrative authorities the opportunity to set out the matters which, in their view, are of importance for the decision to be given; they may address the Court at the hearing, if they so wish (section 76(1)).

32. Subject to certain conditions, section 79 allows an appeal on points of law (Rechtsbeschwerde) to be brought against a judgment or an order issued pursuant to section 72; save in so far as the 1968/1975 Act states otherwise, in determining the appeal the court concerned will follow, by analogy, the provisions of the Code of Criminal Procedure relating to review proceedings (Revision).

7. Administrative procedure and criminal procedure

33. The administrative authorities’ classification of an act as a "regulatory offence" is not binding on the court ruling on the objection; however, it can apply the criminal law only if the person concerned has been informed of the change of classification and been enabled to prepare his defence (section 81(1)). Once this condition has been satisfied, either by the court of its own motion or at the public prosecutor’s request, the person concerned acquires the formal status of an accused (Angeklagter; section 81(2)) and the subsequent proceedings fall outside the scope of the 1968/1975 Act (section 81(3)).

8. Enforcement of decisions imposing a fine

34. A decision imposing a fine is enforceable once it has become final (sections 89 and 84). Unless the 1968/1975 Act states otherwise, enforcement of a decision taken by the administrative authorities is governed by the Federal Act or the Land Act, as the case may be, on enforcement in administrative matters (Verwaltungs-Vollstreckungsgesetze) (section 90(1)). When the decision is one taken by a court, certain relevant provisions of, inter alia, the Code of Criminal Procedure are applicable (section 91).

35. If, without having established (dargetan) his inability to pay, the person concerned has not paid the fine in due time, the court may, at the request of the administrative authorities or, where the fine was imposed by a court decision, of its own motion, order coercive imprisonment (Erzwingungshaft - section 96(1)). The resultant detention does not replace payment of the fine in the manner of an Ersatzfreiheitsstrafe under the criminal law, but is intended to compel payment. The period of detention may not exceed six weeks for one fine and three months for several fines (section 96(3)). Implementation of the detention order is governed, inter alia, by the Code of Criminal Procedure (section 97).

9. Costs

36. As far as the costs of the administrative procedure are concerned, the competent authorities apply by analogy certain provisions of the Code of Criminal Procedure (section 105).

37. Under section 109 - likewise amended with effect from 1 April 1987 -, the person concerned has to bear the costs of the court proceedings if he withdraws his objection or if the competent court rejects it.

For the rest, the provisions of the Code of Criminal Procedure regarding payment of the costs of proceedings and of parties' necessary costs and expenses apply by analogy (Article 464 et seq. of the Code of Criminal Procedure and section 46 of the 1968/1975 Act).

By the terms of Article 464 of the Code of Criminal Procedure, any judgment, order of summary punishment or decision terminating a set of proceedings must determine who is to pay the costs of the proceedings (paragraph 1); the judgment or decision in which the proceedings culminate shall state who is to bear the necessary costs and expenses (paragraph 2).

Paragraph 1 and paragraph 3, second sentence, sub-paragraph 2, of Article 467 of the Code of Criminal Procedure, which were applied in the instant case pursuant to section 46 of the 1968/1975 Act, provide:

> "1. If the defendant (Angeschuldigter) is acquitted or if committal for trial (Hauptverfahren) is refused or if the proceedings against him are discontinued, the costs of the proceedings and the defendant's necessary costs and expenses shall be borne by the Treasury.

...

3. ... The court may decline to award the defendant’s necessary costs and expenses against the Treasury where the defendant

...

(2) has avoided conviction merely because of a technical bar to the proceedings (Verfahrenshindernis)."

Inasmuch as the law does not make the reimbursement of necessary costs and expenses mandatory, the courts decide the issue on an equitable basis and have a degree of discretion in the matter.

B. Road traffic fines

38. The Road Traffic Act, the Road Traffic Regulations and the Road Traffic Licence and Vehicle Conformity Regulations (Strassenverkehrs-Zulassungs-Ordnung) contain lists of "regulatory offences" punishable by a fine (section 24 of the Road Traffic Act).

Section 24 of the Road Traffic Act provides:

"1. It shall be a ‘regulatory offence’ wilfully or negligently (vorsätzlich oder fahrlässig) to contravene a provision in a statutory instrument (Rechtsverordnung) made pursuant to section 6(1) or in an order (Anordnung) made pursuant to such a statutory instrument if the statutory instrument concerned refers to the present provision ... in respect of a given offence. Such reference shall not be required where the provision of the statutory instrument was made before 1 January 1969.

2. A ‘regulatory offence’ is punishable by a fine."

The Road Traffic Regulations, which were applied in the instant case, were contained in one of the statutory instruments issued under section 6(1) of the Road Traffic Act.

39. In the case of a "regulatory offence" committed in gross (grob) and persistent (beharrlich) violation of the duties incumbent on a driver, the administrative authorities or, where an objection has been lodged, the court may at the same time disqualify the person concerned from holding a driving licence (Fahrverbot) for a period of one to three months (section 25 of the Road Traffic Act).

40. The Länder have co-operated to adopt rules (Verwaltungs-vorschriften) establishing a uniform scale of fines (Bussgeldkatalog) for the various road traffic "regulatory offences"; legally, these rules are binding on the administrative authorities empowered to impose fines but not on the courts.

Section 26(a) of the Road Traffic Act, which was inserted into the Act on 28 December 1982 but has not yet been implemented, provides that the

Minister of Transport shall issue such rules with the agreement of the Bundesrat and in the form of a statutory instrument (Rechtsverordnung).

41. Under section 28 of the Road Traffic Act, a fine imposed for contravention of road traffic regulations may in some specified cases be entered in a central traffic register (Verkehrszentralregister) if it exceeds a certain amount (DM 39 at the time of the events in issue, DM 79 as from 1 July 1982); on the other hand, no mention of it is included in the criminal records (Bundeszentralregister). The entry must be expunged after a maximum of two years, unless further entries have been made in the meantime (section 29).

Only certain authorities have access to the register, notably for the purposes of a criminal prosecution or a prosecution for a road traffic "regulatory offence" (section 30).

42. At the time of the events in issue, by virtue of section 26(3) of the Road Traffic Act, the limitation period for the "regulatory offences" specified in section 24 of the Act was three months; since 1 April 1987, it has been three months in respect of the proceedings before an administrative authority and six months as from the date of the decision taken by that authority.

43. According to the unchallenged statements of the Government, the 1968/1975 Act in practice plays a particularly important role in road traffic cases, and approximately 90 per cent of fines imposed relate to road traffic offences.

In Bavaria, which the Government said could be taken as representative of the Federal Republic, there were 1,141,221 decisions imposing a fine in 1985. The percentage of fines of over DM 200 and DM 500 was only 1.3 and 0.1 respectively, as compared with 8.8 for fines of DM 120 to 200, 15 for fines of DM 80 to 119, 22.3 for fines of DM 41 to 79 and 52.5 for fines of DM 5 to 40.

Of the 1,199,802 road traffic offences recorded in 1986, infringements of waiting and parking prohibitions accounted for 49.7 per cent.

C. Case-law of the Federal Constitutional Court relating to the presumption of innocence (judgment - Beschluss - of 26 March 1987)

44. The scope of the principle of the presumption of innocence in the context of discontinuance of criminal proceedings has recently been clarified by the Federal Constitutional Court. By a judgment delivered on 26 March 1987, the Federal Constitutional Court quashed, as contravening the principle, two decisions by district courts and one decision by a regional court whereby the courts, having held the guilt of the defendants to be insignificant (gering), had stayed the private prosecutions brought against them but had awarded the costs of the proceedings against the defendants,

including the costs and expenses of the complainants (cases 2 Bvr 589/79, 2 Bvr 740/81 and 2 Bvr 284/85, Europäische Grundrechte-Zeitschrift 1987, pp. 203-209).

The Constitutional Court held it to be inconsistent with the presumption of innocence to speak in the reasons given for a discontinuance decision of a defendant's guilt or to base an order as to costs and expenses on the supposition (Annahme) that a defendant has been guilty of an offence if the trial has not reached the stage at which the verdict can be given (Schuldspruchreife). It pointed out that the principle of the presumption of innocence derived from the principle of the rule of law, and it also referred to Article 6 § 2 (art. 6-2) of the Convention. The Convention did not have the status of constitutional law in the Federal Republic, but regard should be had to it and to the case-law of the European Court of Human Rights in interpreting the principles and fundamental rights enshrined in the Basic Law (Grundgesetz).

Reaffirming its case-law, the Constitutional Court reiterated that, by virtue of the principle of the presumption of innocence, no measures amounting in effect to a penalty may be taken against a defendant without his guilt having been established beforehand at a proper trial and no defendant may be treated as guilty. The Court added that this principle requires that guilt be proved according to law before it can be held against the person concerned. A finding of guilt will accordingly not be legitimate for this purpose unless it is pronounced at the close of a trial which has reached the stage at which a verdict can be given.

Citing the Minelli judgment of 25 March 1983 (Series A no. 62), the Constitutional Court ruled that a decision discontinuing criminal proceedings may offend the presumption of innocence if it contains in its reasoning a finding of the defendant's guilt without that guilt having been proved according to law. On the other hand, nothing precluded a court from making findings in such a decision as to the defendant's guilt and ordering him to pay the necessary costs and expenses of the complainants as well as the costs of the proceedings if it had held a hearing enabling it to reach a verdict (Entscheidungsreife).

On the basis of these considerations, the Constitutional Court quashed three of the five decisions challenged but dismissed the application in the first of the three cases concerned, as the defence had made the closing address after a trial.

PROCEEDINGS BEFORE THE COMMISSION

45. In his application of 14 June 1982 to the Commission (no. 9912/82), Mr. Lutz relied on Article 6 §§ 1 and 2 (art. 6-1, art. 6-2) of the Convention,

contending that the District Court had not dealt with his case within a "reasonable time" and that the decision as to costs offended the principle of the presumption of innocence, the reasons for it being tantamount to a "conviction in disguise".

46. On 9 July 1985, the Commission declared the application inadmissible in respect of the complaint under Article 6 § 1 (art. 6-1) (as manifestly ill-founded) and declared it admissible as to the rest.

In its report of 18 October 1985 (made under Article 31) (art. 31), it expressed the opinion, by seven votes to five, that there had been a breach of Article 6 § 2 (art. 6-2). The full text of its report and of the three separate opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

47. In their memorial of 13 November 1986, the Government requested the Court to hold that:

> "Article 6 § 2 (art. 6-2) of the European Convention on Human Rights is not applicable in the present case and that the Court cannot deal with this case by reason of its incompatibility with the provisions of the Convention;
>
> alternatively,
>
> that the Federal Republic of Germany has not violated Article 6 § 2 (art. 6-2) of the European Convention on Human Rights."

The Government reiterated their submissions at the hearing on 23 February 1987.

AS TO THE LAW

48. Mr. Lutz complained of the reasons - and of one sentence in them in particular - given for the decisions whereby the German courts refused to order reimbursement of his necessary costs and expenses. He claimed that they offended the principle of the presumption of innocence enshrined in Article 6 § 2 (art. 6-2) of the Convention, which provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government disputed this contention, being of the view that Article 6 § 2 (art. 6-2) was inapplicable and that the application was accordingly

incompatible with the provisions of the Convention; in the alternative, they submitted that there had been no breach of Article 6 § 2 (art. 6-2).

The Commission took the opposite view.

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

49. After the proceedings in respect of a "regulatory offence" had been stayed, Mr. Lutz had to bear his own necessary costs and expenses on the ground that if the proceedings had continued, he would "most probably" or "almost certainly" have been convicted; he claimed that a breach of Article 6 § 2 (art. 6-2) of the Convention resulted.

Such a complaint is not "clearly outside the provisions of the Convention" (see the judgment of 9 February 1967 in the "Belgian Linguistic" case, Series A no. 5, p. 18); it relates to the Convention's interpretation and application (Article 45) (art. 45). In order to reach a decision, the Court will have to determine whether Article 6 § 2 (art. 6-2) can be relied on in respect of the decisions complained of. For the Court this is a question going to the merits, which it cannot try merely as a preliminary issue (see, as the most recent authority, the Kosiek judgment of 28 August 1986, Series A no. 105, p. 19, § 32).

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 (art. 6-2)

A. Applicability of Article 6 § 2 (art. 6-2)

50. In the Government's submission, Article 6 § 2 (art. 6-2) had no application in the instant case, because the applicant was not "charged with a criminal offence". Under the legislation of 1968/1975, which "decriminalised" petty offences, including road traffic offences in particular, the charges against Mr. Lutz constituted merely a "regulatory offence" (Ordnungswidrigkeit). Such an offence, the Government claimed, differed from a criminal offence both in its legal characteristics and consequences and in the procedure to be followed. The judgment delivered by the Court on 21 February 1984 in the Öztürk case was confined to the issue of the free assistance of an interpreter (Article 6 § 3 (e)) (art. 6-3-e) in the circumstances of that applicant and had not, the Government maintained, in any way already decided the applicability of Article 6 § 2 (art. 6-2) to the present case.

In Mr. Lutz's submission, on the contrary, its applicability emerged clearly from that judgment.

The Commission agreed: the two cases were similar as to the facts, and the reasoning in that decision was likewise valid in respect of the guarantee in Article 6 § 2 (art. 6-2).

51. The Court notes firstly that Mr. Lutz - like Mr. Öztürk - had to answer for a breach of the requirements of, inter alia, Regulations 1(2) and 49(1)(1) of the Road Traffic Regulations (see paragraph 13 above and the Öztürk judgment of 21 February 1984, Series A no. 73, p. 9, § 11). In German law, this was not a criminal offence (Straftat) but a "regulatory offence". The question accordingly arises whether this classification is decisive for the purposes of the Convention.

52. In the Öztürk case the Court held that the applicant was "charged with a criminal offence" within the meaning of Article 6 § 3 (art. 6-3). Admittedly, the only point it was determining was whether sub-paragraph (e) (art. 6-3-e) gave the applicant a right to the free assistance of an interpreter in the domestic proceedings complained of. However, with regard to the introductory sentence of paragraph 3 (art. 6-3), the Court referred to paragraph 1 of the same Article (art. 6-1), the reason being that it had consistently held paragraph 1 (art. 6-1) to embody the basic rule of which paragraphs 2 and 3 (art. 6-2, art. 6-3) represented specific applications (see the Öztürk judgment previously cited, p. 17, § 47). After affirming the "autonomy" of the concept of "criminal" in Article 6 (art. 6), the Court concluded that the contravention with which Mr. Öztürk was charged "was criminal" for the purposes of that Article (art. 6) (ibid., pp. 18 and 21, §§ 50 and 54).

The Court thus proceeded on the basis that in using the terms "criminal charge" (accusation en matière pénale) and "charged with a criminal offence" (accusé, accusé d'une infraction) the three paragraphs of Article 6 (art. 6-1, art. 6-2, art. 6-3) referred to identical situations. It had previously adopted a similar approach to Article 6 § 2 (art. 6-2), albeit in a context that was undeniably a criminal one under the domestic law (see the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, § 30, and the Minelli judgment of 25 March 1983, Series A no. 62, p. 15, § 27). The Government, moreover, have accepted that the words "charged with a criminal offence" have the same meaning in all three paragraphs (art. 6-1, art. 6-2, art. 6-3) and must be interpreted accordingly.

53. The issue raised in the present case is therefore broadly the same as the one already decided in the judgment of 21 February 1984. The Court sees no reason to depart from that decision, especially as the Government, the Commission and counsel for the applicant reiterated, or else referred to, the arguments they had put forward in the Öztürk case.

54. In order to determine whether the "regulatory offence" committed by Mr. Öztürk was a "criminal" one, the Court referred to the criteria adopted in its judgment of 8 June 1976 in the case of Engel and Others (Series A no. 22, pp. 34-35, § 82). It summarised them as follows:

> "The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the

> penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States." (Öztürk judgment, Series A no. 73, p. 18, § 50)

Having proceeded according to those principles, it concluded that the general character of the legal provision contravened by Mr. Öztürk and the purpose of the penalty, which was both deterrent and punitive, sufficed to show that the offence in question was, for the purposes of Article 6 (art. 6), criminal in nature (ibid., p. 20, § 53). It held that there was consequently no need to examine Mr. Öztürk's contravention "also in the light of the final criterion stated ...", for "the relative lack of seriousness of the penalty at stake ... cannot divest an offence of its inherently criminal character" (ibid., p. 21, § 54).

These considerations apply in the instant case too.

55. The Government appeared, in fact, to be criticising the Öztürk judgment for not having considered the nature and degree of severity of the penalty that the person concerned risked incurring. They claimed that it thereby differed from the Engel and Others judgment of 8 June 1976.

The Court points out that the second and third criteria adopted in the judgments in the Engel and Others case and the Öztürk case are alternative and not cumulative ones: for Article 6 (art. 6) to apply in virtue of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, as in the instant case, or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the "criminal" sphere (see also the Campbell and Fell judgment of 28 June 1984, Series A no. 80, pp. 35-38, §§ 69-73).

56. The Government also argued that once the statutory limitation period had expired, as it was held to have done in the Heilbronn District Court's final ruling of 24 August 1981, Article 6 § 2 (art. 6-2) ceased to apply because it was no longer possible to convict the applicant.

The Court cannot agree with the Government on this point, any more than the Commission could. No doubt the proceedings against the applicant had become time-barred, but that fact was given judicial recognition by the decision of 24 August 1981 (see paragraph 16 above). This decision also settled the question of costs, as required under Articles 464 and 467 of the Code of Criminal Procedure taken together with section 46 of the Act on "regulatory offences", and left the applicant to bear his own necessary costs and expenses. Apportionment of the costs was a consequence and necessary concomitant of the stay of proceedings (Article 464 of the Code of Criminal Procedure - see paragraph 37 above; see also, mutatis mutandis, the Minelli judgment previously cited, Series A no. 62, p. 16, § 30). The operative provisions of the decision clearly confirmed this: after an initial ruling that

the proceedings were to be stayed, the other two dealt with the costs of the proceedings and the applicant's own necessary costs and expenses.

57. Article 6 § 2 (art. 6-2) therefore applied in the instant case; the Federal Constitutional Court indeed mentioned this provision in its judgment of 2 February 1982 (see paragraph 18 above). However, it must be reiterated (see the Öztürk judgment previously cited, Series A no. 73, pp. 21-22, § 56) that it in no way follows that the very principle of the system adopted in the matter by the German legislature - and in legislation elsewhere - is being put in question. Having regard to the large number of minor offences - notably in relation to road traffic - which are not so discreditable that the offenders deserve the stigma of a criminal penalty, a Contracting State may have good reasons for introducing a system which relieves its courts of the task of dealing with the great majority of them. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention, provided that the person concerned is able to bring any decision thus made against him before a tribunal that does afford the safeguards of Article 6 (art. 6).

B. Compliance with Article 6 § 2 (art. 6-2)

58. The applicant pointed out that he had never had a hearing before a court in respect of the charges against him, and consequently no determination had been made of those charges under a procedure prescribed by law. He claimed that the reasons given in the decisions as to costs and expenses manifestly contained a finding of guilt and thus amounted to a "conviction in disguise".

In the Government's submission, the refusal to order the Treasury to bear Mr. Lutz's necessary costs and expenses did not amount to a penalty or a measure which in its effects could be equated with a penalty. The reasoning given in the decisions complained of did not contain any implied assessment of the defendant's guilt: the courts were describing a "state of suspicion" with the sole aim of reaching a fair decision as to the payment of costs. Furthermore, where a prosecution was discontinued, the Convention did not oblige the Contracting States to indemnify a person "charged with a criminal offence" for any detriment he might have suffered. The impugned decisions could not be contrary to the Convention on account of their supporting reasoning if their operative provisions - which alone acquired final, binding effect - were in conformity with it.

The Commission considered, like the applicant, that there had been a breach of Article 6 § 2 (art. 6-2), as the reasoning complained of could very well be understood as suggesting that the applicant not only remained under suspicion of having committed the offence but was guilty of it.

59. The Court points out, first of all, like the Commission and the Government, that neither Article 6 § 2 (art. 6-2) nor any other provision of

the Convention gives a person "charged with a criminal offence" a right to reimbursement of his costs where proceedings taken against him are discontinued. The refusal to reimburse Mr. Lutz for his necessary costs and expenses accordingly does not in itself offend the presumption of innocence (see, mutatis mutandis, the Minelli judgment previously cited, Series A no. 62, p. 17, §§ 34-35). Counsel for the applicant moreover stated, in reply to a question from the President, that his client was not challenging that refusal but solely the reasons given for it.

60. Nevertheless, a decision refusing reimbursement of an accused's necessary costs and expenses following termination of proceedings may raise an issue under Article 6 § 2 (art. 6-2) if supporting reasoning which cannot be dissociated from the operative provisions (see the same judgment, p. 18, § 38) amounts in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence (ibid., § 37).

61. The refusal complained of by Mr. Lutz was based on Article 467 § 3, second sentence, sub-paragraph 2, of the Code of Criminal Procedure, which was applied in the instant case by virtue of section 46 of the 1968/1975 Act (see paragraphs 16-18 and 37 above). This provision sets forth one of the exceptions to the rule in German law that, where criminal proceedings are discontinued, the necessary costs and expenses of the person "charged with a criminal offence" are to be awarded against the Treasury (Article 467 § 1). Applying the provision means that the relevant courts, which decide the matter on an equitable basis and have a degree of discretion, are under an obligation to take into account, inter alia, the weight of the suspicion still falling on the person concerned.

62. In justification of its decision not to order the Treasury to pay Mr. Lutz's costs and expenses the Heilbronn District Court noted that "as the file [stood], the defendant would most probably have been convicted" (see paragraph 16 above). When dismissing the applicant's appeal, the Regional Court held, among other things, that had the prosecution not been statute-barred, the defendant "would almost certainly have been found guilty of an offence" (see paragraph 17 above). For the Federal Constitutional Court, "the reasons for the order as to costs in the impugned decisions are ... rightly confined to the finding that the defendant would most probably have been found guilty" (see paragraph 18 above).

The German courts thereby meant to indicate, as they were required to do for the purposes of the decision, that there were still strong suspicions concerning Mr. Lutz. Even if the terms used may appear ambiguous and unsatisfactory, the courts confined themselves in substance to noting the existence of "reasonable suspicion" that the defendant had "committed an offence" (Article 5 § 1 (c) of the Convention) (art. 5-1-c). On the basis of the evidence, in particular the applicant's earlier statements (see paragraphs

12, 16 and 17 above), the decisions described a "state of suspicion" and did not contain any finding of guilt. In this respect they contrast with the more substantial, detailed decisions which the Court considered in the Minelli case (see the judgment previously cited, Series A no. 62, pp. 8-10, §§ 12-14, and pp. 11-12, § 16) and also with the decisions set aside by the Federal Constitutional Court on 26 March 1987 (see paragraph 44 above).

63. Moreover, the refusal to order the Treasury to pay Mr. Lutz's necessary costs and expenses does not amount to a penalty or a measure that can be equated with a penalty. In this respect too, the instant case very clearly differs from the Minelli case, as also from the cases decided by the Federal Constitutional Court on 26 March 1987 (see paragraph 44 above). The Swiss courts had directed that Mr. Minelli should bear part of the costs of the proceedings and had ordered him to pay the private prosecutors compensation in respect of their expenses (see the judgment previously cited, ibid.), thus treating him as guilty. Nothing comparable occurred in the instant case : Mr. Lutz did not have to bear the costs of the proceedings but only his own costs and expenses. The German courts, acting on an equitable basis and having regard to the strong suspicions which seemed to them to exist concerning him, did not impose any sanction on him but merely refused to order that his necessary costs and expenses should be paid out of public funds. And, as the Court has already pointed out, the Convention - more particularly Article 6 § 2 (art. 6-2) - does not oblige the Contracting States, where a prosecution has been discontinued, to indemnify a person "charged with a criminal offence" for any detriment he may have suffered.

64. In conclusion, the decision of the Heilbronn District Court, which was upheld by the Regional Court and the Federal Constitutional Court, did not offend the presumption of innocence guaranteed to the applicant under Article 6 § 2 (art. 6-2).

FOR THESE REASONS, THE COURT

1. Rejects unanimously the objection that the application is incompatible with the provisions of the Convention;

2. Holds by fourteen votes to three that Article 6 § 2 (art. 6-2) applies in the instant case;

3. Holds by sixteen votes to one that there has been no breach of this Article (art. 6-2).

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 August 1987.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

A declaration by Mr. Thór Vilhjálmsson and, in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the separate opinions of the following judges are annexed to this judgment:

- dissenting opinion of Mr. Cremona;

- joint dissenting opinion of Mrs. Bindschedler-Robert, Mr. Matscher and Mr. Bernhardt.

R. R.
M.-A. E.

DECLARATION BY JUDGE THÓR VILHJÁLMSSON

My vote in this case reflects a change from my vote in the Öztürk case. This change is prompted by the majority decision in that case.

DISSENTING OPINION OF JUDGE CREMONA

Whilst agreeing with the judgment as to the rejection of the Government's preliminary objection and as to the applicability of Article 6 § 2 (art. 6-2) of the Convention in the instant case, I regret I cannot do the same as to the question of compliance with that provision, and in fact, like the majority of the Commission, I find a violation of it.

In order to clear the ground at once of certain matters, I would premise the following:

1. Firstly, I concur with the judgment that neither Article 6 § 2 (art. 6-2) nor any other provision of the Convention gives a person charged with a criminal offence a right to reimbursement of his costs where proceedings against him are discontinued, and that the domestic courts' refusal to order such reimbursement to the applicant does not therefore in itself offend the presumption of innocence (paragraph 59 of the judgment).

2. Secondly, I also concur with the judgment that a decision refusing such reimbursement following a stay of proceedings may, however, raise an issue under Article 6 § 2 (art. 6-2) if supporting reasoning which cannot be dissociated from the operative provisions amounts in substance to a determination (constat) of the accused's guilt (which I understand in the sense of an assessment thereof) without his having previously been proved guilty according to law and in particular without his having had an opportunity to exercise his defence rights (paragraph 60 of the judgment).

Having premised that, I consider that the conclusion of non-violation in this judgment rests essentially on two points:

(a) that the contested judicial pronouncements of the domestic courts described only "a state of suspicion" and did not involve a finding of guilt (paragraph 62 of the judgment), and

(b) that the courts' refusal to order reimbursement of the accused's necessary costs and expenses did not amount to a penalty or a measure which could be equated with a penalty (paragraph 63 of the judgment).

As to the first point, clearly an element of suspicion is inherent in the very fact that a person is criminally charged, but that is of course inseparable from the essential machinery of the criminal trial itself. Indeed, among the cases where a person may be deprived of his liberty, provided this is done in accordance with a procedure prescribed by law, the Convention itself mentions "the lawful arrest and detention of a person effected for the purpose of bringing him before the competent authority on reasonable suspicion of having committed an offence" (Article 5 § 1 (c)) (art. 5-1-c).

In the present case, however, the clear and explicit wording used by the courts in their judicial decisions concerning the applicant, who was charged with a criminal offence, goes much further than that.

In fact, the decision of the Heilbronn District Court, in staying the proceedings against the applicant and concurrently refusing to order reimbursement of his costs and expenses under the applicable domestic legislation, stated, in terms which, unlike my colleagues, I find unambiguous, that "as the file [stood], the defendant would most probably have been convicted". Moreover, the Regional Court in Heilbronn, in dismissing the applicant's appeal, stated, again in unambiguous terms, that had the prosecution not been statute-barred, "the defendant would almost certainly have been found guilty of an offence". That court also supported its decision by referring to the applicant's admission of certain facts to the police. The decision of the group of three judges of the Federal Constitutional Court in no way altered the situation.

Thus, in my view, what happened in the instant case is the materialisation of the situation envisaged in paragraph 60 of the judgment (see above). Indeed, we have here judicial decisions discontinuing proceedings for an offence and refusing, or confirming refusal of, reimbursement of the accused's costs and expenses, the supporting reasoning of which (which cannot be dissociated from the operative provisions) amounts in substance to a determination (constat) of the accused's guilt (which, as already stated, I understand in the sense of an assessment thereof) without his having been previously proved guilty according to law and in particular without his having had an opportunity to exercise his defence rights.

Like the majority of the Commission, I find that the above reasoning of the aforesaid courts is perfectly capable of being understood as meaning that the accused was in fact guilty of a criminal offence. Indeed this is the ordinary meaning conveyed by the wording actually used, and when it comes to such a basic principle as that of the presumption of innocence, what really matters is not the possible intent with which certain words were uttered in judicial decisions concerning the accused, but the actual meaning of those words to the public at large. What is decisive is that at the end of the day one is left with the impression that the courts did consider that the applicant was in fact guilty. The net result is in my view a surrogate conviction of the accused without the benefit of the protection afforded by Article 6 § 2 (art. 6-2).

Incidentally, the offending wording at the centre of this case is not substantially dissimilar from that which was at the centre of the Minelli case, in which this Court did find a violation of that provision. An attempt has been made to distinguish the two cases on the basis of a "punishment content", and this brings me to the second point on which the finding of non-violation in the present judgment relies.

As to this question of the absence of a penalty or a measure which can be equated with one, I would say that of course the application of such penalty or measure would have reinforced my conclusion, but absence thereof in no

way invalidates it. The principle of the presumption of innocence can be violated independently of the application of such penalty or measure. That presumption accompanies a person charged with a criminal offence throughout the whole trial until conviction. Indeed this cardinal principle of the modern criminal trial would have been lamentably improvident if its scope had to be confined to the non-application of a penalty or, to use again the wording of the judgment, a measure which can be equated with one. Punishment is usually only the last stage in the unfolding of a criminal trial and modern criminal legislation also envisages convictions without punishment or a measure which can be equated with it (cf. for instance in the British system "absolute discharge").

What is decisive for the present purpose is not the non-application of punishment, but the fact of a judicial assessment of the applicant's guilt, and in the instant case it is this that the wording of the judicial decisions in question in fact entails.

I therefore find a violation of Article 6 § 2 (art. 6-2) of the Convention.

JOINT DISSENTING OPINION OF JUDGES BINDSCHEDLER-ROBERT, MATSCHER AND BERNHARDT ON THE APPLICABILITY OF ARTICLE 6 (art. 6)

(Translation)

For the reasons indicated in the dissenting opinions we expressed in the Öztürk case, we are unfortunately not able to endorse the judgment of the Court; we continue to take the view that in a case of this kind Article 6 (art. 6) of the Convention is not applicable.