

EGMR Nr. 63207/00 – Urteil vom 24. März 2005 (Rieg v. Österreich)

Recht auf ein faires Strafverfahren: Schweigerecht und Selbstbelastungsfreiheit (Ausmaß des erforderlichen Zwangs; Verletzungen durch Anwendung von Zwang in Strafverfahren oder durch Verwertung von außerhalb eines Strafverfahrens erzwungener Äußerungen; Verwertungsverbot; Offenbarungspflichten des Fahrzeughalters nach Straßenverkehrsrecht; deliktsunabhängige Geltung der Rechte; Sondervotum); Begriff der strafrechtlichen Anklage (zeitlicher und gegenständlicher Anwendungsbereich des fairen Strafverfahrens); redaktioneller Hinweis.

Art. 6 Abs. 1 Satz 1, Abs. 2 EMRK; Art. 1 GG; Art. 2 Abs. 1 GG; Art. 20 Abs. 3 GG; § 136a StPO

Leitsatz des Bearbeiters

Obschon eine Verletzung des Schweigerechts und des Rechts, sich nicht selbst belasten zu müssen, auch infolge der Ausübung von Zwang vor der Einleitung eines Strafverfahrens vorliegen kann, muss – wenn keine Verwertung von erzwungenen Informationen gegen den Betroffenen erfolgt – hierfür ein konkreter und nicht nur hypothetischer Zusammenhang zwischen einer dem Betroffenen auferlegten Informationspflicht (hier: Pflicht des Fahrzeughalters zur Benennung des Fahrers als Beitrag zur Aufklärung eines bereits anonym verfolgten Straßenverkehrsvergehens) und der möglichen späteren Einleitung eines gegen ihn gerichteten Strafverfahrens bestehen (hier mit fünf zu zwei Stimmen verneint).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant was born in 1954 and lives in Laupheim (Germany).
2. On 17 January 1997 at 18.45 p.m. the car of which the applicant is the registered owner was caught in Austria by a radar-trap exceeding the speed limit by 26 km/h.
3. On 12 March 1997 the Dornbirn District Administrative Authority (*Bezirkshauptmannschaft*) ordered the applicant pursuant to section 103 § 2 of the Motor Vehicles Act (*Kraftfahrzeuggesetz*) to disclose within two weeks the full name and address of the person who had been driving her car at the material time on 17 January 1997.
4. On 24 March 1997 the applicant replied that Mr J.S. [first and family name in full], living in Mostar, Bosnia-Herzegovina had been the driver.
5. On 17 April 1997 the Dornbirn District Administrative Authority issued a provisional penal order (*Strafverfügung*) in which it sentenced the applicant under sections 103 § 2 and 134 § 1 of the Motor Vehicles Act to pay a fine of 1,500 Austrian schillings (ATS) with two days' imprisonment in default.
6. The applicant filed an objection against this decision.
7. On 22 September 1997 the District Administrative Authority dismissed the applicant's objection and issued a penal order (*Straferkenntnis*) confirming its previous decision. It found that the applicant had failed to give complete information as requested in the order of 12 March.
8. The applicant appealed on 1 October 1997 submitting in particular that she had replied to the District Administrative Authority's order, but had been unable to find out the exact address of Mr J.S. Further, she claimed that the obligation under section 103 § 2 of the Motor Vehicles Act to disclose the driver of her car violated the presumption of innocence and her right not to incriminate herself. Finally, she pointed out that she was a German national and that German law did not contain a comparable obligation of the registered car owner to disclose who had been driving the car at a specified time.

9. On 26 November 1997 the Vorarlberg Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) dismissed the applicant's appeal. As to the applicant's complaint that the obligation under section 103 § 2 of the Motor Vehicles Act violated the right not to incriminate oneself and the presumption of innocence, it noted that the relevant sentence of that provision had constitutional rank.

10. On 30 December 1997 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). She repeated the complaint as to the alleged violation of her right not to incriminate herself.

11. On 9 June 1998 the Constitutional Court declined to deal with the applicant's complaint for lack of sufficient prospects of success.

12. On 30 June 2000 the Administrative Court (*Verwaltungsgerichtshof*) refused to deal with the applicant's complaint pursuant to section 33a of the Administrative Court Act since the amount of the penalty did not exceed ATS 10,000 and no important legal problem was at stake.

13. The applicant was not prosecuted for exceeding the speed limit.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. Section 103 (2) of the Motor Vehicles Act as amended in 1986 (*Kraftfahrgesetz*) provides as follows:

“The authority may request information as to who had driven a certain motor vehicle identified by the number plate ... at a certain time or had last parked such a motor vehicle ... at a certain place before a certain date. The registered car owner ... must provide such information, which must include the name and address of the person concerned; if he or she is unable to give such information, he/she must name a person who can do so and who will then be under an obligation to inform the authority; the statements made by the person required to give information do not release the authority from its duty to review such statements where this seems appropriate in the circumstances of the case. The requested information is to be provided immediately or, in case of a written request, within two weeks after the request has been served; where such information cannot be provided without keeping pertinent records, such records shall be kept. The authority's right to require such information shall take precedence over the right to refuse to give information.”

15. The ultimate sentence of this provision was enacted as a provision of constitutional rank after the Constitutional Court had, in its judgments of 3 March 1984 and 8 March 1985 quashed previous similar provisions on the ground that they were contrary to Article 90 § 2 of the Federal Constitution which prohibits *inter alia* that a suspect be obliged on pain of a fine to incriminate himself.

16. In its judgment of 29 September 1988 the Constitutional Court found that the first to third sentences of section 103 § 2 of the Motor Vehicles Act as amended in 1986 were, like the previous provisions, contrary to the right not to incriminate oneself which flowed from Article 90 § 2 of the Federal Constitution and from Article 6 of the European Convention of Human Rights but were saved by the ultimate sentence of that provision which had constitutional rank. In reaching that conclusion the Constitutional Court had examined whether the ultimate sentence of section 103 § 2 was contrary to the guiding principles of the constitution, but had found that this was not the case.

17. Section 134 § 1 of the Motor Vehicles Act, in the version in force at the material time, provided that a fine of up to ATS 30,000 could be imposed on a person who violates the regulations of this Act.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

18. The applicant complained about a violation of her right to remain silent and the privilege against self incrimination and the presumption of innocence. She relied on Article 6 §§ 1 and 2 of the Convention which, so far as relevant, read 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.”

19. The applicant argued that, in cases in which the registered car owner has been the driver at the time when the traffic offence has been committed, section 103 § 2 of the Motor Vehicles Act only left two alternatives. Either, he or she admitted to having driven the car and would, consequently, be convicted of the traffic offence. Or, he or she refused to disclose the driver, and would therefore be sentenced under section 103 § 2 of the Motor Vehicles Act, usually to a fine of exactly the amount to which he or she would be liable for the underlying traffic offence.

20. Further, the applicant contested the Government's public policy argument by saying that there were no convincing arguments to show that the public interest in prosecuting traffic offences was bigger than in prosecuting crimes under the Criminal Code, for which there was no obligation to incriminate oneself. Moreover, the example of other member States showed that it was possible to secure the prosecution of traffic offences without resorting to a provision which infringed the privilege against self-incrimination.

21. The Government advanced the same arguments as in the case of *Weh v. Austria* (no. 38544/97, §§ 35-38, 8 April 2004) which are briefly summarised as follows. Referring to the Court's case-law, the Government contended that the right to silence and the privilege against self-incrimination were not absolute (*John Murray v. the United Kingdom*, judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, p. 49, § 45).

22. The Government distinguished the present case from cases in which the Court found a violation of the right to remain silent and the privilege against self-incrimination (in particular *Funke v. France*, judgment of 25 February 1993, Series A no. 256-A, and, as a recent authority, *J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III) in that the applicant's choice was not limited to either remaining silent and having a fine imposed on her or incriminating herself. She remained free to disclose the name and address of a third person as driver of the car or to state that the car had been used without her consent by a person unknown to her.

23. Given the public interest in the prosecution of traffic offences and the minor nature of the fine imposed, section 103 § 2 of the Motor Vehicles Act strikes a fair balance between the public interest and the individual car owner's interest to remain silent and therefore appears proportionate.

24. The Court notes that the applicant relies on Articles 6 §§ 1 and 2. However, the Court considers that the present case is to be examined under Article 6 § 1 alone. It raises the same issue as *Weh v. Austria* (cited above). The applicant, being the registered owner of a car, which was caught speeding, was requested under section 103 § 2 of the Austrian Motor Vehicles Act to disclose the driver. She gave the name of a third person, with an incomplete address and was fined for failure to comply with section 103 § 2.

25. The heart of the applicant's complaint is that her right to remain silent and not to incriminate herself was violated in that she was punished for having refused to give information which may have incriminated her in the context of criminal proceedings for speeding. However, neither at the time when the applicant was requested to disclose the driver of her car nor thereafter were proceedings for speeding conducted against her.

26. In the case of *Weh* (cited above), the Court came to the conclusion that there has been no violation of Article 6 § 1 of the Convention. After having given an overview of its case-law on the issue, it turned to the facts of the case. The essence of its reasoning ran as follows:

“52. Moreover, the present case differs from the group of cases in which persons, against whom criminal proceedings were pending or were at least anticipated, were compelled on pain of a penalty to give potentially incriminating information. In *J.B.* (cited above) mixed tax-evasion and tax-assessment proceedings had already been opened against the applicant when he was requested to provide information on investments made by him. In *Funke* and in *Heaney and McGuinness* (both cited above) criminal proceedings were anticipated, though they had not been formally opened, at the time the respective applicants were required to give potentially incriminating information. In *Funke* the customs authorities had a specific suspicion against the applicant, in *Heaney and McGuinness* the applicants had been arrested on suspicion of terrorist offences.

53. In the present case the proceedings for speeding were conducted against unknown offenders, when the authorities requested the applicant under section 103 § 2 of the Motor Vehicles Act to disclose who had been driving his car on 5 March 1995. There were clearly no proceedings for speeding pending against the applicant and it cannot even be said that they were anticipated as the authorities did not have any element of suspicion against him.

54. There is nothing to show that the applicant was “substantially affected” so as to consider him being “charged” with the offence of speeding within the autonomous meaning of Article 6 § 1 (see *Heaney and McGuinness*, cited above, § 41, with a reference to *Serves*, also cited above, p. 2172, § 42). It was merely in his capacity as the registered car owner that he was required to give information. Moreover, he was only required to state a simple fact – namely who had been the driver of his car – which is not in itself incriminating.

55. In addition, although this is not a decisive element in itself, the Court notes that the applicant did not refuse to give information, but exonerated himself in that he informed the authorities that a third person had been driving at the relevant time. He was punished under section 103 § 2 of the Motor Vehicles Act only on account of the fact that he had given inaccurate information as he had failed to indicate the person's complete address. Neither in the domestic proceedings nor before the Court did he ever allege that he had been the driver of the car at the time of the offence.

56. The Court reiterates that it is not called upon to pronounce on the existence or otherwise of potential violations of the Convention (see *mutatis mutandis*, *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 35, § 90). It considers that, in the present case, the link between the applicant's obligation under section 130 § 2 of the Motor Vehicles Act to disclose the driver of his car and possible criminal proceedings for speeding against him remains remote and hypothetical. However, without a sufficiently concrete link with these criminal proceedings the use of compulsory powers (i.e. the imposition of a fine) to obtain information does not raise an issue with regard to the applicant's right to remain silent and the privilege against self-incrimination.”

27. The Court notes that the parties have not submitted any new argument. It sees nothing to distinguish the present case from the *Weh* case and, therefore, concludes that there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been no violation of Article 6 §1 of the Convention;

Done in English, and notified in writing on 24 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

JOINT DISSENTING OPINION OF JUDGES HAJIYEV AND JEBENS

For the reasons stated below we are not able to share the majority's opinion that there has been no violation of Article 6 § 1 of the Convention:

1. Firstly, it should be noted that the present case raises the same issue as the case *Weh v. Austria* (no. 38544/97, judgment of 8 April 2004). Our opinion is based upon essentially the same reasoning as presented by the minority in that case. It can be summarized in the following way:

2. Even if the applicant was not formally charged with having breached the relevant speed limit statutes, the reality was in our opinion, different. Thus, criminal proceedings for exceeding speed limits would undoubtedly have been initiated against the applicant, if she had admitted to having driven the car. Since this was the situation, the applicant was, in our opinion,

“substantially affected” and therefore “charged” within the autonomous meaning of that expression in Article 6 § 1.

3. Further, the degree of compulsion imposed on the applicant was, in our opinion, at a level that actually destroyed the very essence of the right to remain silent and the privilege against self-incrimination. In this respect we would like to note that the applicant had no other choice than either to break her silence and provide possibly incriminating information or to have a fine or term of imprisonment imposed on her for failure to provide such information. There was therefore no way in which the applicant could have avoided to give full information, and still not be penalized.

4. In this situation, the fact that the applicant was not punished for having exceeded the speed limits, but for having given incomplete information about the alleged driver, is in our opinion, not decisive. The fact that the applicant was given a penalty fine for this, even though she provided the authorities with a full name and a city address of the alleged driver, underscores on the other hand the close connection with a charge against the applicant for having actually been the driver of the car, and thus the person responsible for exceeding the speed limits.

5. In conclusion, we find that there has been a violation of the applicant's right to remain silent and her privilege against self-incrimination. We are fully aware that our opinion in the present case is not in conformity with the *Weh* case, cited above, since a majority of four judges did not find a violation in that case. Our proposal would therefore be that the present case be referred to the Grand Chamber, in accordance with Article 30 of the Convention.

[Redaktioneller Hinweis: Vgl. auch die übersetzte Entscheidung *Weh v. Österreich* {HRRS 2004 Nr. 459}, JR 2005, Heft 10 mit Anmerkung Gaede.]