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

THIRD SECTION

CASE OF FRANZ FISCHER v. AUSTRIA

(*Application no. 37950/97*)

JUDGMENT

STRASBOURG

29 May 2001

FINAL

29/08/2001

This judgment will become final in the circumstances set out in Article 44 § 2.

In the case of Franz Fischer v. Austria,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 21 March and 10 October 2000 and on 10 May 2001,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37950/97) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Franz Fischer ("the applicant"), on 8 September 1997.

2. The applicant was represented by Mr S. Gloss, a lawyer practising in St. Pölten (Austria). The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged a violation of his right not to be tried or punished twice.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 21 March 2000 the Chamber declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. On 6 June 1996, the applicant, whilst driving under the influence of drink, knocked down a cyclist who was fatally injured. After hitting the cyclist, the applicant drove off without stopping to give assistance and only gave himself up to the police later that night.

8. On 13 December 1996, the St. Pölten District Administrative Authority (*Bezirkshauptmannschaft*), finding the applicant guilty of a number of road traffic offences, ordered him to pay a fine of 22,010 Austrian schillings (ATS) with twenty days' imprisonment in default. This sentence included a fine of ATS 9,000 with nine days' imprisonment in default imposed for driving under the influence of drink, contrary to sections 5 (1) and 99 (1)(a) of the Road Traffic Act 1960 (*Straßenverkehrsordnung*).

9. On 18 March 1997 the St. Pölten Regional Court (*Landesgericht*) convicted the applicant under Article 81 § 2 of the Criminal Code (*Strafgesetzbuch*) of causing death by negligence "after allowing himself ... to become intoxicated ... through the consumption of alcohol, but not to an extent which exclude[d] his responsibility ...", and sentenced him to six months' imprisonment.

10. The applicant's appeal against conviction and sentence was dismissed by the Vienna Court of Appeal (*Oberlandesgericht*) on 24 June 1997. The applicant argued that, in the light of the Court's Gradinger v. Austria judgment (23 October 1995, Series A no. 328-C), the decision of the Regional Court should be quashed. The Court of Appeal recognised that the double conviction violated Article 4 of Protocol No. 7 to the Convention. However, it found that, in spite of the Gradinger case, Austrian law remained unchanged. It distinguished the Gradinger judgment on the ground that in that case the administrative proceedings had been after the criminal proceedings, whereas in the present case, the order was reversed. The Court of Appeal explained that the double punishment was possible because there was no provision of Austrian law which provided for a principle of "subsidiarity" between the administrative and the criminal proceedings in the present circumstances. It concluded that this could not hinder the criminal proceedings which had a much wider scope. The applicant's conviction was therefore upheld.

11. On 19 May 1999 the sentence of six months' imprisonment imposed on the applicant was reduced to five months by virtue of the Federal President's prerogative of pardons.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Road Traffic Act

12. Section 5 (1) 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.

13. Section 99 of the 1960 Act, so far as relevant, provided at the material time, that:

> "(1) It shall be an administrative offence (*Verwaltungsűbertretung*), 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), (2a), (2b), (3) or (4) also constitute an offence falling within the jurisdiction of the [ordinary] courts ... ."

14. In its judgment of 5 December 1996 the Constitutional Court had to examine the constitutionality of section 99 subsection (6)(c) of the Road Traffic Act, by virtue of which the administrative offence of driving under the influence of drink was not subsidiary to an offence falling within the jurisdiction of the courts.

The Constitutional Court noted that that it was not contrary to Article 4 of Protocol No. 7 if a single act constituted more than one offence. This was a feature common to the criminal law of many European countries. However, it was also accepted in criminal law doctrine that sometimes a single act only appeared to constitute more than one offence, whereas interpretation showed that one offence entirely covered the wrong contained in the other so that there was no need for further punishment. Thus, Article 4 of Protocol No. 7 prohibited the trial and punishment of someone for different offences if interpretation showed that one excluded the application of the other. Where, as in the present case, the law explicitly provided that one offence was not subsidiary to another, it had to be guided by Article 4 of Protocol No. 7. The Court's Gradinger judgment of 23 October 1995 had shown that there was a breach of this Article if an essential aspect of an offence, which had already been tried by the courts, was tried again by the administrative authorities.

Section 99 subsections (1)(a) and (6)(c) of the Road Traffic Act, taken together, meant that the criminal administrative offence of drunken driving could be prosecuted even when an offence falling within the competence of the normal criminal courts was also apparent. According to the criminal courts' constant case-law under section 81 § 2 of the Criminal Code (cited

below), drunken driving was also an essential aspect of certain offences tried by these courts. Insofar as section 99 (6)(c) of the Road Traffic Act limited the subsidiarity of administrative offences to those enumerated in subsections (2) to (4) of section 99, thus excluding subsidiarity for the offence of drunken driving contained in section 99 (1)(a), it violated Article 4 of Protocol No. 7.

B. The Criminal Code

15. Under Article 80 of the Criminal Code, it is an offence, punishable by up to one year's imprisonment, to cause death by negligence. Where the special circumstances of Article 81 § 2 apply, the maximum possible sentence is increased to up to three years' imprisonment.

16. 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 his responsibility, notwithstanding that he has foreseen or could have foreseen that he would shortly have to engage in an activity likely to pose ... a danger to the lives ... of others if performed in that state".

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

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

17. The Government contended that the matter has been resolved as the applicant's prison term was reduced by one month (see paragraph 11 above). They argued that a reduction of thirty days' imprisonment corresponded to sixty day rates of ATS 150 each and thus could be equated to the fine of ATS 9,000 paid in the administrative criminal proceedings.

18. The applicant objected, arguing that the reduction of sentence cannot dispel the fact that he has been tried and convicted twice of driving under the influence of drink. Moreover, it was the practice of the criminal courts to impose unconditional prison terms when the special circumstances of Article 81 § 2 of the Criminal Code applied whereas, in cases of causing death by negligence without this special circumstance, the courts regularly only imposed prison terms suspended on probation, or fines.

19. The Court considers that the parties' arguments are closely linked to the well-foundedness of the applicant's complaint and will, therefore, join the Government's preliminary plea to the merits.

II. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

20. The applicant alleged a violation of Article 4 of Protocol No. 7 which, so far as relevant provides 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."

The applicant contended that he was punished twice for driving under the influence of drink, first by the District Administrative Authority under sections 5 (1) and 99 (1)(a) of the Road Traffic Act and, secondly, by the Regional Court, which found that the special circumstance of section 81 § 2 of the Criminal Code applied. In the applicant's view, the conviction by the criminal courts in its entirety, or at least the fact that the conviction was not limited to Article 80 of the Criminal Code, but also extended to Article 81 § 2, infringed Article 4 of Protocol No. 7. The applicant maintained that the present case was not comparable to the Oliveira v. Switzerland case (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V) as in that case the criminal courts had quashed the fine imposed by the police magistrate and stated that, if the fine had already been paid, it was to be deducted from the second fine. However, in his case two sentences were actually imposed.

21. The Government asserted that the Court, in its Gradinger judgment took the "same conduct" as the criterion for determining the "offence" within the meaning of Article 4 of Protocol No. 7. In its Oliveira judgment, however, the Court adopted a different approach by taking the legal qualification of the underlying facts as the criterion for establishing the identity of the "offence" without taking account of the overlapping factual elements of the case. In the Government's view, the present application, like the Oliveira case, concerns a typical example of a single act constituting various offences, i.e. a case where one criminal act constitutes two separate offences, namely driving under the influence of drink and causing death by negligence in the special circumstances of Article 81 § 2 of the Criminal Code. The Government accepted that the present case differed from the Oliveira case in that, under Swiss law, both offences should have been tried by the same authority, and the lesser penalty was absorbed by the greater. However, none of these aspects was considered to be decisive. Finally, unlike the Gradinger case, the authorities in the present application did not

come to a different assessment of the facts. In sum, there has been no breach of Article 4 of Protocol No. 7.

22. The Court recalls that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see the Gradinger judgment cited above, p. 65, § 53).

23. As the Government pointed out, the Court's approach in the Gradinger and Oliveira judgments in order to determine whether the respective applicants were tried or punished again "for an offence for which [they had] already been finally acquitted or convicted" appears somewhat contradictory. The Court recalls that in each case two sets of proceedings arose out of one traffic accident. In the Gradinger case, the applicant was first convicted by the criminal courts for causing death by negligence, but acquitted of the special element under Article 81 § 2 of "allowing himself to become intoxicated", where there was an irrebuttable presumption of intoxication with a blood alcohol level of 0.8 grams per litre. He was then convicted by the administrative authorities of driving "a vehicle under the influence of drink" contrary to sections 5 (1) and 99 (1)(a) of the Road Traffic Act, where the influence of drink is deemed present with a blood alcohol level of 0.8 grams per litre.

In the Oliveira case, the applicant was first convicted by the police magistrate for failing to control her vehicle as she had not adapted her speed to the road conditions. Subsequently, she was convicted by the criminal courts of causing physical injury by negligence.

24. In the Gradinger case the Court, while emphasising that the offences at issue differed in nature and aim, found a violation of Article 4 of Protocol No. 7 as both decisions were based on the same conduct (ibid., §§ 54-55). In the Oliveira case it found no violation of this provision, considering that it presented a typical example of a single act constituting various offences (*concours idéal d'infractions*) which did not infringe Article 4 of Protocol No. 7, since that provision only prohibited people being tried twice for the same offence (see the Oliveira judgment, previously cited, p. 1998, § 26).

25. The Court observes that the wording of Article 4 of Protocol No. 7 does not refer to "the same offence" but rather to trial and punishment "again" for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others (see paragraph 14 above). An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other

plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements.

26. This view is supported by the decision in the case of *Ponsetti and Chesnel v. France* (nos. 36855/97 and 41731/98 ECHR 1999-VI, [14.9.99]), relating to separate convictions for two tax offences arising out of the failure to submit a tax declaration, where the respondent Government also argued that this was an example of one act constituting more than one offence. Nevertheless, the Court examined whether the offences in question differed in their essential elements.

27. It can also be argued that this is what distinguishes the Gradinger case from the Oliveira case. In the Gradinger case the essential elements of the administrative offence of drunken driving did not differ from those constituting the special circumstances of Article 81 § 2 of the Criminal Code, namely driving a vehicle while having a blood alcohol level of 0.8 grams per litre or more. However, there was no such obvious overlap of the essential elements of the offences at issue in the Oliveira case.

28. In the present case, the applicant was first convicted by the administrative authority for drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act. In subsequent criminal proceedings he was convicted of causing death by negligence with the special element under Article 81 § 2 of the Criminal Code of "allowing himself to become intoxicated". The Court notes that there are two differences between the Gradinger case and the present: the proceedings were conducted in reverse order and there was no inconsistency between the factual assessment of the administrative authority and the criminal courts, as both found that the applicant had a blood alcohol level above 0.8 grams per litre.

29. However, the Court considers that these differences are not decisive. As said above, the question whether or not the *non bis in idem* principle is violated concerns the relationship between the two offences at issue and can, therefore, not depend on the order in which the respective proceedings are conducted. As regards the fact that Mr Gradinger was acquitted of the special element under Article 81 § 2 of the Criminal Code but convicted of drunken driving, whereas the present applicant was convicted of both offences, the Court repeats that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be tried twice. What is decisive in the present case is that, on the basis of one act, the applicant was tried and punished twice, since the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act, and the special circumstances under Article 81 § 2 of the Criminal Code, as interpreted by the courts, do not differ in their essential elements.

30. The Court is not convinced by the Government's argument that the case was resolved due to the reduction of the applicant's prison term by one month, being equivalent to the fine paid in the administrative proceedings. The reduction of the prison term by virtue of the Federal President's prerogative of pardons cannot alter the above finding that the applicant was tried twice for essentially the same offence, and the fact that both his convictions stand.

The Court therefore rejects the Government's preliminary objection based on the same argument.

31. Finally, the Court observes that, in a case like the present, the Contracting State remains free to regulate which of the two offences shall be prosecuted. It further notes that the legal situation in Austria has changed following the Constitutional Court's judgment of 5 December 1996, so that nowadays the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act will not be pursued if the facts also reveal the special elements of the offence under Article 81 § 2 of the Criminal Code.

However, at the material time, the applicant was tried and punished for both offences containing the same essential elements.

32. There has, thus, been a violation of Article 4 of Protocol No. 7.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

34. The applicant claimed ATS 100,000 for non-pecuniary damage arguing that, without the special circumstances of Article 81 § 2 of the Criminal Code, he would not have been sentenced to an unconditional term of imprisonment.

35. The Government objected, stating that there is no causal link between the applicant's imprisonment and the alleged breach of Article 4 of Protocol No. 7, as the alleged breach could equally have been avoided by making the administrative offence subsidiary to the offence falling within the competence of the criminal courts. They pointed out that this has been the legal situation pertaining since the Constitutional Court's judgment of 5 December1996.

36. The Court agrees that there is no causal link between the violation found and the damage claimed by the applicant. Moreover, it considers that the finding of a violation constitutes in itself sufficient just satisfaction as regards any non-pecuniary damage the applicant may have sustained. Thus, it makes no award under this head.

B. Costs and expenses

37. The applicant claimed ATS 43,532 for the costs incurred in the domestic proceedings and ATS 25,110 for the costs incurred in the Convention proceedings. Further, arguing that if the Court found a violation of Article 4 of Protocol No. 7 the proceedings before the criminal courts would have to be reopened, he requested ATS 15,000 for these future proceedings.

38. The Government accepted the applicant's costs claim for the domestic and Convention proceedings. However, they objected to the claim for the costs of possible future proceedings.

39. The Court, having regard to the Government's position, awards the costs incurred in the domestic and Convention proceedings in full, thus granting the applicant ATS 68,642 under this head.

It cannot, however, award costs which the applicant has not yet incurred.

C. Default interest

40. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* the Government's preliminary objection to the merits and rejects it;

2. *Holds* that there has been a violation of Article 4 of Protocol No. 7 to the Convention;

3. *Holds* that this finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage the applicant may have sustained;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 68,642 (sixty-eight thousand six hundred and forty-two) Austrian schillings for costs and expenses;

(b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 29 May 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President