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

COURT (CHAMBER)

CASE OF GRADINGER v. AUSTRIA

(Application no. 15963/90)

JUDGMENT

STRASBOURG

23 Octobre 1995

In the case of Gradinger v. Austria [1],

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 Rules of Court A [2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr R. MACDONALD,
Mr S.K. MARTENS,
Mr I. FOIGHEL,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr J. MAKARCZYK,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 28 April and 28 September 1995,

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 9 September 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15963/90) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Josef Gradinger, on 22 May 1989.

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 object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

[1] The case is numbered 33/1994/480/562. 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.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

the respondent State of its obligations under Article 6 para. 1 of the Convention and Article 4 of Protocol No. 7 (art. 6-1, P7-4).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The President of the Court gave the lawyer leave to use the German language during the written proceedings (Rule 27 para. 3).

3. On 24 September 1994 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider the instant case and the cases of Schmautzer, Umlauft, Pramstaller, Palaoro and Pfarrmeier v. Austria [3].

The Chamber to be constituted for this purpose 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 para. 3 (b)). On the same day, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L. E. Pettiti, Mr R. Macdonald, Mr S.K. Martens, Mr I. Foighel, Mr J.M. Morenilla, Sir John Freeland and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 24 January 1995 and the applicant's memorial on 30 January 1995. Mr Gradinger's claims under Article 50 (art. 50) were filed on 14 March. On 21 March the Commission supplied the Registrar with various documents that he had requested on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 April 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr F. CEDE, Head of the International Law
Department, Federal Ministry of
Foreign Affairs, *Agent*,

Ms I. SIEß, Constitutional Department,
Federal Chancellery,

Ms E. BERTAGNOLI, International Law Department,

[3] Cases nos. 31/1994/478/560, 32/1994/479/561, 35/1994/482/564, 36/1994/483/565 and 37/1994/484/566.

Federal Ministry of Foreign Affairs, *Advisers*;
(b) for the Commission
Mr A. WEITZEL, *Delegate*;
(c) for the applicant
Mr R. FIEBINGER, Rechtsanwalt, *Counsel*.
The Court heard addresses by Mr Weitzel, Mr Fiebinger and Mr Cede.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. Mr Gradinger is an Austrian citizen who lives at St Pölten (Lower Austria).

7. On 1 January 1987 at about 4 a.m., while driving his car, he caused an accident which led to the death of a cyclist.

At the hospital where he was taken for treatment a specimen of his blood was taken. This showed that he then had a blood alcohol level of 0.8 grams per litre.

8. On 15 May 1987 the St Pölten Regional Court (Landesgericht) convicted him of causing death by negligence (fahrlässige Tötung) and sentenced him to 200 day-fines of 160 Austrian schillings (ATS) with 100 days' imprisonment in default of payment (Article 80 of the Criminal Code (Strafgesetzbuch) - see paragraph 13 below).

According to the applicant, an expert, Dr Psick, had stated at his trial that in view of the shortness of the interval between the last drink the applicant had had and the collision, he could not have absorbed an amount of alcohol exceeding the prescribed limit.

In the judgment, as set out in the court record (Protokolls- und Urteilsvermerk), it was held that the applicant had indeed been drinking before the accident but not to such an extent as to be caught by Article 81 para. 2 of the Criminal Code, which prescribed a heavier penalty for causing death by negligence while under the influence of drink (see paragraph 14 below).

9. On 16 July 1987 the St Pölten district authority (Bezirkshauptmannschaft) issued a "sentence order" (Straferkenntnis) imposing on Mr Gradinger a fine of ATS 12,000, with two weeks' imprisonment in default, for driving under the influence of drink. It made this order pursuant to sections 5(1) and 99(1)(a) of the Road Traffic Act 1960 (Straßenverkehrsordnung - see paragraphs 15 and 16 below) and on the basis of a different medical report, of 5 February 1987, according to which, in view of the time that had elapsed between the collision and the

taking of the blood specimen, Mr Gradinger's blood alcohol level when the accident had occurred must have been at least 0.95 grams per litre.

10. The applicant appealed to the Lower Austria regional government (Amt der Landesregierung), which dismissed his appeal on 27 July 1988 on the basis of a further expert opinion, of 16 June 1988, to the effect that the blood alcohol level had been 0.9 grams per litre.

11. On 11 October 1988 the Constitutional Court (Verfassungsgerichtshof) declined to accept for adjudication an appeal by the applicant, on the ground that it did not have sufficient prospects of success.

12. A further appeal, to the Administrative Court, was dismissed as ill-founded on 29 March 1989. It was held that the regional authorities had not in any way misconstrued the law in finding that at the material time Mr Gradinger had been under the influence of drink for the purposes of section 5(1) of the Road Traffic Act. That finding had been based on an expert opinion of 16 June 1988 in which it had been assumed that all the alcohol consumed by the applicant had passed into his bloodstream by the time of the accident, a point which Mr Gradinger had not contested. He was therefore wrong in asserting that the expert report had not analysed the effects of the last drink he had had before the accident.

Furthermore, the authorities had acted in accordance with the law in appointing an official expert (Amtssachverständiger) rather than a sworn court expert (gerichtlich beeideter Sachverständiger) to report on Mr Gradinger's blood alcohol level. In the case under consideration there had been no special factor to justify their doing otherwise. Nor, contrary to the applicant's assertions, had they appointed as expert the person already called upon at first instance by the district authority (see paragraph 9 above).

As for Article 14 para. 7 of the International Covenant on Civil and Political Rights, embodying the "non bis in idem" principle, this was not directly applicable in the Austrian legal system. Accordingly, the authorities had not misconstrued the law by punishing the applicant after a criminal court had acquitted him (see paragraph 8 above).

II. RELEVANT DOMESTIC LAW

A. Substantive law

1. The Criminal Code

13. By Article 80 of the Criminal Code (Strafgesetzbuch):

"It shall be an offence, punishable with up to one year's imprisonment, for any person to cause the death of another by negligence."

14. Article 81 para. 2 of the Criminal Code provides:

"It shall be an offence, punishable with up to three years' imprisonment, for any person to cause the death of another by negligence

1. ...

2. 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."

Under 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 para. 2 of the Criminal Code (Foregger/Serini, Kurzkommentar zum Strafgesetzbuch, 4th edition, 1988, p. 217).

2. The Road Traffic Act

15. Under section 5 of the Road Traffic Act 1960 it is an offence for any 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. The same section also lays down the conditions for the use of breathalysers and blood tests.

16. Since 1 May 1986 section 99(1)(a) of the Act has provided:

"It shall be an administrative offence (Verwaltungsübertretung), punishable with a fine of not less than 8,000 and not more than 50,000 schillings 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 ..."

17. In 1958, at the time when the Austrian Government ratified the Convention (see paragraph 28 below), section 7 of the Traffic Police Act 1947 (Straßenpolizeigesetz) provided: "Every driver shall be under a duty to pay reasonable heed to other road users and to display the care and diligence necessary to ensure the maintenance of order, safety and a proper flow of traffic."

B. Procedure

18. Article 90 para. 1 of the Federal Constitution (Bundes-Verfassungsgesetz) provides:

"Hearings by trial courts in civil and criminal cases shall be oral and public. Exceptions may be prescribed by law."

1. Proceedings in the Constitutional Court

19. By Article 144 para. 1 of the Federal Constitution the Constitutional Court, when an application (Beschwerde) is made to it, has to determine whether an administrative decision (Bescheid) has infringed a right guaranteed by the Constitution or has applied regulations (Verordnung) contrary to the law, a law contrary to the Constitution or an international treaty incompatible with Austrian law.

Article 144 para. 2 provides:

> "Up to the time of the hearing the Constitutional Court may by means of a decision (Beschluß) decline to accept a case for adjudication if it does not have sufficient prospects of success or if it cannot be expected that the judgment will clarify an issue of constitutional law. The court may not decline to accept for adjudication a case excluded from the jurisdiction of the Administrative Court by Article 133."

2. Proceedings in the Administrative Court

20. By Article 130 para. 1 of the Federal Constitution, the Administrative Court has jurisdiction to hear, inter alia, applications alleging that an administrative decision is unlawful.

21. Section 35(1) of the Administrative Court Act (Verwaltungsgerichtshofsgesetz) provides:

> "Applications from whose content it is apparent that the contravention of the law alleged by the applicant has not occurred shall be dismissed, at a private sitting, without further formality."

22. Section 39(1) provides, in particular, that at the end of the preliminary proceedings (Vorverfahren) the Administrative Court must hold a hearing where the applicant makes a request to that effect.

Section 39(2) reads as follows:

> "Notwithstanding a party's application under subsection (1), the Administrative Court may decide not to hold a hearing where
>
> 1. the proceedings must be stayed (section 33) or the application dismissed (section 34);
>
> 2. the impugned decision must be quashed as unlawful because the respondent authority lacked jurisdiction (section 42(2)(2));
>
> 3. the impugned decision must be quashed as unlawful on account of a breach of procedural rules (section 42(2)(3));
>
> 4. the impugned decision must be quashed because its content is unlawful according to the established case-law of the Administrative Court;
>
> 5. neither the respondent authority nor any other party before the court has filed pleadings in reply and the impugned decision is to be quashed;

6. it is apparent to the court from the pleadings of the parties to the proceedings before it and from the files relating to the earlier administrative proceedings that a hearing is not likely to clarify the case further."

Sub-paragraphs 1 to 3 of section 39(2) were in force in 1958; sub-paragraphs 4 and 5 were inserted in 1964 and sub-paragraph 6 in 1982.

23. Section 41(1) of the Administrative Court Act provides:

"In so far as the Administrative Court does not find any unlawfulness deriving from the respondent authority's lack of jurisdiction or from breaches of procedural rules (section 42 (2)(2) and (3)) ..., it must examine the impugned decision on the basis of the facts found by the respondent authority and with reference to the complaints put forward ... If it considers that reasons which have not yet been notified to one of the parties might be decisive for ruling on [one of these complaints] ..., it must hear the parties on this point and adjourn the proceedings if necessary."

24. Section 42(1) of the same Act states that, save as otherwise provided, the Administrative Court must either dismiss an application as ill-founded or quash the impugned decision.

By section 42(2),

"The Administrative Court shall quash the impugned decision if it is unlawful

1. by reason of its content, [or]

2. because the respondent authority lacked jurisdiction, [or]

3. on account of a breach of procedural rules, in that

(a) the respondent authority has made findings of fact which are, in an important respect, contradicted by the case file, or

(b) the facts require further investigation on an important point, or

(c) procedural rules have been disregarded, compliance with which could have led to a different decision by the respondent authority."

25. If the Administrative Court quashes the impugned decision, "the administrative authorities [are] under a duty ... to take immediate steps, using the legal means available to them, to bring about in the specific case the legal situation which corresponds to the Administrative Court's view of the law (Rechtsanschauung)" (section 63(1)).

26. In a judgment of 14 October 1987 (G 181/86) the Constitutional Court held:

"From the fact that it has been necessary to extend the reservation in respect of Article 5 (art. 5) of the Convention to cover the procedural safeguards of Article 6 (art. 6) of the Convention, because of the connection between those two provisions (art. 5, art. 6), it follows that, conversely, the limited review (die (bloß) nachprüfende Kontrolle) carried out by the Administrative Court or the Constitutional Court is insufficient in respect of criminal penalties within the meaning of the Convention that are not covered by the reservation."

3. The "independent administrative tribunals"

27. Pursuant to Article 129 of the Federal Constitution, administrative courts called "independent administrative tribunals" (Unabhängige Verwaltungssenate) were set up in the Länder with effect from 1 January 1991. The functions of these tribunals include determining both the factual and the legal issues arising in cases concerning administrative offences (Verwaltungsübertretungen).

III. AUSTRIA'S RESERVATIONS

28. The instrument of ratification of the Convention deposited by the Austrian Government on 3 September 1958 contains, inter alia, a reservation worded as follows:

> "The provisions of Article 5 (art. 5) of the Convention shall be so applied that there shall be no interference with the measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl [Federal Official Gazette] No. 172/1950, subject to review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution."

29. The instrument of ratification of Protocol No. 7 (P7) deposited by the Austrian Government on 14 May 1986 contains, inter alia, the following declaration:

> "Articles 3 and 4 (P7-3, P7-4) exclusively relate to criminal proceedings in the sense of the Austrian Code of Criminal Procedure."

PROCEEDINGS BEFORE THE COMMISSION

30. Mr Gradinger applied to the Commission on 22 May 1989. Relying on Article 6 (art. 6) of the Convention, he complained that he had been convicted, contrary to the "non bis in idem" principle, by an administrative authority which, furthermore, could not be considered an "independent and impartial tribunal" and had called on the services of its own experts. At the hearing he also alleged a violation of Article 6 para. 2 (art. 6-2), which enshrined the presumption of innocence.

31. On 10 May 1993 the Commission rejected the complaint relating to Article 6 para. 2 (art. 6-2) for failure to comply with the six-month rule (Article 26 read in conjunction with Article 27 para. 3 of the Convention) (art. 26+27-3) and declared the remainder of the application (no. 15963/90) admissible.

In its report of 19 May 1994 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention (right to an independent and impartial tribunal)

and Article 4 of Protocol No. 7 (P7-4); it also expressed the view that no separate issue arose under Article 6 para. 1 (art. 6-1) regarding the lack of a hearing in the Administrative Court (unanimously). The full text of the Commission's opinion and of the concurring opinion contained in the report is reproduced as an annex to this judgment [4].

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

32. In their memorial the Government asked the Court

> "1. to find that Article 6 (art. 6) is not applicable in the case at issue; alternatively,
>
> 2. to find that there was no violation of Article 6 (art. 6) in connection with the administrative criminal proceedings underlying the present application;
>
> 3. to declare the application in respect of the concerns raised under Article 4 of Protocol No. 7 (P7-4) incompatible ratione temporis with the Convention pursuant to Article 27 para. 2 (art. 27-2); or alternatively,
>
> 4. to find that Article 4 of Protocol No. 7 (P7-4) to the Convention was not infringed in the administrative criminal proceedings underlying the application".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

33. The applicant complained of a violation of Article 6 para. 1 (art. 6-1) of the Convention, which provides:

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

He had, he maintained, been denied the right to a "tribunal" and to a hearing before such a body.

[4] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 328-C of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

A. Applicability of Article 6 para. 1 (art. 6-1)

1. Whether there was a "criminal charge"

34. In Mr Gradinger's submission, the administrative criminal offence of which he was accused gave rise to a "criminal charge". This was not disputed by the Government.

35. In order to determine whether an offence qualifies as "criminal" for the purposes of the Convention, it is first necessary to ascertain whether or not the provision (art. 6-1) defining the offence belongs, in the legal system of the respondent State, to criminal law; next the "very nature of the offence" and the degree of severity of the penalty risked must be considered (see, among other authorities, the Öztürk v. Germany judgment of 21 February 1984, Series A no. 73, p. 18, para. 50, and the Demicoli v. Malta judgment of 27 August 1991, Series A no. 210, pp. 15-17, paras. 31-34).

36. Like the Commission, the Court notes that, although the offences in issue and the procedures followed in the case fall within the administrative sphere, they are nevertheless criminal in nature. This is moreover reflected in the terminology employed. Thus Austrian law refers to administrative offences (Verwaltungsstraftaten) and administrative criminal procedure (Verwaltungsstrafverfahren). In addition, the fine imposed on the applicant was accompanied by an order for his committal to prison in the event of his defaulting on payment (see paragraph 16 above).

These considerations are sufficient to establish that the offence of which the applicant was accused may be classified as "criminal" for the purposes of the Convention. It follows that Article 6 (art. 6) applies.

2. Austria's reservation in respect of Article 5 (art. 5) of the Convention

37. According to the Government, the procedure in question was covered by Austria's reservation in respect of Article 5 (art. 5) of the Convention. There could be no doubt that by the reference in that reservation to "measures for the deprivation of liberty" the Austrian Government had meant to include proceedings resulting in such measures. Any other construction would not only lack coherence; it would also run counter to the authorities' intention, which had been to remove from the scope of the Convention the whole administrative system, including the substantive and procedural provisions of administrative criminal law. That would be so even in a case where, as in this instance, the accused was merely fined, in so far as default on payment of that fine would entail committal to prison.

Admittedly, the Road Traffic Act 1960 was not one of the four laws designated in the reservation. However, one of those laws, the Administrative Criminal Justice Act, stated in section 10 that, except as

otherwise provided, the general administrative laws were to determine the nature and severity of sanctions. It mattered little in this respect that section 5 of the Road Traffic Act, which was applied in the present case, had been enacted after the reservation had been deposited, because that provision merely clarified the substance of an existing obligation laid down in section 7 of the Traffic Police Act 1947 (see paragraph 17 above).

38. The applicant argued that the reservation could not apply in the present case. In the first place, it failed to satisfy the requirements of Article 64 (art. 64) of the Convention, which provides:

> "1. Any State may, when signing [the] Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision (art. 64). Reservations of a general character shall not be permitted under this Article (art. 64).
>
> 2. Any reservation made under this Article (art. 64) shall contain a brief statement of the law concerned."

Secondly, on a strict construction, its wording precluded extending its scope to the procedural sphere, which was in issue here.

39. The Court points out that in the Chorherr v. Austria judgment of 25 August 1993 it held that Austria's reservation in respect of Article 5 (art. 5) of the Convention was compatible with Article 64 (art. 64) (Series A no. 266-B, p. 35, para. 21). It therefore remains only to ascertain whether the provisions (art. 5, art. 64) applied in the present case are covered by that reservation. They differ in certain essential respects from those in issue in the Chorherr case.

The Court notes that Mr Gradinger based his complaints on Article 6 (art. 6) of the Convention, whereas the wording of the reservation invoked by the Government mentions only Article 5 (art. 5) and makes express reference solely to measures for the deprivation of liberty. Moreover, the reservation only comes into play where both substantive and procedural provisions of one or more of the four specific laws indicated in it have been applied. Here, however, the substantive provisions of a different Act, the Road Traffic Act 1960, were applied.

These considerations are a sufficient basis for concluding that the reservation in question does not apply in the instant case.

B. Compliance with Article 6 para. 1 (art. 6-1)

1. Access to a tribunal

40. Mr Gradinger contended that none of the bodies that had dealt with his case in the proceedings in issue could be regarded as a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1). This was true not only of the

administrative authorities, but also of the Constitutional Court, whose review was confined to constitutional issues, and above all of the Administrative Court. The latter was bound by the administrative authorities' findings of fact, except where there was a procedural defect within the meaning of section 42(2), sub-paragraph 3, of the Administrative Court Act (see paragraph 24 above). It was therefore not empowered to take evidence itself, or to establish the facts, or to take cognisance of new matters. Moreover, in the event of its quashing an administrative measure, it was not entitled to substitute its own decision for that of the authority concerned, but had always to remit the case to that authority. In short, its review was confined exclusively to questions of law and therefore could not be regarded as equivalent to that of a body with full jurisdiction.

41. The Government contested this view, whereas the Commission accepted it.

42. The Court reiterates that decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 para. 1 (art. 6-1) of the Convention - as is the case in this instance with the district authority and the regional government (see paragraphs 9 and 10 above) - must be subject to subsequent control by a "judicial body that has full jurisdiction" (see, inter alia and mutatis mutandis, the following judgments: Albert and Le Compte v. Belgium of 10 February 1983, Series A no. 58, p. 16, para. 29; Öztürk, previously cited, pp. 21-22, para. 56; and Fischer v. Austria of 26 April 1995, Series A no. 312, p. 17, para. 28).

43. The Constitutional Court is not such a body. In the present case it could look at the impugned proceedings only from the point of view of their conformity with the Constitution, and this did not enable it to examine all the relevant facts. It accordingly lacked the powers required under Article 6 para. 1 (art. 6-1).

44. The powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention. It follows that when the compatibility of those powers with Article 6 para. 1 (art. 6-1) is being gauged, regard must be had to the complaints raised in that court by the applicant as well as to the defining characteristics of a "judicial body that has full jurisdiction". These include the power to quash in all respects, on questions of fact and law, the decision of the body below. As the Administrative Court lacks that power, it cannot be regarded as a "tribunal" within the meaning of the Convention. Moreover, in a judgment of 14 October 1987 the Constitutional Court held that in respect of criminal penalties not covered by the reservation in respect of Article 5 (art. 5), the limited review carried out by the Administrative Court or the Constitutional Court was insufficient (see paragraph 26 above).

45. It follows that the applicant did not have access to a "tribunal". There has accordingly been a violation of Article 6 para. 1 (art. 6-1) on this point.

2. Lack of a hearing and failure to take evidence from witnesses

46. Mr Gradinger further criticised the Administrative Court for failing to hold a hearing or take evidence from witnesses.

47. Having regard to the conclusion set out in paragraph 45 above, the Court does not consider it necessary to examine these complaints.

II. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 (P7-4)

48. The applicant maintained in addition that, by fining him pursuant to section 5 of the Road Traffic Act, the district authority and the regional government had punished him in respect of facts that were identical with those on the basis of which the Regional Court had decided that he did not have a case to answer under Article 81 para. 2 of the Criminal Code. As both these provisions in substance prohibited driving a vehicle with a blood alcohol level of 0.8 grams per litre or higher, there had been a breach of Article 4 of Protocol No. 7 (P7-4), which provides:

> "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.
>
> 2. The provisions (P7-4) of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> 3. No derogation from this Article (P7-4) shall be made under Article 15 (art. 15) of the Convention."

A. The reservation in respect of Article 4 (P7-4)

49. The Government argued that the provision (P7-4) relied on by the applicant could not be invoked in the instant case because Austria's declaration limited its scope exclusively to "criminal proceedings in the sense of the Austrian Code of Criminal Procedure" (see paragraph 29 above), thereby excluding administrative or disciplinary proceedings.

50. Like the Commission, the Court considers that the "declaration" is to be regarded as a reservation within the meaning of Article 64 (art. 64) of

the Convention (see, mutatis mutandis, the Belilos v. Switzerland judgment of 29 April 1988, Series A no. 132, p. 24, para. 49). Indeed, the Government did not dispute this.

It is therefore necessary to determine whether the declaration satisfies the requirements of that provision (art. 64).

51. The Court notes at the outset that there is no "brief statement" of the law which is said not to conform to Articles 3 and 4 of Protocol No. 7 (P7-3, P7-4). Admittedly, it can be inferred from the wording of the "declaration" that Austria intended all proceedings that were not "criminal proceedings in the sense of the Austrian Code of Criminal Procedure" to be excluded from the scope of Articles 3 and 4 (P7-3, P7-4); the Government rightly drew attention to this. Nevertheless, with a description of this nature, which is not exhaustive, the "declaration" does not afford to a sufficient degree "a guarantee ... that [it] does not go beyond the provisions expressly excluded" by Austria (see, as the most recent authority, the Chorherr judgment previously cited, p. 34, para. 20). Accordingly, the declaration does not satisfy the requirements of Article 64 para. 2 (art. 64-2).

This conclusion is a sufficient basis for finding the "declaration" invalid, without its being necessary also to examine whether the other requirements of Article 64 (art. 64) were complied with.

B. Applicability ratione temporis of Article 4 (P7-4)

52. The Government contended further that Article 4 of Protocol No. 7 (P7-4) was inapplicable ratione temporis. Under section 1(2) of the Administrative Criminal Justice Act (Verwaltungsstrafgesetz), the sanction imposed depended on the law in force when the offence was committed or when the first-instance decision was delivered, if that was more favourable to the accused. In the present case the relevant dates were respectively 1 January and 16 July 1987, whereas Protocol No. 7 (P7) had not entered into force until 1 November 1988. The fact that the Administrative Court had given judgment after that date, on 29 March 1989, made no difference, because it too was required to rule on the basis of the law applicable when the offence was committed or when the first-instance decision was delivered.

53. Like the Commission, the Court observes that the aim of Article 4 of Protocol No. 7 (P7-4) is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. That provision (P7-4) does not therefore apply before new proceedings have been opened. In the present case, inasmuch as the new proceedings reached their conclusion in a decision later in date than the entry into force of Protocol No. 7 (P7), namely the Administrative Court's judgment of 29 March 1989, the conditions for applicability ratione temporis are satisfied.

C. Compliance with Article 4 (P7-4)

54. In reply to Mr Gradinger's arguments (see paragraph 48 above), which the Commission endorsed in substance, the Government affirmed that Article 4 of Protocol No. 7 (P7-4) did not preclude applying the two provisions in issue consecutively. The latter were different in nature and pursued different aims: whereas Article 81 para. 2 of the Criminal Code punished homicide committed while under the influence of drink, section 5 of the Road Traffic Act punished the mere fact of driving a vehicle while intoxicated. The former was designed to penalise acts that cause death and threaten public safety, the latter to ensure a smooth flow of traffic.

55. The Court notes that, according to the St Pölten Regional Court, the aggravating circumstance referred to in Article 81 para. 2 of the Criminal Code, namely a blood alcohol level of 0.8 grams per litre or higher, was not made out with regard to the applicant. On the other hand, the administrative authorities found, in order to bring the applicant's case within the ambit of section 5 of the Road Traffic Act, that that alcohol level had been attained. The Court is fully aware that the provisions in question differ not only as regards the designation of the offences but also, more importantly, as regards their nature and purpose. It further observes that the offence provided for in section 5 of the Road Traffic Act represents only one aspect of the offence punished under Article 81 para. 2 of the Criminal Code. Nevertheless, both impugned decisions were based on the same conduct. Accordingly, there has been a breach of Article 4 of Protocol No. 7 (P7-4).

III. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

56. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

57. Mr Gradinger claimed the sum of ATS 293,130 for the costs and expenses incurred in the proceedings in the national courts and then before the Convention institutions.

58. The Government expressed the view that only the proceedings in the Administrative Court - which had given rise to the alleged violations - and those in Strasbourg could be taken into account. They also contested the quantum of the costs, but they were prepared to reimburse a total of ATS 100,000.

59. The Delegate of the Commission left the matter of just satisfaction to the discretion of the Court.

60. Making an assessment on an equitable basis, having regard to the information in its possession and its case-law, the Court awards Mr Gradinger ATS 150,000.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 6 para. 1 (art. 6-1) of the Convention applies in this case;

2. Holds that there has been a violation of that Article (art. 6-1) as regards access to a court;

3. Holds that it is not necessary to examine the complaints based on the lack of a hearing in the Administrative Court and that court's failure to take evidence from witnesses;
4. Holds that Article 4 of Protocol No. 7 (P7-4) applies in this case;

5. Holds that there has been a violation of that Article (P7-4);

6. Holds that the respondent State is to pay the applicant, within three months, the sum of 150,000 (one hundred and fifty thousand) Austrian schillings in respect of costs and expenses;

7. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 October 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the separate opinion of Mr Martens is annexed to this judgment.

R. R.
H. P.

SEPARATE OPINION OF JUDGE MARTENS

1. I concur in the Court's finding that Article 6 (art. 6) has been violated, but cannot agree with its reasoning.

2. My objections concern paragraph 44 of the judgment, which starts with the statement:

> "The powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention."

3. I will refrain from a structural criticism of this paragraph. I cannot help noting, however, that here again the Court finds it necessary to remark that when it is being assessed whether or not the Administrative Court is to be considered a court that affords the safeguards of Article 6 para. 1 (art. 6-1), "regard must be had to the complaints raised in that court". One looks in vain, however, for evidence of this methodological principle being put into practice: there does not follow any analysis of what the applicant argued before the Administrative Court, nor is there any trace of "regard" to these arguments in the assessment of the adequacy of the Administrative Court's jurisdiction. For the rest, I refer to the methodological objections to this "test" that I raised in paragraph 18 of my separate opinion in the case of Fischer v. Austria (judgment of 26 April 1995, Series A no. 312).

4. My main objection to this paragraph is the following. In the three civil cases discussed in my aforementioned separate opinion, the Court found that the Austrian Administrative Court met the requirements of a tribunal within the meaning of Article 6 para. 1 (art. 6-1). In the paragraph under discussion, however, it reaches the opposite conclusion, stressing that in this case the Administrative Court was sitting in proceedings of a criminal nature. One cannot but infer that the Court is of the opinion that in a case which under national law is an "administrative" one but under the Convention is a "criminal" one, the safeguards afforded by the tribunal that is to review the final decision of the administrative bodies differ from those required in a case that under national law is an "administrative" one but under the Convention is a "civil" one. I cannot see any justification for such differentiation, which does not find support in the wording or the purpose of Article 6 (art. 6) [1]. Nor does the Court offer one, its decision on this crucial point being unsupported by any argument. This is the more to be regretted as this differentiation is contrary to the Court's case-law [2].

---

[1] I refer in this context to footnote 62 of my aforementioned separate opinion in the case of Fischer v. Austria.

[2] See, inter alia, the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, pp. 23-24, para. 53; the Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 17, para. 30; see also the Diennet v. France judgment of 26 September 1995, Series A no. 325-A, pp. 13-14, para. 28.