CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

AFFAIRE OLIVEIRA c. SUISSE

CASE OF OLIVEIRA v. SWITZERLAND

(84/1997/868/1080)

ARRÊT/JUDGMENT

STRASBOURG

30 juillet/July 1998

Liste des agents de vente/List of Agents

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SUMMARY[1]

Judgment delivered by a Chamber

Switzerland – successive convictions of applicant for failing to control her vehicle and for negligently causing physical injury in respect of a road-traffic accident (sections 31 and 32 of Federal Road Traffic Act and Article 125 of Criminal Code)

ARTICLE 4 OF PROTOCOL No. 7

Typical example of single act constituting various offences (*concours idéal d'infractions*); characterised by fact that single criminal act was split up into two separate offences, in case before Court: failure to control vehicle and negligent causing of physical injury. Article 4 of Protocol No. 7 not infringed since it prohibited people being tried twice for same offence, whereas in cases concerning single act constituting various offences one criminal act constituted two separate offences.

Would have been more consistent with principles governing proper administration of justice for sentence in respect of both offences, which resulted from same criminal act, to have been passed by same court in single set of proceedings. Irrelevant as regards compliance with Article 4 of Protocol No. 7 that that procedure had not been followed in instant case.

Case before Court therefore distinguishable from case of Gradinger in which two different courts had come to inconsistent findings on applicant's blood alcohol level.

Conclusion: no violation (eight votes to one).

COURT'S CASE-LAW REFERRED TO

23.10.1995, Gradinger v. Austria

1. This summary by the registry does not bind the Court.

In the case of Oliveira v. Switzerland[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President,*
Mr F. GÖLCÜKLÜ,
Mr A.N. LOIZOU,
Mr L. WILDHABER,
Mr B. REPIK,
Mr P. KŪRIS,
Mr E. LEVITS,
Mr P. VAN DIJK,
Mr M. VOICU,

and also of Mr H. PETZOLD, *Registrar,* and Mr P.J. MAHONEY, *Deputy Registrar,*

Having deliberated in private on 20 April and 22 June 1998,

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

PROCEDURE

1. The case was referred to the Court by a Portuguese national, Mrs Maria Celeste Vieira Veloso de Oliveira ("the applicant"), on 25 August 1997 and by the European Commission of Human Rights ("the Commission") on 22 September 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 25711/94) against the Swiss Confederation lodged with the Commission under Article 25 by the applicant on 22 October 1994.

The Commission's request referred to Articles 44 and 48 as amended by Protocol No. 9 as regards Switzerland and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46). Mrs Oliveira's application to the Court referred to Article 48 of the Convention. The object of the request and of the 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 4 of Protocol No. 7.

Notes by the Registrar

1. The case is numbered 84/1997/868/1080. 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 of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant designated the lawyer, Mr A. von Albertini who would represent her (Rule 31). He was given leave by the President of the Chamber to use the German language (Rule 28 § 3). Having originally been designated in the proceedings before the Commission by the initials C.M.L.-O., the applicant subsequently agreed to the disclosure of her name.

3. The Chamber to be constituted included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 25 September 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr A.N. Loizou, Mr B. Repik, Mr P. Kūris, Mr E. Levits, Mr P. van Dijk and Mr M. Voicu (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted Mr P. Boillat, the Agent of the Swiss Government ("the Government"), the applicant's lawyer and Mr E.A. Alkema, the Delegate of the Commission, on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 23 February and 30 March 1998 respectively. On 17 April the Delegate of the Commission submitted his written observations.

5. On 27 February 1998 the Chamber decided to dispense with a hearing in the case, having satisfied itself that the condition for this derogation from its usual procedure had been met (Rules 27 and 40).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mrs Oliveira, a Portuguese citizen, was born in 1967 and currently lives in Zürich (Switzerland).

7. On 15 December 1990, while she was driving on a road covered with ice and snow in Zürich, her car veered onto the other side of the road hitting one car and then colliding with a second driven by M., who sustained serious injuries.

8. On 19 March 1991 the Zürich police magistrate's office (*Polizeirichteramt*) sent the file to the district attorney's office (*Bezirksanwaltschaft*) for further investigation as to whether the applicant had negligently inflicted serious physical injury contrary to Article 125 § 2 of the Swiss Criminal Code (see paragraph 16 below).

9. On 5 April 1991 the Zürich District Office (*Statthalteramt*) sent the file to the district attorney's office for further investigations as to whether any offences had been committed under the Federal Road Traffic Act (see paragraph 17 below).

10. On 3 June 1991 the district attorney's office returned the case file concerning the party injured in the accident to the police magistrate's office. It contained a medical certificate stating that the injuries were serious. On 12 August 1991 the police magistrate found that there was no case for the injured party to answer (*Einstellungs-Verfügung*). On 13 August 1991 he convicted the applicant of an offence under sections 31 and 32 of the Federal Road Traffic Act of failing to control her vehicle, as she had not adapted her speed to the road conditions (*Nichtbeherrschen des Fahrzeuges infolge Nichtanpassens der Geschwindigkeit an die Strassenverhältnisse*) and sentenced her to a fine of 200 Swiss francs (CHF). He found in particular that on 15 December 1990 the road had been covered with ice and snow and that the applicant's car had veered onto the other side of the road hitting one car before colliding with a second.

11. On 25 January 1993 the district attorney's office issued a penal order (*Strafbefehl*) fining Mrs Oliveira CHF 2,000 for negligently causing physical injury contrary to Article 125 of the Swiss Criminal Code in respect of the injuries sustained by M. as a result of the collision between his vehicle and the applicant's.

12. The applicant challenged that order in the Zürich District Court (*Bezirksgericht*), which on 11 March 1993 reduced the fine to CHF 1,500. It held in particular:

> "The police magistrate who imposed the fine (*Bussenverfügung*) referred to by the applicant had to examine the situation within the context of proceedings concerning a minor criminal offence (*Übertretungsstrafverfahren*), so that by virtue of the *non bis in idem* principle there is no doubt that no further prosecution for a minor criminal offence can be brought on the basis of the same incident. However, the fact that

> investigations in this type of proceedings are summary and limited in scope means that offenders on whom only a fine has been imposed may, if a more thorough investigation is needed in view of legal or factual considerations, also be prosecuted on the same facts for a serious crime or other major offence. In such cases, the original decision and sentence are quashed."

The court went on to quash the CHF 200 fine imposed on 13 August 1991 and said that any part of that fine that had already been paid was to be deducted from the fine it was imposing, the latter fine thus being reduced to CHF 1,300.

13. The applicant appealed to the Zürich Court of Appeal (*Obergericht*), which on 7 October 1993 dismissed the appeal holding, *inter alia*:

> "It is necessary to consider what conclusions are to be drawn from the police magistrate's error regarding the question in issue. It is clear that in his decision of 13 August 1991 he made a finding only in respect of the applicant's failure to control the vehicle, but not in respect of the resulting physical injuries suffered by the victim… However, in determining whether the Highway Code had been followed, the police magistrate had the power and duty to consider all the facts before him and to rule on them exhaustively under the criminal law; his failure to remit the case file, even though possibly serious physical injuries had been caused by negligence, does not necessarily mean that the decision of the police magistrate is invalid – that decision stands. It has not been submitted, and does not appear from the file, that the decision in issue contains serious defects requiring that it be quashed in its entirety in any event."

The Court of Appeal subsequently upheld the decision to deduct CHF 200 from the CHF 1,500 fine, considering that the applicant ought not to be punished more severely than she would have been if both offences had been dealt with together in a single set of proceedings.

14. Mrs Oliveira appealed against that decision on grounds of nullity (*Nichtigkeitsbeschwerden*) to the Court of Cassation (*Kassationsgericht*) of the Canton of Zürich and to the Federal Court. On 27 April 1994 the Court of Cassation declined to consider her appeal.

15. The applicant then filed a public-law appeal with the Federal Court against that decision.

On 17 August 1994, the Federal Court dismissed both the applicant's public-law appeal and her appeal on grounds of nullity. In its latter decision the Federal Court held that it had to be assumed that when on 13 August 1991 the police magistrate had imposed a fine on Mrs Oliveira, he had been unaware that M. had sustained serious injuries, as otherwise he would have had no jurisdiction to impose a fine and would have had to return the file to the district attorney's office. The Federal Court concluded that the District Court had nevertheless avoided the effects of punishing an offender twice for the same offence by taking into account the CHF 200 fine imposed by the police magistrate when "determining the amount of the new fine" (*bei der Bemessung der neuen Busse*).

II. RELEVANT DOMESTIC LAW

16. Article 125 of the Swiss Criminal Code provides:

> "1. Anyone who negligently causes damage to the physical integrity or health of another shall, on a complaint, be liable to imprisonment or a fine.
>
> 2. If the injury is serious, the offender shall be prosecuted even in the absence of a complaint."

17. Subsection 31(1) of the Federal Road Traffic Act provides, *inter alia*, that drivers shall remain in control of their vehicles at all times so as to fulfil their obligations to drive carefully. Under section 32, drivers must adapt the vehicle's speed to conditions.

PROCEEDINGS BEFORE THE COMMISSION

18. Mrs Oliveira applied to the Commission on 22 October 1994. She complained of a breach of Article 4 of Protocol No. 7.

19. The Commission declared the application (no. 25711/94) admissible on 13 January 1997. In its report of 1 July 1997 (Article 31), it expressed the opinion that there had been a violation of that provision (twenty-four votes to eight). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

20. In their memorial, the Government invited the Court to hold that there had been no violation of Article 4 of Protocol No. 7 in the instant case.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

21. In her memorial, the applicant requested the Court

"1. To find that judgments delivered in criminal proceedings under the sovereign authority of the Swiss Confederation by the single judge at the Zürich District Court, by the Court of Appeal, by the Court of Cassation of the Canton of Zürich and by the Swiss Federal Court have infringed, to the applicant's detriment, provisions of the European Convention on Human Rights, in particular Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and that accordingly the respondent Government have failed to fulfil their obligation to comply with the provisions of the Convention.

2. To order the respondent Government, pursuant to Article 50 of the Convention taken together with Rule 52 § 1 of Rules of Court B, to pay the applicant just satisfaction in the sum of 60,340 Swiss francs."

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7

22. In the applicant's submission, the fact that the same incident had led to her conviction firstly for failing to control her vehicle and subsequently for negligently causing physical injury constituted a breach of Article 4 of Protocol No. 7, 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 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 shall be made under Article 15 of the Convention."

In its judgment of 7 October 1993 the Court of Appeal had noted that the police magistrate knew that the accident victim had suffered serious injuries, in respect of which he had no jurisdiction. He had nonetheless given a ruling without remitting the case file to the district attorney's office. The police magistrate had therefore decided the case in full knowledge of the relevant facts and in that regard it did not really matter

why he had chosen not to impose a heavier penalty on the applicant. Even if he had erred in his assessment of the facts and the penalty called for, it was unacceptable that the applicant should be made to suffer the consequences by being convicted twice in respect of the same incident. Neither the police magistrate's decision nor the fine he had imposed had been set aside by the higher courts, which had also punished the applicant. In short, there had been a breach of the *non bis in idem* principle.

23. The Government submitted that the limits within which Article 4 of Protocol No. 7 had been conceived could not be drawn so as categorically to exclude all possibility of the same set of facts being considered in two separate sets of proceedings. In any event, the case was distinguishable in three respects from that of Gradinger v. Austria (see the judgment of 23 October 1995, Series A no. 328-C): (i) there had been no inconsistency in the two relevant authorities' assessment of the facts, (ii) as the jurisdiction of the first authority (the police magistrate) was limited he would not have been able to consider all the aspects of the offending conduct and, (iii) the applicant had not been put at any disadvantage as a result of there being separate proceedings.

Under Swiss law, the police magistrate's jurisdiction did not extend to serious offences (*crimes* and *délits*), which were the responsibility of the district attorney's office (*Bezirksanwaltschaft*) and the public prosecutor's office (*Staatsanwaltschaft*). The *non bis in idem* principle could not therefore apply in respect of a matter over which the police magistrate had no jurisdiction. The fact that he had nonetheless given a ruling was in all probability due to a misunderstanding between him and the district attorney in that, when the latter had sent the former the case file concerning a possible prosecution of the person injured in the accident, the police magistrate had taken it to be the file concerning the applicant. Whatever the position, Mrs Oliveira had not been prejudiced by his decision as the amount of the first fine had been deducted from the second. However, it would not be right either for the applicant to benefit in the name of the *non bis in idem* principle from that procedural error.

24. Relying on the Gradinger judgment cited above, the Commission accepted in substance the applicant's argument. It noted that the basis for Mrs Oliveira's two convictions had been that her car had veered onto the other side of the road hitting one car and then colliding with a second, whose driver had sustained serious injuries. The injuries had not been a separate element, but an integral part of the conduct by which they had finally been caused. Moreover, a defendant could not be deprived of the protection against a reopening of his case merely because his conviction had been based on a procedural defect.

25. The Court notes that the convictions in issue concerned an accident caused by the applicant on 15 December 1990. She had been driving on a road covered with ice and snow when her car veered onto the other side of the road hitting one car and then colliding with a second, whose driver sustained serious injuries. Mrs Oliveira was firstly ordered to pay a 200 Swiss franc (CHF) fine by the police magistrate for failing to control her vehicle as she had not adapted her speed to the road conditions (see paragraph 10 above). Subsequently, the Zürich District Court and then the Zürich Court of Appeal imposed a CHF 1,500 fine (from which, however, was deducted the amount of the initial fine) for negligently causing physical injury (see paragraphs 11–12 above).

26. That is a typical example of a single act constituting various offences (*concours idéal d'infractions*). The characteristic feature of this notion is that a single criminal act is split up into two separate offences, in this case the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one.

There is nothing in that situation which infringes Article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concours idéal d'infractions*) one criminal act constitutes two separate offences.

27. It would admittedly have been more consistent with the principles governing the proper administration of justice for sentence in respect of both offences, which resulted from the same criminal act, to have been passed by the same court in a single set of proceedings. Indeed, it appears that that is what ought to have occurred in the instant case as the police magistrate should, in view of the fact that the serious injuries sustained by the injured party were outside his jurisdiction, have sent the case file to the district attorney for him to rule on both offences together (see paragraph 10 above). The fact that that procedure was not followed in Mrs Oliveira's case is, however, irrelevant as regards compliance with Article 4 of Protocol No. 7 since that provision does not preclude separate offences, even if they are all part of a single criminal act, being tried by different courts, especially where, as in the present case, the penalties were not cumulative, the lesser being absorbed by the greater.

28. The instant case is therefore distinguishable from the case of Gradinger cited above, in which two different courts came to inconsistent findings on the applicant's blood alcohol level.

29. In conclusion, there has been no violation of Article 4 of Protocol No. 7.

FOR THESE REASONS, THE COURT

Holds by eight votes to one that there has been no violation of Article 4 of Protocol No. 7.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 July 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the dissenting opinion of Mr Repik is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE REPIK

(*Translation*)

I regret that I am unable to concur with the reasoning of the majority of the Court which led to its finding that there has been no violation of Article 4 of Protocol No. 7.

The issue of identifying the type of offence in criminal proceedings, and the consequences thereof (*res judicata*, *non bis in idem*) is the subject of much debate in legal theory. What is decisive: identification of the *actus reus* or of the legal qualification? If one and the same *actus reus* is decisive, which of its elements have to be the same in order for the *actus* to remain the same? The national legislatures adopt various solutions. None of those solutions may be used to construe Article 4 of Protocol No. 7. It is for the Court to give the word "offence" in that provision an autonomous meaning corresponding to that provision's subject matter and purpose. The purpose is to "ensure that the fate of an accused is not be open to review"[1], in other words to ensure that he is not exposed more than once to the constraints of criminal proceedings or convicted and sentenced in respect of the same incident.

The solution adopted by the Court in the Gradinger case is adapted to that need for legal certainty. It expressly excluded the identification of the legal qualification as a criterion for determining the "offence" within the meaning of Article 4 of Protocol No. 7, saying: "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 § 2 of the Criminal Code. Nevertheless, both impugned decisions were based on the same conduct."[2] It is therefore undoubtedly the identity of the *actus reus* and, in particular, of the conduct that the Court held to be the criterion for identifying the "offence" within the meaning of Article 4 of Protocol No. 7. I fully approve the Court's decision in that case. It prevents a single, well-defined *actus reus* being broken down by changing some of its specific aspects and the same individual being prosecuted more than once in respect of the same incident as a result of different legal qualifications.

1. R. Merle and A. Vitu: *Traité de droit criminel. Procédure pénale*, Cujas, 4th ed., 1989, s. 878.
2. See the Gradinger v. Austria judgment of 23 October 1995, Series A no. 328-C, p. 66, § 55.

However, the Court chose exactly the opposite solution in the present case, in that it took the legal qualification as the criterion for identifying the "offence". A different legal qualification for "a single criminal act" sufficed to oust the *non bis in idem* guarantee contained in Article 4 of Protocol No. 7.

Yet no difference can be seen between the Gradinger case and the Oliveira case that can justify these two wholly conflicting decisions. In both cases, the conduct that led to the prosecution was identical. In both cases, owing to a mistake by the court that first convicted the accused, one aspect of the *actus* was not taken into account in the conviction. Lastly, in both cases, the same conduct, aggravated by the aspect that the first court had omitted to take into account, led to a second conviction under a different legal qualification.

Whether the fact that not all of the aspects of the case against the accused were or could be taken into account in the first conviction was the result of an erroneous assessment of the facts or negligence on the part of the police magistrate, such indecisiveness in the case-law cannot be justified. A judicial error can be no more relevant under Article 4 of Protocol No. 7 than an erroneous assessment of the facts.

It is for these reasons that I voted in favour of finding that there has been a violation of that provision.