



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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32307/96
by Hans Jorg SCHIMANEK
against Austria

The European Court of Human Rights (First Section) sitting on 1 February 2000 as a Chamber composed of

Mrs E. Palm, *President*,
Mr J. Casadevall,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr W. Fuhrmann,
Mrs W. Thomassen,
Mr R. Maruste, *judges*,
and Mr M. O'Boyle, *Section Registrar*;
Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 17 May 1996 by Hans Jörg Schimanek against Austria and registered on 18 July 1996 under file no. 32307/96;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows::

THE FACTS

The applicant is an Austrian national, born in 1963 and living in Vienna.

A. Particular circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 25 January 1992 the applicant was arrested on the suspicion of having performed activities inspired by National Socialist ideas (*Betätigung im nationalsozialistischen Sinn*). Upon solemn promise (*gegen Gelöbnis*) to refrain from such activities he was released on 16 April 1992. The Public Prosecutor's Office (*Staatsanwaltschaft*) preferred the indictment (*Anklageschrift*) on 23 June 1994, charging the applicant with offences under section 3a (2) of the National Socialism Prohibition Act (the Prohibition Act - *Verbotsgesetz*). From the beginning the proceedings received extensive press coverage.

On 27 September 1994 the applicant was questioned as a witness in criminal proceedings brought against G.K., who was also charged with offences under section 3a (2) of the Prohibition Act. Following his testimony, the presiding judge ordered the applicant's arrest on the suspicion of having given false evidence.

On 20 March 1995 the trial against the applicant started before the Assize Court (*Geschworenengericht*) at the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*). The presiding judge was the same that had conducted the proceedings against G.K. and had ordered the applicant's arrest during the hearing on 27 September 1994.

Trial hearings were held on nine days. As of the third day, evidence was taken by hearing witnesses, reading out documents and showing video tapes. On the fifth day the applicant's defence counsel, who was at that stage given the opportunity to make an extensive comment on the evidence taken so far, expressly appreciated the fair and objective conduct of the proceedings. When on the eighth hearing day personal letters of the applicant and his father were read out neither the applicant nor his defence counsel opposed this manner of taking evidence.

On 31 March 1995 the Assize Court convicted the applicant under Section 3a (2) of the Prohibition Act (*Verbotsgesetz*) and sentenced him to fifteen years' imprisonment.

The jury found that the applicant had as leader of an association (*Kameradschaft*) – amongst other activities – recruited new members, organised special events where the members of the association were familiarised with a historical view glorifying the dictators of the Third Reich, its army, the SA and the SS, denying at the same time the systematic killing by use of toxic gas under the National Socialist regime and transmitting National Socialist ideology to the members and that he had organised the distribution of pamphlets with similar contents. Further, the jury found that the applicant had organised as of the end of the year 1987 paramilitary training camps (*Wehrsportübung*) by mobilising members in uniform of different associations organised in the extreme right-wing “*Volkstreue Ausserparlamentarische Opposition*” (VAPO) with a view to strengthen the feeling of solidarity among the participants, their tactical preparation for violent conflicts and the setting-up of a military cadre which could impose – if necessary by the use of force – the

aims of the VAPO, namely the seizure of power in Austria and the simultaneous incorporation of Austria into an Enlarged Germany (*Grossdeutschland*).

In imposing the sentence, the Assize Court considered the applicant's confession as a mitigating circumstance while his leading position in the above organisations, the multitude of his activities and the indoctrination of a great number of young people with National Socialist ideas were taken into account as aggravating circumstances.

On 16 May 1995 the applicant filed a plea of nullity and an appeal against sentence (*Nichtigkeitsbeschwerde und Berufung*). In his plea of nullity he complained in particular that the questions put to the jury were not duly formulated and that the legal instructions given to the jury were incorrect.

On 22 November 1995 the Supreme Court (*Oberster Gerichtshof*) confirmed the conviction while reducing the sentence to eight years' imprisonment.

The Supreme Court found that the Assize Court had not duly weighed mitigating and aggravating circumstances. In particular, it had not attached sufficient weight to the applicant's confession and had failed to take into account that the applicant had renounced the incriminated activities in 1992. Moreover, he had clearly placed himself at a distance from his former activities during the trial. Having regard to the recent conviction under section 3a (2) of the Prohibition Act of G.K. who had been the founder and leader of VAPO and was sentenced to eleven years' imprisonment, a sentence of fifteen years' imprisonment for the applicant appeared disproportionate. Finally, the Supreme Court, referring to section 41 § 1 of the Criminal Code (*Strafgesetzbuch*) found that the conditions for an extraordinary mitigation of sentence (*ausserordentliche Strafmilderung*) were met, i.e. a sentence below of the statutory level of punishment could be handed down. Having regard to all the circumstances of the case, the Supreme Court found that eight years' imprisonment were commensurate to the applicant's guilt.

B. Relevant domestic law

Section 3a (2) of the National Socialism Prohibition Act, as amended in 1992 by Federal Law Gazette (*Bundesgesetzblatt*) no. 148/1992, reads as follows:

“The following persons shall be guilty of a criminal offence and shall be liable to ten to twenty years' imprisonment or, in the event that the perpetrator or the activity is deemed to be particularly dangerous, life imprisonment:

1. ...
2. Whosoever founds an association whose purpose, through its members' activities inspired by National Socialist ideas, is to undermine the autonomy and independence of the Austrian Republic or to subvert public order and the reconstruction of Austria, or plays a leading role in an association of that kind.”

Before the amendment, which entered into force on 20 March 1992, the offence carried life imprisonment.

Section 41 § 1 of the Criminal Code provides that if the mitigating circumstances clearly outweigh the aggravating circumstances and if there are sufficient reasons to believe that the perpetrator will refrain from committing further offences in case a sentence below the statutory level of punishment is imposed, the court may hand down a sentence of not less than one year's imprisonment if the offence is punishable with life imprisonment or with ten to twenty years' imprisonment or life imprisonment.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention about the alleged lack of impartiality of the Assize Court. His arrest on suspicion of having given false evidence and the press coverage allegedly prejudiced the jury. Further, he claims that the presiding judge was biased and submits in particular that she attacked him in a polemical manner during the trial, read out letters written by or sent to him and tried to influence the jury.

2. Further the applicant complains that Section 3a (2) of the Prohibition Act, in particular the term "activities inspired by National Socialist ideas", is not sufficiently precise to serve as a basis for a criminal conviction. He also alleges that the statutory level of punishment as well as the actual sentence of eight years' imprisonment are excessive in relation to the incriminated activities which he considers to be non-violent political activities and therefore constitutes inhuman punishment. The applicant does not consider the provision to be necessary in a democratic society in order to prevent activities which could possibly destroy any of the rights and freedoms set out under the Convention. Further, he considers that the Prohibition Act had a legitimate aim after the Second World War but should presently be repealed. He invokes Articles 3, 7, 9 and 10 of the Convention.

THE LAW

1. The applicant complains under Article 6 of the Convention that the presiding judge as well as the jury were biased against him.

Article 6, so far as relevant, reads as follows:

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

The Court notes that neither the applicant nor his defence counsel filed any motion challenging the presiding judge of the Assize Court or the members of the jury for bias. On the contrary, the applicant's counsel stated on the fifth day of the trial hearings that he found the conduct of the proceedings fair and objective. The issue was not raised in the applicant's plea of nullity to the Supreme Court either. Thus, the applicant failed to raise the complaint concerning the alleged lack of impartiality of the Assize Court in the domestic proceedings.

It follows that the applicant has failed to exhaust domestic remedies and that this part of the application must be rejected as being inadmissible under Article 35 §§ 1 and 4 of the Convention.

2. Further the applicant complains that Section 3a (2) of the Prohibition Act, in particular the term “activities inspired by National Socialist ideas”, is not sufficiently precise to serve as a basis for a criminal conviction. He also alleges that the statutory level of punishment as well as the actual sentence of eight years’ imprisonment are excessive in relation to the incriminated activities which he considers to be non-violent political activities and therefore constitutes inhuman punishment. The applicant does not consider the provision to be necessary in a democratic society in order to prevent activities which could possibly destroy any of the rights and freedoms set out under the Convention. Further, he considers that the Prohibition Act had a legitimate aim after the Second World War but should presently be repealed. He invokes Articles 3, 7, 9 and 10 of the Convention.

a. The Court will first examine the applicant’s complaint that the statutory level of punishment provided for in section 3a (2) of the Prohibition Act as well as the actual sentence of eight years’ imprisonment are incompatible with Article 3 of the Convention which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Court recalls that in cases originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it. Its task is accordingly not to review the aforesaid legal provisions and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention (see for instance, Eriksson v. Sweden judgment of 22 June 1989, Series A no. 156, p. 23, § 54). The Court is therefore not called upon to examine whether the punishment provided for in section 3a (2) of the Prohibition Act in itself violates Article 3. The question at stake is whether the sentence imposed on the applicant discloses any violation of this provision.

The Court recalls first that the Convention does not in general provide a basis for contesting the length of a sentence lawfully imposed by a competent court. Only in exceptional circumstances could the length of a sentence raise doubts as to its compatibility with Article 3 of the Convention (Weeks v. the United Kingdom judgment of 2 March 1987, Series A no. 114, p. 25 § 47).

In the present case, the applicant was found guilty of a serious political offence, namely of having played a leading role in an association which - through its members’ activities inspired by National Socialist ideas - aimed at, *inter alia*, undermining the autonomy and independence of the Austrian Republic or subverting public order. Section 3a (2) of the Prohibition Act provides for a statutory level of punishment of ten to twenty years’ imprisonment or, in particular circumstances, life imprisonment. The Assize Court sentenced the applicant to fifteen years’ imprisonment. The Supreme Court carefully weighed mitigating and aggravating circumstances and compared the sentence imposed on the applicant by the Assize Court to the sentence of eleven years’ imprisonment imposed in a related but even more serious case. Finding that the conditions laid down in section 41 § 1 of the Criminal Code for imposing a sentence below the statutory level of punishment were met, it came to the conclusion that a sentence of eight years’ imprisonment was commensurate to the applicant’s guilt.

The Court, having particular regard to the careful determination of the applicant's sentence by the Supreme Court, cannot find any circumstances which would put that sentence's conformity with Article 3 into doubt.

b. The applicant further complains that Section 3a (2) of the Prohibition Act, in particular the term "activities inspired by National Socialist ideas", is not sufficiently precise to serve as a basis for a criminal conviction. He submits that the provision had a certain legitimacy after the Second World War but should presently be repealed. The first of these complaints falls to be examined under Article 7 of the Convention which, so far as relevant, reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

As to the applicant's submission that the provision should presently be repealed the Court notes that the continued validity and constitutionality of the provisions of the Prohibition Act is primarily a question of national law. However, it observes that in the Austrian State Treaty of 1955 Austria undertook to maintain its legislation outlawing National Socialist Activities (no. 12774/87, H., W., P. and K. v Austria, Dec. 12.10.89, DR 62, p. 216 at p. 219).

As regards the alleged lack of precision of Section 3a (2) of the Prohibition Act, it is true that the notion of "activities inspired by National Socialist ideas" appears rather vague. However, the Court follows the line of reasoning of the European Commission of Human Rights in 12774/87 (quoted above, at p. 220), where a similar provision of the Prohibition Act which contains exactly the same term, was found to be in conformity with Article 7 on the following grounds: "The legislator intended to outlaw any kind of National Socialist activities. Furthermore, the scope of the provision is limited to the national socialist concept as a historical ideology, frequently referred to in Austria and elsewhere, which is a sufficiently precise concept. In addition to this background, the case-law and legal doctrine in Austria have developed further criteria making the applicable law sufficiently accessible and foreseeable and enabling the jury to distinguish clearly between the applicant's activities which could and which could not be considered as National Socialist activities".

The Court, therefore, finds no appearance of a violation of Article 7 of the Convention.

c. Finally the applicant, invoking Articles 9 and 10 of the Convention, submits in essence that section 3a (2) of the Prohibition Act is a provision which is not necessary in a democratic society.

The Court will examine this complaint under Article 10 of the Convention which, so far as relevant, reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, ...”

The Court notes that the applicant’s conviction under section 3a (2) of the Prohibition Act constituted an interference with his right to freedom of expression. Having regard to its above findings under Article 7 of the Convention, the Court finds that section 3a (2) of the Prohibition Act formed a sufficiently precise legal basis for the interference at issue, which was therefore “prescribed by law”.

As to both, the legitimate aim and the necessity of the interference, the Court refers to previous case-law, in which it was held that “the prohibition against activities involving the expression of national socialist ideas is lawful in Austria and, in view of the historical past forming the immediate background of the Convention itself, can be justified as being necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime. It is therefore covered by Article 10 para. 2 of the Convention” (see no. 12774/87, quoted above).

The Court also refers to Article 17 of the Convention which reads as follows:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

Article 17 covers essentially those rights of the Convention which will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention. In particular the European Commission of Human Rights has found in several similar cases that the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in a sense contrary to Article 17 (see *mutatis mutandis* the *Lawless v. Ireland* judgment of 1 July 1961 (*merits*), Series A no. 3, pp. 45-46, § 7, and the *United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, p. 27, § 60; see also no. 12194/86, Dec. 12.5.88, D.R. 56, p. 205; no. 21128/92, Dec. 11.1.95, D.R. 80, p. 94).

As regards section 3a (2) of the Prohibition Act, under which the applicant was convicted, the Court notes that it prohibits the founding or leading of groups which aim at undermining public order or the autonomy or independence of the Austrian Republic through its members’ activities inspired by National Socialist ideas. The applicant was actually found guilty of having held a leading position within such a group. National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in Article 17 of the Convention. In these circumstances, the Court concludes that it derives from Article 17 that the applicant’s conviction was necessary in a democratic society within the meaning of the second paragraph of Article 10.

In follows that this part of the application has to be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle
Registrar

Elisabeth Palm
President