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

THIRD SECTION

**CASE OF ASAN RUSHITI v. AUSTRIA**

(Application no. 28389/95)

JUDGMENT

STRASBOURG

21 March 2000

**FINAL**

*21/06/2000*

**In the case of ASAN RUSHITI v. AUSTRIA**,

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

Sir Nicolas BRATZA, *President*,
Mr J.-P. COSTA,
Mr P. KŪRIS,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 15 December 1998 and 7 March 2000;

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

# PROCEDURE

1. The case originated in an application (no. 28389/95) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 by Mr Asan RUSHITI ("the applicant"), a national of the Former Yugoslav Republic of Macedonia on 5 July 1995. The applicant alleged violations of Article 6 §§ 1 and 2 of the Convention in proceedings concerning his compensation claim for detention on remand.

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

3. Following the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 2 thereof, the application falls to be examined by the Court.

4. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber constituted within the Section included *ex officio* Mr W. Fuhrmann, the judge elected in respect of Austria (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Sir Nicolas Bratza, the President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr J.-P. Costa, Mr P. Kūris, Mr K. Jungwiert, Mrs H.S. Greve and Mr K. Traja (Rule 26 (1) (b)).

5. On 15 December 1998, the Chamber declared the application partly admissible.

6. After consulting the Agent of the Government and the applicant's lawyer, the Chamber decided that it was not necessary to hold a hearing.

# AS TO THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. On 1 April 1993 the Graz Regional Criminal Court *(Landesgericht für Strafsachen*) took the applicant into detention on remand (*Untersuchungs-haft*) on charges of attempted murder. He was suspected of having, together with an accomplice, tried to kill M.R. in that his accomplice attacked M.R. with a knife, while the applicant prevented him from fleeing. In these and the following proceedings the applicant was represented by counsel.

8. On 1 September 1993 the Graz Regional Criminal Court, sitting as an Assize Court (*Geschwornengericht*), acquitted the applicant. The jury answered the main question as to attempted murder and the alternative question as to aggravated assault with seven votes "no" to one vote "yes". According to the record of its deliberations (*Niederschrift*), the jury had answered both questions in the negative as "the evidentiary basis was insufficient". Following his acquittal, the applicant was released.

9. On 2 September 1993 the applicant, relying on the Compensation (Criminal Proceedings) Act 1969 (*Strafrechtliches Entschädigungsgesetz* 1969, hereinafter "the 1969 Act"), filed a compensation claim relating to his detention on remand.

10. On 25 November 1993, the Graz Regional Criminal Court, after a first decision had been quashed on appeal, dismissed the applicant's compensation claim. The court was sitting in camera.

11. The court noted that it had heard the applicant on 12 November 1993. It also noted the submissions of the Public Prosecutor's Office of 16 September 1993, proposing that the compensation claim be dismissed. The court, referring to section 2 (1) (b) of the 1969 Act, found that there had been a reasonable suspicion against the applicant, which had not been dissipated, particularly in view of the statement made by the victim at the hearing of 1 September 1993, which was not entirely without credibility.

12. On 3 December 1993 the applicant filed an appeal. He submitted in particular that the Regional Court's reasoning violated the presumption of innocence guaranteed by Article 6 § 2 of the Convention. For the same reason, section 2 (1) (b) of the 1969 Act was unconstitutional. It put the onus of proof as regards the dissipation of the suspicion on the person claiming compensation, even if that person had been acquitted. Further, the applicant claimed that Article 6 of the Convention applied to the

compensation proceedings at issue, as they related to a pecuniary claim. He was, thus, entitled to a public hearing and a public pronouncement of the decisions. As there had not been a public hearing at first instance, he requested that such a hearing be held before the court of appeal.

13. On 30 December 1993 the Graz Court of Appeal (*Oberlandesgerich*) adjourned the proceedings and requested the Constitutional Court (*Verfassungsgerichtshof*) to give a ruling that section 2 (1) (b) of the 1969 Act was unconstitutional.

14. On 29 September 1994 the Constitutional Court dismissed the request of the Graz Court of Appeal (see below, § 19).

15. On 15 December 1994 the Graz Court of Appeal, sitting in camera, dismissed the applicant's appeal.

The court, referring to the decision of the Constitutional Court, found that in order to determine whether the suspicion against the applicant had been dissipated it was not entitled to examine the statements of the witnesses heard or other results of the taking of evidence in the criminal proceedings, but had to limit itself to the reasons which the jury gave for its finding. The court also referred to case-law according to which the suspicion was only dissipated if either the claimant's innocence had been proven, or if all arguments supporting the suspicion against him had been refuted. An acquittal for lack of evidence did not give an entitlement to compensation unless the innocence of the person concerned had at least become probable. Applying these principles to the facts of the case the court continued as follows:

> "It can be concluded here - from the above-mentioned questions which were put to the jury and from the record of that jury's deliberations - that both the main and the alternative question were answered with seven 'no' votes and one 'yes' vote and that seven jurors therefore cast a 'no' vote in response to the main and the alternative question 'because the evidence was insufficient'. This means that on the one hand one juror in any case found the applicant guilty, whereas on the other hand the other jurors answered the questions addressed to them in the negative only because they considered the evidence insufficient, in other words, they were of the opinion that the evidence did not suffice to find Asan Rushiti guilty of the charges brought against him. By no means can one draw the conclusion that, as a result of these considerations, the suspicion has been dispelled or Rushiti's innocence has at least become probable!"

It concluded that the suspicion against the applicant had not been dissipated.

16. This decision was served on the applicant's counsel on 5 January 1995.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The relevant provisions of the Compensation (Criminal Proceedings) Act 1969 read as follows:

**Section 2 (1)(b)**

"(1) A right to compensation arises:...

(b) where the injured party has been placed in detention or remanded in custody by a domestic court on suspicion of having committed an offence making him liable to criminal prosecution in Austria … and is subsequently acquitted of the alleged offence or otherwise freed from prosecution and the suspicion that he committed the offence has been dispelled or prosecution is excluded on other grounds, in so far as these grounds existed when he was arrested; ..."

**Section 6**

"... (2) A court which acquits a person or otherwise frees him from prosecution … (section 2 (1) (b) or (c)) must decide either of its own motion or at the request of the individual in question or the public prosecutor's office whether the conditions of compensation under section 2 (1) (b) or (c), (2) and (3) have been satisfied or whether there is a ground for refusal under section 3 ... If the investigating judge decides to discontinue the proceedings, the Review Division concerned shall rule.

(3) Before ruling, the court shall hear the detained or convicted person and gather the evidence necessary for its decision where this has not already been adduced in the criminal proceedings ...

(4) Once the judgment rendered in the criminal proceedings has become final, the decision, which need not be made public, must, as part of the proceedings provided for in paragraph 2, be served on the detained or convicted person personally and on the public prosecutor ...

(5) The detained or convicted person and the public prosecutor may appeal against the decision to a higher court within two weeks.

(6) The court with jurisdiction to rule on the appeal shall order the criminal court of first instance to carry out further investigations if that is necessary for a decision. If the court which has to rule is the court of first instance, the investigations shall be carried out by the investigating judge.

(7) Once the decision has become final, it is binding on the courts in subsequent proceedings."

18. As a general rule, there is no public hearing in the Court of Appeal. The Court of Appeal rules after sitting in private.

19. In its judgment of 29 September 1994 (*VfSlg 13879*) the Constitutional Court dismissed the application filed by the Graz Court of Appeal to have section 2 (1) (b) of the 1969 Act annulled as being unconstitutional. It found that section 2 (1) (b) as such did not violate Article 6 § 2 of the Convention which, under Austrian law, has the force of constitutional law. In the light of the Sekanina v. Austria case (judgment of 25 August 1993, Series A no. 266-A), it held that it was not the refusal of a

claim for compensation which was contrary to the Convention, but the re-examination of the question of guilt after a final acquittal. In the Constitutional Court's view only the separate re-assessment of evidence on the basis of the contents of the whole court file was likely to infringe the presumption of innocence. Nevertheless, the Constitutional Court observed that it would be desirable to amend section 2 (1) (b) of the 1969 Act in order to clarify the law.

# AS TO THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant complained about the lack of a public hearing and the lack of any public pronouncement of the decisions in the proceedings relating to his compensation claim for detention on remand. He relied on Article 6 § 1 of the Convention which provides:

> " In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal ... Judgment shall be pronounced publicly ..."

21. The Government, having regard to the Court's judgments of 24 November 1997 in the cases of Szücs and Werner v. Austria (*Reports of Judgments and Decisions* 1997-VII) accepted the merits of these complaints.

22. The Court recalls that in the cases of Szücs and Werner, it found that Article 6 § 1 of the Convention applied to the proceedings under the 1969 Act, as they involved a determination of civil rights and obligations and that both the lack of a public hearing in these proceedings and the failure to deliver judgments publicly constituted violations of Article 6 § 1 (see the Szücs judgment, cited above, pp. 2479-80, §§ 33-38, and pp. 2481-82, §§ 43-48; Werner judgment, cited above, pp. 2507-09, §§ 35-40 and pp. 2510-13, §§ 45-60).

23. The Court finds that there is nothing to distinguish the present case from the Szücs and Werner judgments. It, therefore, concludes that in the proceedings complained of there have been violations of Article 6 § 1 of the Convention on account of the lack of a public hearing and on account of the lack of any public delivery of the domestic decisions.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

24. The applicant complained that the reasoning of the Graz Court of Appeal, dismissing his compensation claim on the ground that the suspicion against him had not been dissipated, violated the presumption of innocence laid down in Article 6 § 2 of the Convention, which is worded as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

25. The applicant maintained that, once he had been finally acquitted, it could no longer be held against him if the suspicion had not been dissipated. Further, he emphasised that the Constitutional Court in its decision of 29 September 1994 (see § 19 above) had stated that an amendment to section 2 (1) (b) of the 1969 Act would be desirable.

26. The Government contended that the present case had to be distinguished from the Sekanina v. Austria case (judgment of 25 August 1993, Series A no. 266-A). They argued that what was decisive in the Sekanina case, was the fact that the courts examined the question whether the suspicion against the accused had been dissipated on the basis of the file, thereby replacing the jury's evaluation of the evidence. Thus, Article 6 § 2 only prohibited a court deciding on a compensation claim for detention on remand from undertaking a new assessment of the claimant's guilt on the basis of the file, while it was permissible to rely on the verdict of the jury and the reasons contained in the record of the jury's deliberations. In conclusion the Government submitted that, in the present case, the Graz Court of Appeal no more than repeated the reasons given in the record of the jury's deliberations. They finally pointed out that the above view was also shared by the Austrian Constitutional Court in its judgment of 29 September 1994 on the constitutionality of section 2 (1) (b) of the 1969 Act.

27. The Court recalls that the applicant can rely on Article 6 § 2 of the Convention, irrespective of the fact that the contested decision was given after his acquittal had become final, as Austrian legislation and practice link the two questions - the criminal responsibility of the accused and the right to compensation - to such a degree that the decisions on the latter issue can be regarded as a consequence and, to some extent, the concomitant of the decision on the former (see the Sekanina judgment, cited above, p. 13, § 22).

28. As to the merits of the complaint, the Court recalls its case-law on the interpretation of the presumption of innocence in comparable cases relating to compensation proceedings for detention on remand. In the Englert and Nölckenbockhoff cases, the Court found that, following the discontinuation of criminal proceedings, statements which described a state of suspicion - as opposed to statements which amount to a determination of

the accused's guilt - were compatible with the presumption of innocence (see the Englert and Nölckenbockhoff v. Germany judgments of 25 August 1987, Series A no. 123, pp. 54-55, §§37-39, and pp. 79-81, §§ 37-39). In these cases the criminal proceedings were discontinued without a formal acquittal. In the subsequent Sekanina case, the Court found that "the voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final" (see the Sekanina judgment, cited above, p. 15-16, § 30). In that case, Mr. Sekanina was acquitted by a final judgment after a full hearing of his case.

29. It is true, as the Government pointed out, that in the Sekanina case, the Court, *inter alia*, referred to the fact that the courts which had to rule on the compensation claim undertook an assessment of the applicant's guilt on the basis of the contents of the Assize Court file and made affirmations which were not corroborated by the judgment acquitting the applicant or by the record of the jury's deliberations.

30. It is also true that in the present case, the Graz Court of Appeal, which was not the court which acquitted the applicant, did not proceed to a new assessment of the applicant's guilt on the basis of the Assize Court file. However, it first pointed out that one member of the jury had answered the questions with "yes" and had, thus, in any case found the applicant guilty. Further, having quoted the record of the jury's deliberations which stated merely that "the evidence was insufficient", the court concluded that the jury had found that "the evidence did not suffice to find Asan Rushiti guilty ... By no means can one draw the conclusion that, as a result of these considerations, the suspicion has been dispelled or Rushiti's innocence has at least become probable!" Having regard to this line of reasoning, the Court cannot subscribe to the Government's argument that the affirmations made by the Graz Court of Appeal were covered by the reasons given in the record of the jury's deliberations.

31. In any case, the Court is not convinced by the Government's principal argument, namely that a voicing of suspicions is acceptable under Article 6 § 2 if those suspicions have already been expressed in the reasons for the acquittal. The Court finds that this is an artificial interpretation of the Sekanina judgment, which would moreover not be in line with the general aim of the presumption of innocence which is to protect the accused against any judicial decision or other statements by State officials amounting to an assessment of the applicant's guilt without him having previously been proved guilty according to law (see the Allenet de Ribemont v. France judgment of 10 February 1995, Series A no. 308, p. 16, § 35, with further references). The Court cannot but affirm the general rule stated in the Sekanina judgment that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible. The

Court, thus, considers that once an acquittal has become final - be it an acquittal giving the accused the benefit of the doubt in accordance with Article 6 § 2 - the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence.

32. In the present case, the Graz Court of Appeal made statements in the compensation proceedings following the applicant's final acquittal which expressed that there was a continuing suspicion against him and, thus, cast doubt on his innocence. Accordingly, there has been a violation of Article 6 § 2 of the Convention.

## 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 a total of 200,775 Austrian schillings (ATS) in respect of pecuniary damages, in particular on account of a loss of earnings during his detention on remand and the ensuing need to give up his apartment. He also sought ATS 132,500 in respect of non-pecuniary damages resulting from his detention. The Government did not comment on these claims.

35. The Court notes that there is no causal link between the breaches found and the alleged pecuniary damage.

36. As to non-pecuniary damage, the Court considers it sufficiently compensated by the finding of violations of Article 6 §§ 1 and 2.

### B. Costs and expenses

37. The applicant claimed ATS 61,318.80 for the costs and expenses incurred in the proceedings before the Convention organs. The Government did not comment on this claim.

38. The Court, noting that the applicant did not have the benefit of legal aid in these proceedings, finds the claim reasonable and, therefore, awards it in full.

### C. Default interest

39. 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. *Holds* that there have been violations of Article 6 § 1 of the Convention on account of the lack of a public hearing in the proceedings concerning the applicant's compensation claim for detention on remand and on account of the failure to pronounce the judgments in these proceedings publicly;

2. *Holds* that there has been a violation of Article 6 § 2 of the Convention;

3. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, 61,318 (sixty-one thousand three hundred and eighteen) Austrian schillings and 80 (eighty) groschen in respect of 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;

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

Done in English, and notified in writing on 21 March 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| S. Dollé | N. Bratza |
| Registrar | President |