

D. v. AUSTRIA

AS TO THE ADMISSIBILITY OF

Application No. 16410/90
by K. D.
against Austria

The European Commission of Human Rights sitting in private on 31 August 1992, the following members being present:

MM. C. A. NØRGAARD, President
J. A. FROWEIN
E. BUSUTTIL
G. JÖRUNDSSON
A. S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C. L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M. P. PELLONPÄÄ
B. MARXER

Mr. H. C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 17 January 1990 by K. D. against Austria and registered on 6 April 1990 under file No. 16410/90;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts, as they have been submitted by the parties, may be summarised as follows:

The applicant, an Austrian citizen born in 1937, resides in Vienna. He is represented by Mr. W. Strigl, a lawyer practising in Vienna.

A. Particular circumstances of the case

In 1989 criminal proceedings were instituted against the applicant, a judge, on the suspicion of in particular having aided Mr. P. after the fact (Begünstigung). Mr. P. was charged with grave fraud (schwerer Betrug) and dangerous use of explosives (Gefährdung durch Sprengmittel) and had fled from Austria.

On 18 May 1989 the Investigating Judge at the Vienna Regional Court (Landesgericht für Strafsachen) ordered the secret surveillance of the applicant's telephones for a period of two weeks. The Investigating Judge assumed that the applicant might have telephone

D. v. AUSTRIA

contacts with Mr. P. or other persons involved in the case. This order was based on S. 149 a para. 1 of the Code of Criminal Procedure (Strafprozeßordnung).

On 24 May 1989 the Judges' Chamber (Ratskammer) at the Vienna Regional Court approved the above surveillance order.

During the relevant period a number of conversations of the applicant, including conversations with his defence counsel Mr. Strigl, were recorded on tapes and subsequently transcribed. The police entrusted with this operation included some comments in the transcript and appended a report.

On 26 June 1989 the applicant was orally informed by the Investigating Judge of the secret surveillance.

On 28 June 1989 the applicant requested the Investigating Judge to destroy these records (tapes and transcripts) together with the annexed police report, and not to take them to the criminal file.

On 17 July 1989 the Investigating Judge allowed this application in so far as the records concerned conversations of a purely private nature. The erasure of other records, including those concerning the applicant's conversations with his legal defence counsel, was refused.

On 21 July 1989 the records of the intercepted telephone conversations were transmitted to the applicant.

On 26 July 1989 the Judges' Chamber at the Vienna Regional Court dismissed the applicant's complaint about the decision of 17 July 1989. The Judges' Chamber considered that the contents of the records were relevant to the criminal proceedings against the applicant on the ground that they dealt with facts of the investigation, revealed possible manipulations of evidence and also contacts with third persons which might lead to the institution of further criminal proceedings. The fact that in some conversations the applicant's correspondent had been his defence counsel was regarded as irrelevant under Article 6 of the Convention because the secret surveillance had taken place at the applicant's address and not at that of the defence counsel. Moreover, both had expected a secret surveillance.

On 1 September 1989 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's complaint about the surveillance of his telephones. The Court of Appeal considered in particular that the surveillance was justified under S. 149 a para. 1 sub-paras. 1 and 2 of the Code of Criminal Procedure, and could not be objected to under constitutional law. It therefore refused to seize the Constitutional Court (Verfassungsgerichtshof).

Following the communication of the present application to the Austrian Government, the Attorney General's Office (Generalprokuratur) lodged a plea of nullity for safeguarding the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) against the above decisions.

On 23 April 1991 the Supreme Court (Oberster Gerichtshof) allowed the plea of nullity and quashed the decisions of the Investigating Judge of 17 July 1989 and of the Judges' Chamber of 26 July 1989. The Investigating Judge was instructed to destroy the records concerning the telephone conversations with the applicant's counsel Mr. Strigl.

The Supreme Court, referring to the protection of the secrecy of telecommunications under the Convention and Austrian law, considered in particular that defence counsel's right under S. 152 para. 1 (2) of the Code of Criminal Procedure to refuse testimony concerning any information given to him by the defendant should not be obstructed. The mere possibility of intercepting telephone conversations with defence counsel could not render secret surveillance as such unlawful. However, the preservation of recorded conversations with defence

D. v. AUSTRIA

counsel infringed the right to a fair trial, as the rights of defence outweighed the public interest in the investigation and prosecution of criminal offences. The destruction of these records should have been ordered in accordance with S. 149 b para. 2 of the Code of Criminal Procedure, as they could not be used as pieces of evidence.

On 4 June 1991 the Vienna Regional Court ordered the destruction of all records, and copies thereof, concerning the applicant's telephone conversations with Mr. Strigl.

On the occasion of consulting the files, the applicant's defence counsel subsequently noticed that some records concerning telephone calls of the applicant with him and with assisting counsel still had not been destroyed.

On 16 December 1991 the Vienna Regional Court, upon the applicant's requests of 23 July and 11 October 1991, ordered the destruction of these specified records, except one concerning the applicant's conversation with his daughter about counsel. The Regional Court referred to the Supreme Court's judgment of 23 April 1991, and considered that similar considerations applied to the conversations with assisting counsel. However, a conversation about counsel did not enjoy such protection.

It appears that in April 1992 the applicant's defence counsel learnt that copies of the applicant's file had been included in the files concerning criminal proceedings against Mr. G. On 13 May 1992 the applicant, assuming that records of his telephone conversations with his counsel had also been copied, requested the Vienna Regional Court to order the destruction of any such copies.

On 3 June 1992 the Vienna Regional Court granted his request.

B. Relevant domestic law

The provisions concerning secret surveillance of telephone conversations are set out in SS. 149 a and 149 b of the Austrian Code of Criminal Procedure (Strafprozeßordnung).

S. 149 a para. 1 provides that the secret surveillance of telecommunications including recording of their content is only admissible if it can be expected that it might lead to clearing up a criminal offence committed with intent and liable to a sanction of more than one year imprisonment, and if (1) the person in possession of the telecommunication installation is himself gravely suspected of that offence; or (2) there are reasons to assume that the person gravely suspected of the offence resides at the address of the person in possession of the telecommunication installation or will contact him through the use of that installation, unless the latter is one of the persons referred to in S. 152 para. 1 sub-para. 2; or (3) the person in possession of the installation declares his express consent.

S. 149 b para. 2 provides that after termination of the secret surveillance the investigating judge shall inform the person in possession of the tapped telecommunication installation and the person suspected of the offence (the accused) of the fact that secret surveillance has taken place. At the same time the person in possession of the telecommunication installation shall be given the opportunity to inspect the records taken. At this inspection the person in possession of the telecommunication installation or the suspected offender (the accused) may request the preservation of the inspected records. If there is no such request the investigating judge shall take only those records to the file which could be relevant in the pending or any imminent criminal proceedings. He shall order the destruction of all records not taken to the file.

S. 152 para. 1 (2), to which S. 149 a refers, states that the

D. v. AUSTRIA

obligation to give evidence shall not apply, inter alia, to counsel as regards confidential information from their clients.

COMPLAINTS

The applicant complains under Articles 6, 8 and 10 of the Convention about the secret surveillance of his telephones and the recording of his telephone conversations as well as the refusal to destroy the relevant records, in particular those concerning conversations with his defence counsel. He submits in particular that these measures could not be justified as being necessary for the prevention of crime, as they had been taken for the purpose of tracing another person suspected of having committed offences who had fled.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 17 January 1990 and registered on 6 April 1990.

On 9 November 1990 the Commission communicated the application to the respondent Government and invited them to submit written observations on its admissibility and merits before 1 February 1991.

On 29 January 1991 the Government informed the Commission of the introduction of the Attorney General's plea of nullity and requested an extension of the above time-limit.

On 2 March 1991 the Commission decided to suspend the time-limit until after the handing-down of the Supreme Court's decision.

On 12 June 1991 the Government submitted further observations and joined the Supreme Court's decision of 23 April 1991. The applicant submitted observations in reply on 24 July, which he supplemented on 5 November 1991. The Government replied thereto on 26 February 1992. Further submissions were received from the applicant on 12 June 1992.

THE LAW

1. The applicant complains under Article 6 paras. 1 and 3 (c), Articles 8 and 10 (Art. 6-1, 6-3-c, 8, 10) of the Convention about the secret surveillance of his telephones and in particular of telephone conversations with his defence lawyers.

2. The Commission finds that the secret surveillance measures complained of fall to be considered under Article 8 in conjunction with Article 6 paras. 1 and 3 (c) (Art. 8+6-1+6-3-c) of the Convention.

The Commission recalls that secret surveillance of telephones constitutes an interference with the right to respect for the private life and the correspondence of the person concerned (cf. Eur. Court H.R., *Klass and Others* judgment of 6 September 1978, Series A no. 28, p. 21, para. 41; *Malone* judgment of 2 August 1984, Series A no. 82, p. 30, para. 64; *Kruslin and Huvig* judgments of 24 April 1990, Series A no. 176, p. 20, para. 26 and p. 52, para. 25, respectively).

3. The Government submit that following the Supreme Court's decision of 23 April 1991 the applicant's rights under the Convention were restored, and request the Commission to declare the application inadmissible.

The applicant maintains his complaint. He submits in particular that the Supreme Court did not as such declare unlawful the secret surveillance of his telephones.

The Commission notes that the secret surveillance of the

D. v. AUSTRIA

applicant's telephone conversations was confirmed by the Austrian courts. In particular, the Supreme Court, in its judgment of 23 April 1991, considered that the mere possibility of intercepting telephone conversations with defence counsel could not render secret surveillance as such unlawful. However, the preservation of recorded conversations with defence counsel was regarded as infringing the right to a fair trial, and the destruction of these records ordered. Following the Supreme Court's judgment and further decisions of the Vienna Regional Court of 4 June and 16 December 1991, and of 3 June 1992, all material relating to the surveillance of the applicant's telephone conversations with counsel was destroyed.

So far as the secret surveillance also covered the applicant's telephone conversations with counsel, and the preservation of records thereof, the Commission considers that, in the course of the domestic proceedings, the Austrian courts acknowledged a breach of the right to a fair trial and ordered destruction of the records concerned (cf. No. 8290/78, Dec. 13.12.79, D.R. 18, p. 176; see also Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, pp. 29-32; paras. 64-70). In these circumstances, the applicant can no longer claim to be a victim of a violation of his rights under the Convention within the meaning of Article 25 para. 1 (Art. 25-1).

4. As regards the remainder of the applicant's complaint about telephone surveillance, there has been an interference with his rights under Article 8 para. 1 (Art. 8-1), which was not remedied by the Supreme Court's decision of 23 April 1991 and the subsequent Austrian court decisions. Such interference constitutes a violation of Article 8 para. 1, if it was not justified under Article 8 para. 2 (Art. 8-1, 8-2).

The surveillance of the applicant's telephone conversations in the course of criminal proceedings against him and others was based on S. 149 a para. 1, the filing of the records on S. 149 b para. 2 of the Austrian Code of Criminal Procedure. The measures were thus in accordance with Austrian law.

Furthermore, the secret surveillance was carried out in order to trace the applicant's accomplice after the fact Mr. P. as well as other persons involved in the case. The measure, therefore, was aimed at the "prevention of crime", one of the legitimate aims under Article 8 para. 2 (Art. 8-2).

As regards the necessity of this secret surveillance in a democratic society, the Commission notes that S. 149 a para. 1 and S. 149 b para. 2 of the Code of Criminal Procedure lay down various limitative conditions and procedural safeguards concerning secret surveillance of telephones. The applicant was suspected of having acted as accessory after serious criminal offences, and of keeping contact with the main suspect. The Commission is satisfied that there were sufficient reasons to order the surveillance of the applicant's telephone conversations. Furthermore, the applicant was informed about the secret surveillance and given the opportunity to consult the transcripts.

In these circumstances, the Commission considers that the secret surveillance of the applicant's telephone conversations was not disproportionate to the legitimate aim pursued. The interference was, therefore, justified as being necessary in a democratic society for the prevention of crime.

5. It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

D. v. AUSTRIA
DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission

President of the Commission

(H. C. Krüger)

(C. A. Nørgaard)