CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

application no. 34311/96
by Adolf HUBNER
against Austria

The European Court of Human Rights (Third Section) sitting on 31 August 1999 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J.-P. Costa,
Mr L. Loucaides,
Mrs F. Tulkens,
Mr K. Jungwiert,
Mrs H. Greve,
Mr K. Traja, *Judges*,
Mr P. Kūris, *Substitute Judges*,

with Mrs S. Dollé, *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 6 November 1996 by Adolf Hubner against Austria and registered on 19 December 1996 under file no. 34311/96;

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 1943 and living in Vienna.

He is represented before the Court by Mr S. Holter, a lawyer practising in Grieskirchen.

A. Particular circumstances of the case

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

16 June 1994 the Grieskirchen district authority (*Bezirkshauptmannschaft*) issued a "sentence order" (*Straferkenntnis*) imposing on the applicant, as manager of the F company, fines for five administrative offences (*Verwaltungsübertretungen*) under section 31(2)(k) and (p) of the Industrial Safety Act (*Arbeitnehmerschutzgesetz*), in conjunction with further provisions of the Industrial Safety Act, as well as other industrial safety regulations (*Allgemeine Arbeitnehmerschutzverordnung; Allgemeine Dienstnehmerschutzverordnung*) and the Code of Administrative Offences (*Verwaltungsstrafgesetz*). Having regard to the results of an inspection by the Wels Works Inspection (*Arbeitsinspektorat*), it found that

(1) no appointment had been made of a person responsible for security matters (*Sicherheitsvertrauensperson*) or a deputy, although the F. company had more than 50 employees;

(2) there was not the requisite number of employees who could prove that they had been sufficiently trained in first aid;

(3) two emergency exits were defective and could not be used;

(4) a gate was defective and did not close safely; and

(5) three cranes had not been regularly checked by the Works Inspection.

The authority imposed fines amounting to (1) ATS 5,000 with two days' imprisonment in default; (2) ATS 7,000 with three days' imprisonment in default; (3) and (4) ATS 10,000 with four days' imprisonment in default for each offence; and (5) ATS 7,000 with three days' imprisonment in default. In these and the following proceedings the applicant was assisted by counsel.

On 16 November 1995 the Upper Austria Independent Administrative Tribunal (*Unabhängiger Verwaltungssenat*), following two days of hearings, dismissed the applicant's appeal.

In its decision, the Tribunal mentioned that it had consulted the administrative files which sufficiently indicated the relevant facts. However, upon the applicant's express request, it had ordered an oral hearing and the taking of evidence from two witnesses named by him. Neither the applicant, nor the witnesses K and N, who had been summoned at the F. company's address, had appeared at the two day court hearing. The applicant's counsel had explained the applicant's absence with his workload, and the absence of the witness K with his illness although no medical certificates were presented. Counsel had further stated that the

witness N could no longer be reached at the F company's address without indicating any new address, contrary to his undertaking in court.

As regards the legal assessment, the Tribunal considered that the objective facts could be established from the Works Inspection report, and were not challenged in the applicant's appeal except for the offence of failing to appoint a person responsible for security matters or a deputy. In the latter respect, the Tribunal, having regard to the material before it, considered that the applicant's statements were untrue. As regards the applicant's guilt, the Tribunal, referring to section 5(1) of the Code of Administrative Offences, found that, in his appeal submissions, the applicant had failed to show that no fault lay with him for the contravention of the provisions of administrative law. If he had shown the necessary care in complying with industrial safety rules and an earlier report of the Works Inspection on various shortcomings, the facts constituting the offences would not have occurred.

On 3 January 1996 the applicant lodged a complaint with the Administrative Court (*Verwaltungsgerichtshof*).

On 29 March 1996 the Administrative Court quashed the decision of 16 November 1995 regarding the conviction on the first offence as being unlawful due to a violation of procedural rules. In this respect, the Administrative Court found that the Administrative Tribunal had failed to hear the witness K, as requested by the applicant, on the question whether or not the applicant had appointed persons responsible for security matters. This witness had been cited to give evidence on a relevant issue. The witness' absence due to health reasons, albeit without medical certificates, had not been sufficient to discharge the Tribunal of its duty to ensure and, if necessary, enforce the witness' presence and testimony. Referring to section 33a of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), the court declined to deal with the remainder of the applicant's complaints. The decision was served on 13 May 1996.

In the resumed proceedings, on 14 October 1996, the Independent Administrative Tribunal again dismissed the applicant's appeal and confirmed the administrative fine on the first offence. As to the taking of evidence, the Tribunal noted that it had scheduled two hearings and summoned the witness K, who had not been able to attend the hearings for health reasons and who had subsequently died. Thereupon, a further hearing had been fixed and the witness N had been heard. Having regard to the statements made by N, the Tribunal found that no-one had been appointed to handle security matters at the company.

B. Relevant domestic law

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. According to Articles 129a and 129b, their members are lawyers, appointed by the Regional Government for a term of office of at least six years. They are independent and must not receive instructions. They can only be dismissed from office upon a decision of the Independent Administrative Panel itself. The Upper Austria Regional Act on the Independent Administrative Panel (*Gesetz über den Unabhängigen Verwaltungssenat des Landes Oberösterreich*) repeats to a large extent the provisions of the Federal Constitution.

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

Section 33a of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), as in force from 1 January 1991, reads as follows:

> "The Administrative Court may decline to deal with a complaint against a decision of an Independent Administrative Panel in an administrative criminal case, if no prison sentence or a fine exceeding AS 10,000 has been imposed and the Administrative Court's decision would not involve the determination of a legal question of fundamental importance. A legal question of fundamental importance is involved in particular if the challenged decision of the Independent Administrative Panel is at variance with the Administrative Court's case-law, if no such case-law exists or if the legal questions at issue have not been answered uniformly in the Administrative Court's case-law."

By section 42(2) of that Act,

> "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."

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)).

COMPLAINTS

1. The applicant complains that the Administrative Court's refusal to deal with part of his complaint violated Article 2 of Protocol No. 7. He considers that the distinction between the offence under point (1) of the sentence order, as confirmed in the decision of the Independent Administrative Tribunal, and the other offences was arbitrary.

2. The applicant further complains under Article 6 §§ 1, 2 and 3(d) of the Convention about the alleged unfairness of the administrative criminal proceedings against him. He considers that the fact that he could not question K as a witness not only affected the proceedings as far as the first offence was concerned, but also rendered the proceedings regarding the other offences unfair.

THE LAW

1. The applicant complains that the Administrative Court's refusal to deal with part of his complaint violated Article 2 of Protocol No. 7 which, insofar as relevant, reads as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

The Court, having regard to the nature of the applicant's offences of failing to comply with specific industrial safety regulations, their qualification under domestic law as administrative criminal offences and the severity of the punishments involved, finds that the applicant was convicted of criminal offences within the meaning of Article 2 of Protocol No. 7 (see, *mutatis mutandis*, the Öztürk v. Germany judgment of 21 February 1984, Series A no. 73, p. 18, § 50; the Gradinger v. Austria judgment of 23 October 1995, Series A no. 328-C, p. 61, §§ 35-36).

The Court observes that the Grieskirchen district authority cannot be considered to have acted as a tribunal within the meaning of Article 6 § 1 of the Convention (see the above-mentioned Gradinger judgment, p. 63, § 42, and the Schmautzer v. Austria judgment of 23 October 1995, Series A no. 328-A, p. 15, § 34). Consequently, it was not a tribunal for the purpose of Article 2 of Protocol No. 7.

However, having regard to the criteria developed in its case-law for the qualification of tribunals under Article 6 § 1 of the Convention and the relevant domestic provisions on the institution and powers of Independent Administrative Tribunals, the Court finds that the Upper Austria Independent Administrative Tribunal has to be regarded as a tribunal within the meaning of Article 6 of the Convention and Article 2 § 1 of Protocol No. 7 (see, *mutatis mutandis*, the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 39, § 95; the Sramek v. Austria judgment of 22 October 1984, Series A no. 84, pp. 17-18, §§ 36-38; the Ettl v. Austria judgment of 23 April 1987, Series A no. 117, pp. 17-19, §§ 34-41). Article 2 of Protocol No. 7 thus applies to the applicant's convictions by that tribunal and he was therefore, in principle, entitled to a review of his convictions or sentences by a higher tribunal.

The Court recalls that the reference to the grounds for review being governed by law, in the second sentence of paragraph 1 of Article 2 of Protocol No. 7, shows that the Contracting States have a discretion as to the modalities for the exercise of the right to review. Thus, different rules govern review by a higher tribunal in the various Member States of the Council of Europe. In some Member States a person wishing to appeal to the highest tribunal must apply for leave to appeal. Such a right to apply for leave to appeal to a higher court can in itself be regarded as a review within the meaning of Article 2 of Protocol No. 7

(see Eur. Commission HR, No. 18066/91, Dec. 6.4.94, D.R. 77, p. 37; No. 20087/92, Dec. 26.10.95, D.R. 83, p. 5).

Decisions given by the Administrative Court pursuant to section 33a of the Administrative Court Act may be equated to decisions given on applications for leave to appeal (see Eur. Commission HR, No. 26808/95, Dec. 16.1.96, unpublished).

In the present case the Administrative Court, which had the competence to review the Independent Administrative Tribunal's decision of 16 November 1995, decided pursuant to section 33a of the Administrative Court Act not to deal with part of the applicant's complaint which concerned several different points. The applicant's submissions do not disclose any arbitrary interpretation or application of the relevant legislation in this respect.

In these circumstances the Court finds that there is no appearance of a violation of the applicant's right under Article 2 of Protocol No. 7 to a review of his conviction or sentence by a higher tribunal.

This part of the application is therefore manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

2. The applicant further complains under Article 6 §§ 1 and 3(d) of the Convention about the alleged unfairness of the administrative criminal proceedings against him. He also refers to Article 6 § 2.

Article 6, as far as relevant, provides as follows:

> "1. In the determination … of any criminal charge against him, everyone is entitled to a fair … hearing … by [a] … tribunal …
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> …
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; … ."

It seems appropriate in the instant case to look at the applicants' complaints from the points of view of paragraphs 1, 2 and 3 of Article 6 taken together, especially as the guarantees in paragraphs 2 and 3 represent aspects of the concept of a fair trial contained in paragraph 1 (see, *inter alia*, the Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, § 29).

The Court refers to its above findings that the Independent Administrative Tribunal qualified as a tribunal within the meaning of the Convention.

As regards the applicant's complaints about the Tribunal's taking of evidence and the Administrative Court's decision only to entertain part of his complaint, the Court recalls that, as a general rule, it is for the national courts to assess the evidence before them as well as the

relevance of the evidence which defendants seek to adduce (see the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33).

In the present case, the Upper Austria Independent Administrative Tribunal, in the first set of proceedings before it, did not hear the witnesses K and N, as requested by the applicant. K had not appeared at the hearings for health reasons, although no medical certificates had been produced. N was not heard because, as the applicant's counsel initially stated, N could no longer be contacted at the company's address. Counsel subsequently failed to indicate N's address, contrary to his undertaking to the court. In its assessment, the Tribunal considered that the objective facts could be established from the Works Inspection report and were not challenged in the applicant's appeal, except for the offence of failing to appoint a person responsible for security matters or a deputy.

In the latter respect, the decision of the Tribunal was quashed by the Administrative Court for not having heard K. In the resumed proceedings, the witness K could not be heard for health reasons and subsequently died, but the witness N was questioned on the relevant matters concerning the first offence.

In the Court's opinion, the applicant's submissions do not disclose any appearance of unfairness of the proceedings regarding his conviction on the first offence.

In the applicant's submission, the fairness of the proceedings would have also required a hearing of the witness K regarding the other offences held against him. The Court observes that the Tribunal's initial decision to summon the witness concerned is, in itself, not decisive as to the relevance of the evidence which might have been obtained from that person concerning all points before it. The Court notes that the applicant, in his appeal to the Independent Administrative Tribunal, had only challenged the objective facts regarding the first offence. His appeal submissions regarding the other offences concerned the question of whether he had shown the necessary care, and the Tribunal did not regard them as conclusive. In these circumstances, the Administrative Court, in its decision of 29 March 1996, considered that the evidence of the witness K was only relevant to the first offence.

Considering the course of the administrative criminal proceedings as a whole, the Court finds no indication that the rights of the defence were restricted or that there were other circumstances rendering the proceedings against the applicant unfair. Moreover, there is no evidence which might indicate a breach of the presumption of innocence.

Consequently, there is no appearance of a breach of the applicant's rights under Article 6 §§ 1, 2 and 3. It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

S. DolléN. Bratza
Registrar President