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

COURT (CHAMBER)

CASE OF ASCH v. AUSTRIA

(Application no. 12398/86)

JUDGMENT

STRASBOURG

26 April 1991

In the Asch case[·],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[··] and the relevant provisions of the Rules of Court[···], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. MATSCHER,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
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 22 November 1990 and 20 March 1991,

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 21 May 1990 and then by the Austrian Government ("the Government") on 20 July, within the three-month period laid down by Article 32 par. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12398/86) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Johann Asch, on 22 August 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the

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[·] The case is numbered 30/1990/221/283. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[··] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

[···] The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

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

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 par. 3 (b)). On 24 May 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Sir Vincent Evans, Mr R.Macdonald, Mr C. Russo, Mr R. Bernhardt, Mr A. Spielmann, Mr J. De Meyer and Mr N. Valticos (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 par. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 par. 1). In accordance with the order made in consequence, the Registrar received the applicant's memorial on 3 October; the latter had been authorised by the President to use the German language (Rule 27 par. 3). On the same day the Government indicated that they did not wish to submit a memorial.

5. In a letter of 5 November 1990 the Deputy Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing. The Commission produced various documents which, on the instructions of the President, the Registrar had requested from it.

6. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 27 July 1990 that the oral proceedings should open on 19 November 1990 (Rule 38).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr W. OKRESEK, Federal Chancellery, *Agent*,
  Mr F. HAUG, Ministry of Foreign Affairs,
  Mrs I. GARTNER, Ministry of Justice, *Advisers*;
- for the Commission
  Mr S. TRECHSEL, *Delegate*;
- for the applicant
  Mr S. GLOSS, Rechtsanwalt, *Counsel*.

The Court heard addresses by the above-mentioned representatives.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Johann Asch, an Austrian national, resides at Laaben in Austria.

9. In the night of 5 to 6 July 1985 a dispute broke out between him and the woman he lived with, Mrs J.L. She left the house and took refuge at her mother's home.

The following morning she consulted a doctor. He sent her the same day to the St Pölten hospital then transmitted to that establishment a certificate dated 9 July attesting that she was suffering from multiple bruising and headaches. A report drawn up by the hospital, dated 11 July, stated that she claimed to have been struck with a belt and that she had several bruises on her body and one on her head.

10. In the evening of 6 July Mrs J.L. reported the incident to the Brand-Laaben police (Gendarmerie). She alleged that the applicant had threatened to use violence on her if she did not get out immediately. As she had refused to obey, he had hit her with a belt on her back, on her arms and on her legs. Seeing him seize a rifle, she had tried to reason with him and then taken advantage of a moment of calm to escape.

11. The police officer who had taken down this statement, Officer B., informed the public prosecutor's office of St Pölten by telephone the same evening; he was instructed by that office to file a report (anzeigen) concerning Mr Asch, but not to arrest him.

12. On the morning of 10 July Mrs J.L. went back to the Brand-Laaben police station to inform the relevant officers that she and the applicant had been reconciled and that she had returned to live with him on 7 July. She expressed her wish to withdraw her complaint.

13. Questioned at the police station in the evening, the applicant denied that he had ill-treated Mrs J.L. or threatened her with a rifle. She had, he claimed, only a scratch on her back; in addition, she had explained to him that she had lodged a complaint because she had been furious with him.

14. On 16 July 1985 the Brand-Laaben police sent a report on Mr Asch to the Neulengbach District Court. They substantially repeated the allegations made by Mrs J.L. and produced the medical certificate of 9 July, the hospital report of 11 July and the records of the statements of the applicant and his woman friend, of 6 and 10 July (see paragraphs 9-10 and 13 above).

15. On 7 August 1985 the St Pölten public prosecutor's office committed the applicant for trial before the Regional Court (Kreisgericht) of that town on charges of intimidation (Nötigung, Article 105 of the Criminal Code) and causing actual bodily harm (Körperverletzung, Article 83). At the hearing on 15 November 1985 Mr Asch protested his innocence; according

to him, Mrs J.L. had hurt herself in the night of 5 to 6 July when she struck the end of the bed. However, he admitted having attacked her and having pushed her away from him.

16. When questioned by the court, Mrs J.L. availed herself of her right to refuse to give evidence (see paragraph 20 below). Subsequently Officer B. testified; he recounted the statements that she had made before him on 6 July 1985 and told the court that she had appeared to him to have been scared. She had shown to him the bruises on her arm and the bandage which covered a part of her back. No further applications being made by the parties, the judge ordered the report of 16 July, the interview record of 6 July 1985 (see paragraphs 10-11 and 14 above) and an extract from Mr Asch's criminal record to be read out.

17. On 15 November 1985 the court convicted Mr Asch of intimidation and causing actual bodily harm and sentenced him to a fine of 80 schillings per day for 180 days. On the basis of the statements made at the hearing by the accused and by Officer B., the police investigation and the other evidence before it, the court found the facts to be established as described by Mrs J.L. on 6 July. According to the judgment, they were corroborated by the doctor's diagnosis. Moreover the evidence revealed Mr Asch's irascible and unpredictable personality and thus made the version given by Mrs J.L. plausible. The court did not find credible the accused's claims that she had deliberately falsely accused him.

18. The applicant appealed. He complained inter alia that the first-instance court had had the record of Mrs J.L.'s statements (see paragraphs 10-11 above) read out at the hearing, without having asked him to comment on this document or having questioned him or Mrs J.L. He also asked the appeal court to order an expert medical opinion and to effect a search of the premises, as, he contended, the first-instance court ought to have done. In his view, the fact that Mrs J.L. had withdrawn her complaint had deprived the prosecution brought against him of its legal basis.

19. On 19 March 1986 the Court of Appeal (Oberlandesgericht) of Vienna upheld the contested judgment. It ruled inter alia that, according to well-established case-law, Article 252 par. 2 of the Code of Criminal Procedure (see paragraph 21 below) required the court before which the proceedings were pending to have the statements made outside court by witnesses who had refused to appear in court read out at the hearing, when such statements related to important points. The Court of Appeal also held that Mr Asch had failed to give sufficient reasons for his request for an expert opinion, since he had provided no evidence casting doubt on the cause of the victim's injuries.

II. THE RELEVANT DOMESTIC LAW

20. Under Article 152 par. 1, sub-paragraph 1, of the Code of Criminal Procedure, the members of the accused's family as referred to in Article 72 of the Criminal Code are exempted from giving evidence; they include cohabitees.

21. Paragraphs 2 and 3 of Article 252 of the Code of Criminal Procedure are worded as follows:

> "2. The records of on-the-spot inspections and police reports, as well as the accused's criminal record and any other material documents or written evidence, shall be read out at the hearing, unless both parties agree to dispense with this proceeding.
>
> 3. After each such document has been read out, the accused shall be asked if he wishes to make any comments thereon."

PROCEEDINGS BEFORE THE COMMISSION

22. In his application (no. 12398/86) lodged with the Commission on 22 August 1986, Mr Asch complained that he had been convicted solely on the basis of the statements of Mrs J.L., who had not given evidence before the Regional Court; he relied on Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention.

23. The Commission declared the application admissible on 10 July 1989. In its report of 3 April 1990 (Article 31) (art. 31), it expressed the opinion by twelve votes to five that there had been a violation of paragraph 1 of Article 6, taken together with paragraph 3 (d) (art. 6-1, art. 6-3-d) thereof. The full text of its opinion is reproduced as an annex to this judgment·.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 (art. 6)

24. The applicant complained of a breach of the following provisions of Article 6 (art. 6) of the Convention:

· Note by the Registrar: for practical reasons, this annex will appear only with the printed version of the judgment (volume 203 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... .

... .

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

... ."

According to the applicant, his conviction by the St Pölten Regional Court was based solely on the statements of Mrs J.L. to the police, which were read out at the hearing notwithstanding that she had withdrawn her complaint and refused to give evidence in court. He claimed that at no stage of the proceedings had he had the opportunity to examine her or to have her examined. By rejecting his application for an expert medical opinion, the Vienna Court of Appeal had moreover deprived him of the sole means of contesting effectively at least some of Mrs J.L.'s allegations, namely those accusing him of causing actual bodily harm.

The Commission accepted in substance the applicant's views; the Government disputed them. They considered that Mrs J.L.'s statements constituted only one item of evidence amongst others. They regarded it as decisive that before the first-instance court Mr Asch had not questioned the police officer, had failed to call any witnesses and had not submitted any other application. On this basis they concluded that the applicant could not claim that the rights of the defence had been infringed.

25. As the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1), the Court will consider the complaint under the two provisions taken together (see, among other authorities, the Isgrò judgment of 19 February 1991, Series A no 194-A, p. 12, par. 31).

Although Mrs J.L. refused to testify at the hearing she should, for the purposes of Article 6 par. 3 (d) (art. 6-3-d), be regarded as a witness - a term to be given an autonomous interpretation (ibid., p. 12, par. 33) - because her statements, as taken down in writing by Officer B. and then related orally by him at the hearing, were in fact before the court, which took account of them.

26. The admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (ibid., p. 11, par. 31).

27. All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in particular, this may prove impossible in certain cases. The use in this way of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-1, art. 6-3-d), provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings (ibid., p. 12, par. 34).

28. In this instance, before the trial court only Officer B. recounted the facts of the case, as Mrs J.L. had described them to him on the very day of the incident. It would clearly have been preferable if it had been possible to hear her in person, but the right on which she relied in order to avoid giving evidence cannot be allowed to block the prosecution, the appropriateness of which it is moreover not for the European Court to determine. Subject to the rights of the defence being respected, it was therefore open to the national court to have regard to this statement, in particular in view of the fact that it could consider it to be corroborated by other evidence before it, including the two medical certificates attesting to the injuries of which Mrs J.L. had complained (see paragraph 9 above).

29. Furthermore, Mr Asch had the opportunity to discuss Mrs J.L.'s version of events and to put his own, first to the police and later to the court. However, on each occasion he gave a different version, which tended to undermine his credibility (see paragraphs 13, 15 and 17 above).

Moreover, the applicant chose not to question Officer B. on, in particular, the latter's own findings (see paragraph 16 above) or to call other witnesses (see paragraph 9 above).

On the question of the expert medical opinion concerning the alleged injuries, Mr Asch only sought such a measure on appeal, at a time when it could reasonably have been supposed that the marks caused by the blows had disappeared. In any event, the Court of Appeal found the reasons stated in his application to be insufficient (see paragraph 19 above).

30. Above all it is clear from the file that Mrs J.L.'s statements, as related by Officer B., did not constitute the only item of evidence on which the first-instance court based its decision. It also had regard to the personal assessment made by that officer as a result of his interviews with Mrs J.L. and the applicant, to the two concurring medical certificates, to the police investigation and to the other evidence appearing in Mr Asch's file (see paragraphs 16-17 above). In this respect, the present case is distinguishable from the Unterpertinger case (judgment of 24 November 1986, Series A no. 110) and the Delta case (judgment of 19 December 1990, Series A no. 191-A).

31. The fact that it was impossible to question Mrs J.L. at the hearing did not therefore, in the circumstances of the case, violate the rights of the defence; it did not deprive the accused of a fair trial. Accordingly, there has been no breach of paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d), taken together.

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no violation of paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d) taken together.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 April 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 par. 2 (art. 51-2) of the Convention and Rule 53 par. 2 of the Rules of Court, the joint dissenting opinion of Sir Vincent Evans and Mr Bernhardt is annexed to the present judgment.

R. R.
M.-A. E.

JOINT DISSENTING OPINION OF JUDGES SIR VINCENT EVANS AND BERNHARDT

1. We are unable to share the view of the majority of the Court that there was no violation of Article 6 (art. 6) of the Convention in this case.

2. The St Pölten Regional Court found Mr Asch guilty of two offences against Mrs J.L. - intimidation, in particular by threatening her with a rifle, and causing her actual bodily harm. In reaching its findings the court had regard to the statement made at the trial by Officer B., the contents of the police report and the applicant's answers to the charges against him. Nevertheless, it was on Mrs J.L.'s statement to the police, which she refused to confirm at the hearing before the court, that Mr Asch's convictions on both counts were essentially based. It is true that there was corroborative evidence that in the course of their quarrel she had suffered injuries, but he contended that they were the result of an accident and he denied the allegation that he had threatened her with a rifle. Because Mrs J.L. availed herself of the right to refuse to give evidence at the trial there was no opportunity at any stage of the proceedings for the applicant or his lawyer "to examine" her as a witness against him in accordance with paragraph 3 (d) of Article 6 (art. 6-3-d).

3. While we concur with the approach of the European Court to the interpretation of the relevant provisions of Article 6 (art. 6) as stated in paragraphs 25-27 of the Court's judgment, the question remains whether the rights of the defence were duly respected in this case.

4. It is pertinent to note that Mrs J.L.'s statement to the police was made several hours after the alleged attack. In the circumstances the possibility could by no means be excluded that her version of events was incorrect in material respects. There was further reason to question its veracity when she decided to withdraw her complaint and refused to confirm her statement at the hearing before the St Pölten Regional Court. In a case of this kind the need to establish the true facts beyond reasonable doubt is, of course, relevant not only to the question whether the accused was guilty of the offences charged but also, in the event of conviction, to the fixing of the sentence to be imposed.

5. We in no way call into question the compatibility with the Convention of the right under Austrian law of Mrs J.L. to refuse to give evidence at the hearing. In consequence of the exercise by her of this right, however, we are of the view that Mr Asch was, as in the case of Mr Unterpertinger (see the Court's judgment of 24 November 1986, Series A no. 110), convicted on the basis of testimony in respect of which his defence rights were restricted to an extent that he did not have a fair trial.

6. For these reasons we conclude that there was a breach of paragraph 1, taken in conjunction with paragraph 3 (d), of Article 6 (art. 6-1, art. 6-3-d) of the Convention.