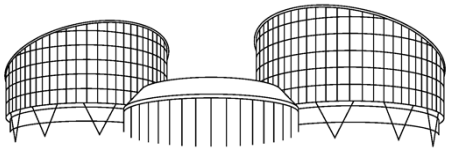

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KINDLHOFER v. AUSTRIA

(Application no. 20962/15)

JUDGMENT

Art 2 P7 • Exception to the right of a review by a higher tribunal • Offence punishable by a fine, or imprisonment in default of its payment, regarded as "minor" in view of procedural safeguards governing enforcement of the latter sanction • Underlying offence not of serious nature, considering the maximum sentence provided for in the law or the amount of fine actually imposed

STRASBOURG

26 October 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kindlhofer v. Austria,

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

Yonko Grozev, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 20962/15) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Manfred Kindlhofer ("the applicant"), on 20 April 2015;

the decision to give notice to the Austrian Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 21 September 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The present case concerns principally the applicant's complaint under Article 2 of Protocol No. 7 to the Convention that he had been deprived of a remedy against the Regional Administrative Court's decision in administrative criminal matters.

THE FACTS

2. The applicant was born in 1963 and lives in Graz. He was represented by Mr R. Frühwirth, a lawyer practising in Graz.

3. The Government were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

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

5. On 20 November 2012 the Styria Regional Police Directorate (*Landespolizeidirektion* – "the LPD") issued a penalty notice against the applicant for breaching section 4(5) of the Road Traffic Act (see paragraph 19 below). It found that he had been driving a car involved in a traffic accident in which only material damage had been caused, and that he

had failed to inform the nearest police station of the accident without undue delay. The LPD issued him with a fine of 200 euros (EUR) plus costs of EUR 20, with four days' imprisonment in default of payment.

6. On 19 December 2012 the applicant lodged an appeal (*Beschwerde*) with the Styria Regional Administrative Court (*Landesverwaltungsgericht*) in which he asserted his innocence, stating that he had consumed alcohol in several bars on the evening in question and had therefore not driven home with the vehicle he had borrowed from his friend, and that he was unable to indicate who else had been driving the vehicle at the time of the accident. He also complained about the LPD's assessment of the evidence.

7. The Regional Administrative Court dismissed the applicant's appeal on 5 February 2014, after holding an oral hearing. It upheld the sanction imposed by the LPD consisting of a fine of EUR 200, plus costs of EUR 40 for the appeal proceedings, and four days' imprisonment in default of payment. It concluded that the LPD had correctly assessed the evidence, which consisted of witness statements, parts of the fender of the car that had caused the accident and had been found at the scene, as well as the applicant's admission that he had driven the car in question earlier that evening. The court did not consider as plausible the applicant's defence that the driver of his friend's car would have had head injuries (which he had not had) since the upper left corner of the windscreen had been cracked. The court refused to take the evidence requested by the applicant, namely a report by a technical expert, as it was apparent that a person sitting in the driver's seat could not have banged his or her head in that precise spot. In the information note as to further remedies (*Rechtsmittelbelehrung*), the court informed the applicant that an appeal to the Supreme Administrative Court (*Verwaltungsgerichtshof*) against its decision was not permitted, pursuant to section 25a(4) of the Administrative Court Act (see paragraph 12 below).

8. On 31 March 2014 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He submitted that section 25a of the Administrative Court Act – which provided that an appeal could not be lodged with the Supreme Administrative Court if the fine imposed was less than EUR 400 – was unconstitutional because it violated Article 2 of Protocol No. 7 to the Convention, as both the penalty range of the underlying provision in the abstract (see paragraphs 14-15 below) and the sanction applied to him included imprisonment in default of payment. Furthermore, there had been a breach of the principle of equality of arms enshrined in Article 6 of the Convention because the authority which had imposed the fine and the competent federal minister could lodge an appeal with the Supreme Administrative Court irrespective of the amount of the fine, while the applicant could not (see paragraph 10 below).

9. On 25 September 2014 the Constitutional Court declined to deal with the applicant's complaint for lack of prospects of success. In so far as the

complaint challenged the constitutionality of section 25a(4) of the Administrative Court Act, the court found that, in the light of its case-law on the issue, there was no indication of a violation, as alleged by the applicant, of a constitutionally guaranteed right or a violation of another right due to the application of an unconstitutional law. The legal issues at stake thus did not require specific constitutional consideration.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Federal Constitution Act

10. Articles 133 and 144 read, in so far as relevant, as follows:

Article 133

"(1) The Supreme Administrative Court shall hear:

1. appeals against the decision of a Regional or Federal Administrative Court on the grounds of illegality;

...

(4) An appeal against the decision of an Administrative Court shall be permitted if the decision depends on the resolution of a question of law of fundamental importance, particularly where the decision at issue deviates from the Supreme Administrative Court's case-law, there is no such case-law or if the question of law to be resolved has not been answered uniformly in the Supreme Administrative Court's case-law. If the subject matter of the decision is a small fine, federal law may provide that an appeal (*Revision*) is inadmissible.

...

(6) The following may appeal against the decision of an Administrative Court on the grounds of illegality:

...

2. the authority whose decision had been the subject of the proceedings before the Administrative Court;

3. the federal minister competent to deal with the legal issues stated in Article 132 § 1 (2);"

Article 144

"(1) The Constitutional Court shall hear complaints against the decision [of an Administrative Court] where the appellant claims that the decision has infringed a constitutionally guaranteed right ...

(2) Up to the time of the hearing the Constitutional Court may, by means of a decision, decline to deal with a complaint if it does not have sufficient prospects of success or if it cannot be expected that the judgment will clarify a question of constitutional law.

...

(5) To the extent that the decision of the Administrative Court concerns the admissibility of the appeal, a complaint pursuant to paragraph (1) is inadmissible."

B. Constitutional Court Act

11. Section 88a(2) of the Constitutional Court Act (Verfassungsgerichtshofgesetz) reads, in so far as relevant, as follows:

"(2) A complaint is not permitted against:

1. findings in accordance with section 25a(1) of the Administrative Court Act; Federal Law Gazette No. 10/1985;"

C. Administrative Court Act

12. Section 25a of the Administrative Court Act (Verwaltungsgerichtshofgesetz) reads, in so far as relevant, as follows:

"(1) The Administrative Court shall state in its decision whether the appeal is permitted pursuant to Article 133(4) of the Federal Constitution Act. The decision shall be briefly substantiated.

...

(4) If in an administrative criminal matter or a financial criminal matter:

1. a fine of up to 750 euros and no prison sentence could be imposed; and

2. a fine of up to 400 euros was imposed in the decision;

an appeal is not permitted."

D. Administrative Offences Act

13. The Administrative Offences Act (*Verwaltungsstrafgesetz*) regulates the general principles governing administrative offences and the procedures to be followed. Sections 10 to 18 specify the sanctions for administrative offences, such as imprisonment (section 12), fines (sections 13 to 15) and confiscation (section 17).

14. Section 16, which deals with imprisonment in default of payment of a fine (*Ersatzfreiheitsstrafe*) reads, in so far as relevant, as follows:

"(1) If a fine is imposed as a sanction, a term of imprisonment in default of payment (*für den Fall der Uneinbringlichkeit*) must be fixed at the same time.

(2) The term of imprisonment in default may not exceed the maximum term of imprisonment stipulated for the administrative offence and, if imprisonment is not provided for as a sanction, may not exceed two weeks. A term of imprisonment in default may not exceed six weeks ..."

15. The relevant parts of section 54b, which deals with the enforcement of fines, read as follows:

"(1) A fine ... shall be paid within two weeks of becoming final. If no payment is received within this period, a further appropriate deadline of no more than two weeks may be set. After the expiry of this time-limit, the sanction of imprisonment shall be enforced. If there is reason to assume that the person sanctioned is not ready to pay or that the fine is irrecoverable by enforcement, it is not necessary to set a further time-limit and the authority shall enforce it immediately or proceed in accordance with subsection (2).

...

(2) If a fine is irrecoverable (*uneinbringlich*) or there is good reason to assume that this is the case, the term of imprisonment corresponding to the unpaid fine shall be enforced. The term of imprisonment shall not be enforced if the outstanding amount of the fine has been paid. This shall be indicated in the notice ordering the serving of the sentence (*Aufforderung zum Strafantritt*).

(3) A person sentenced to a fine and who, for financial reasons, cannot be expected to pay the fine immediately, shall be granted by the authority an appropriate extension or [permission to pay] in instalments ... [Permission to pay] the fine in instalments may only be granted on the condition that all remaining instalments become due immediately if the person fined is in arrears with at least two instalments."

16. The Constitutional Court, in its case-law, specified under which conditions a fine as an administrative sanction could be considered "irrecoverable" (*uneinbringlich*):

"Under section 54b of the Administrative Offences Act, the enforcement of a term of imprisonment in default of payment of an administrative fine in place of the fine imposed is not left to the discretion of the authority. On the contrary, the authority, before enforcing the imprisonment in default, must conduct regular enforcement proceedings to recover the fine or carry out enquiries, the outcome of which must justify the conclusion that there is a high degree of probability that the fine imposed will not be recovered. What is decisive is not the convicted person's willingness to pay, but whether recovery of the fine is actually impossible (*tatsächliche Uneinbringlichkeit*) [see the Constitutional Court's decision B921/89, 26 February 1990, with further references]."

17. According to the Supreme Administrative Court's case-law, enquiries into the financial situation of the convicted person must be recent and comprehensive and take into account the person's specific indications and actual income (see the Supreme Administrative Court's decisions 94/02/0165, 20 May 1994, and 2011/02/0232, 22 February 2013) in order to provide a sufficient basis for concluding that there are objective reasons for assuming that the person cannot pay.

18. The Constitutional Court also found that a notice ordering the serving of the sentence must be served on the convicted person. In the absence of such a notice, which is not a formal decision (*Bescheid*) amenable to appeal, the enforcement of a sentence of imprisonment in default is unlawful and in breach of the right to liberty (see, for example, the Constitutional Court's decisions B175/85, 27 September 1985, and B463/87, 27 November 1987).

E. Road Traffic Act

19. Section 4 of the Road Traffic Act (*Straßenverkehrsordnung*) reads, in so far as relevant, as follows:

> "(1) All persons whose conduct is causally related to a traffic accident shall:
>
> (a) stop immediately if they are driving the vehicle;
>
> (b) if, as a consequence of the traffic accident damage to persons or objects is feared, take all necessary measures to avoid such damage;
>
> (c) participate in the establishment of the facts.
>
> ...
>
> (5) If in a traffic accident only material damage (*Sachschaden*) has been caused, the persons specified in subsection (1) shall inform the nearest police station of the accident without undue delay; this information is not necessary if the persons specified in subsection (1) who have suffered damage to their property have exchanged names and addresses."

20. Section 99(3) reads, in so far as relevant, as follows:

> "(3) An administrative criminal offence (*Verwaltungsübertretung*) has been committed and is punishable by a fine of up to 726 euros [and], in the event that the amount of the fine cannot be recovered (*Uneinbringlichkeit*), with imprisonment of up to two weeks by:
>
> ...
>
> (b) anyone who infringes the provisions of section 4, particularly if he or she ... does not inform the authority of the material damage caused by a traffic accident ..."

II. EXPLANATORY REPORT TO PROTOCOL NO. 7 TO THE CONVENTION

21. The relevant paragraphs of the Explanatory Report to Protocol No. 7 read as follows:

> "17. This article recognises the right of everyone convicted of a criminal offence by a tribunal to have his conviction or sentence reviewed by a higher tribunal. It does not require that in every case he should be entitled to have both his conviction and sentence so reviewed. Thus, for example, if the person convicted has pleaded guilty to the offence charged, the right may be restricted to a review of his sentence. As compared with the wording of the corresponding provisions of the United Nations Covenant (Article 14, paragraph 5), the word 'tribunal' has been added to show clearly that this provision does not concern offences which have been tried by bodies which are not tribunals within the meaning of Article 6 of the Convention.
>
> 18. Different rules govern review by a higher tribunal in the various member States of the Council of Europe. In some countries, such review is in certain cases limited to questions of law, such as the *recours en cassation*. In others, there is a right to appeal against findings of facts as well as on the questions of law. The article leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law.

...

20. Paragraph 2 of the article permits exceptions to this right of review by a higher tribunal:

- for offences of a minor character, as prescribed by law;

...

21. When deciding whether an offence is of a minor character, an important criterion is the question of whether the offence is punishable by imprisonment or not."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant complained that there had been a breach of the principle of equality of arms because he could not appeal against the decision of the Regional Administrative Court to the Supreme Administrative Court, whereas this had been open to the authority having issued the decision in question. He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

23. The Government submitted that the applicant had not complained of an actual breach of the Convention but merely about hypothetical or theoretical possibilities of a violation, because no appeal had been lodged by the competent authority in the present case. Moreover, the ability for the authority which had issued the decision in question or the competent federal minister to lodge an official appeal (*Amtsrevision*) (see paragraph 10 above) regardless of the fine imposed in the proceedings did not constitute a breach of the principle of equality of arms, as the purpose of that specific remedy was to safeguard the uniformity and correctness of the case-law of the Regional Administrative Courts, thereby ensuring legal conformity and uniform interpretation of federal laws in a federally organised State. Lastly, while the authority concerned and the federal minister could lodge an official appeal, only the applicant could lodge a complaint with the Constitutional Court claiming a violation of his constitutionally guaranteed rights or raising concerns under constitutional law about the legal basis for the imposed penalty and the conduct of the criminal proceedings.

24. This was disputed by the applicant. He submitted that the fact that the review of a first-instance court decision by referral to the second instance was only accessible to the administrative authority as the prosecuting authority in administrative criminal proceedings, but not to the accused, had the effect that the authority was in a stronger position than the defendant in the first-instance proceedings. Even though the two parties to the proceedings had the same procedural rights at first instance, only the

prosecution had the ability to complain of procedural defects such as the rejection of a request for evidence, failure to examine a witness and so forth, while an infringement of the accused's procedural rights was of no consequence owing to the inability to lodge an appeal with the Supreme Administrative Court.

25. The applicant further acknowledged that the ability for the competent federal minister to lodge an official appeal with the Supreme Administrative Court served the purpose of ensuring the uniformity and correctness of the case-law and served a legitimate public interest. These considerations were not, however, valid for the prosecuting authority, which was fully entitled to an official appeal and whose power to do so was not limited by law to cases which served to ensure the uniformity and correctness of the case-law.

26. The Court has consistently held in its case-law that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but rather to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention. Accordingly, in order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he or she was "directly affected" by the measure complained of. This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, with further references).

27. In the present case, the Court observes in the first place that in fact only the authority which had issued the decision in question or the federal minister competent to deal with certain legal issues as defined by the domestic legislation (see paragraph 10 above) could bring an official appeal before the Supreme Administrative Court on the grounds of illegality. However, neither the competent federal minister nor the authority which had issued the penalty notice and had been the applicant's opponent in the proceedings before the Regional Administrative Court had actually lodged an official appeal with the Supreme Administrative Court. The applicant argued that the mere existence of the ability to lodge such an official appeal gave the opposing party more weight in the proceedings before the Regional Administrative Court than the accused. However, in the absence of any justification for his argument, the Court cannot see how the mere existence of a remedy could have strengthened the procedural position of the opposing party to the detriment of the applicant in the proceedings before the Regional Administrative Court.

28. Accordingly, the facts of the present case are not such as to allow the applicant to claim to be the victim of a violation of the principle of equality of arms as guaranteed by Article 6 of the Convention. This complaint is thus

incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 7 TO THE CONVENTION

29. The applicant complained that he had been unable to appeal to the Supreme Administrative Court against the decision of the Regional Administrative Court. He relied on Article 2 of Protocol No. 7, which 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.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

A. Admissibility

30. It is common ground between the parties that the proceedings before the Regional Administrative Court against the applicant concerned his conviction for a criminal offence. The Court sees no reason to disagree. Indeed, according to its established case-law, Article 6 § 1 of the Convention applies, under its criminal head, to administrative offences like the one at issue in the present case and the corresponding administrative criminal proceedings under Austrian law (see, *Gradinger v Austria*, 23 October 1995, § 36, Series A no. 328-C, and *Baischer v. Austria*, no. 2381/96, § 22, 20 December 2001). The concept of "criminal offence" in the first sentence of Article 2 of Protocol No. 7 corresponds to that of "criminal charge" in Article 6 § 1 of the Convention (see *Zaicevs v. Latvia*, no. 65022/01, § 53, 31 July 2007). Article 2 of Protocol No. 7 therefore applies in the present case.

31. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

32. The applicant submitted that there had been a violation of his right to have his conviction reviewed by a higher tribunal. His conviction by the Regional Administrative Court had not concerned an offence of a minor

character as, according to the Court's case-law, an offence punishable by imprisonment of up to fourteen days was not considered one of a minor character (see *Zaicevs*, cited above; *Galstyan v. Armenia*, no. 26986/03, 15 November 2007; and *Gurepka v. Ukraine (no. 2)*, no. 38789/04, 8 April 2010). The offence he had been convicted of carried a sanction of up to two weeks' imprisonment in default of payment.

33. As to the Government's argument that an accused person has the option of challenging the Regional Administrative Court's decision before the Constitutional Court, the applicant pointed out that the Constitutional Court's decision-making power clearly differed from that of the Supreme Administrative Court, especially since only a violation of constitutionally guaranteed rights could be claimed before the Constitutional Court, which meant that, in particular, incorrect application of the law or procedural errors could only be alleged if they reached constitutional level, for example the level of arbitrary application of the law. However, the rejection of a request for evidence by a court of first instance, as in the applicant's case, could not be successfully appealed against, since the level of arbitrariness was not reached.

34. The Government referred to the wide margin of appreciation of the legislature in defining the system of legal protection and maintained that the inability for the applicant to appeal against the decision of the Regional Administrative Court to the Supreme Administrative Court had been in conformity with Article 2 of Protocol No. 7, as it had been based on the exception to the right of appeal in criminal matters for offences of a minor character. The domestic legislation at issue fulfilled the relevant criteria of the Court's case-law, since the maximum possible punishment was a fine of up to EUR 726 and the offence was not punishable by imprisonment. In the case of *Putz v. Austria* (Commission decision of 3 December 1993, no. 18892/91), the Commission had regarded an offence carrying a criminal sanction consisting of a fine of up to 10,000 Austrian schillings (approximately EUR 726) and up to eight days' imprisonment in default of payment as one of a minor character within the meaning of Article 2 § 2 of Protocol No. 7.

35. The Government further submitted that, in any event, the applicant had made use of the opportunity to have his case reviewed by the Constitutional Court, which had constituted a sufficient review of his conviction for the purposes of Article 2 of Protocol No. 7.

2. The Court's assessment

36. The Court will first examine whether the offence the applicant was convicted of may be regarded as one of a "minor character" within the meaning of Article 2 § 2 of Protocol No. 7 and whether the case thus falls under one of the exceptions to the right of a review by a higher tribunal.

37. In this connection, the Court notes that the Explanatory Report to Protocol No. 7 expressly states that when deciding whether an offence is of a minor character, an important criterion is whether or not the offence is punishable by imprisonment. The Court has repeatedly found that if the law prescribes a custodial sentence as the main punishment, an offence cannot be described as "minor" within the meaning of Article 2 § 2 (see *Zaicevs*, cited above, § 55; *Galstyan*, cited above, § 124; *Stanchev v. Bulgaria*, no. 8682/02, § 48, 1 October 2009; and *Gurepka (no. 2)*, cited above, § 33). The Court also found that an offence concerning a petty theft and not punishable by imprisonment was of a minor nature, falling within the exceptions permitted by the second paragraph of Article 2 of Protocol No. 7 (see *Luchaninova v. Ukraine*, no. 16347/02, § 72, 9 June 2011). However, the absence of a prison term, though an important factor for the assessment of the minor character of an offence, is not decisive in itself. In making this assessment, the Court has to take into account the specific circumstances of the case before it (see *Saquetti Iglesias v. Spain*, no. 50514/13, §§ 36 *in fine* and 44, 30 June 2020, where it found that a very serious financial penalty imposed for a customs offence, without any assessment of its proportionality, could also preclude an offence being considered minor within the meaning of that provision).

38. In the present case, a fine of EUR 200 or four days' imprisonment in default of payment was imposed on the applicant for a breach of the Road Traffic Act (see paragraph 5 above), an offence considered administrative under domestic law. Under section 99(3) of the Road Traffic Act, the sanction for the offence in question, failure to inform the police of an accident in which only material damage has been caused, is "a fine of up to 726 euros [and], in the event that the amount of the fine cannot be recovered ... imprisonment of up to two weeks" (see paragraph 20 above). Within the gradation of the penal sanctions provided for in the Road Traffic Act, this maximum sentence is clearly one of the least serious ones, indicating that within the domestic legal system the underlying offence thus belongs to the less serious offences.

39. The decision of the Regional Administrative Court, the tribunal which dismissed the applicant's appeal against the penalty notice (see paragraph 7 above), was not amenable to appeal before the Supreme Administrative Court pursuant to section 25a(4) of the Administrative Court Act, as the fine the applicant risked incurring did not exceed EUR 750, no (primary) prison sentence could be imposed, and the fine actually imposed did not exceed EUR 400 (see paragraph 12 above).

40. The offence of which the applicant was convicted did not carry a custodial sentence as the main punishment. The Court must therefore determine whether an offence for which the law prescribes a term of up to two weeks' imprisonment in default of payment can be considered "minor"

for the purposes of Article 2 § 2 of Protocol No. 7, a question which it has not yet dealt with.

41. The applicant argued that such a sentence must be treated like a primary prison sentence and that, consequently, the exemption under Article 2 § 2 of Protocol No. 7 concerning convictions of a minor character was not applicable. The Government disagreed.

42. The Court considers that in order to examine whether imprisonment in default of payment has an impact on whether an offence may be regarded as one of a minor character, it has to take into account the particular circumstances of the case (see, *mutatis mutandis*, *Saquetti Iglesias*, cited above, § 37), in particular whether it is likely that the imprisonment in default will actually be enforced. It must therefore have regard to the legal framework for the enforcement of imprisonment in default. It notes that once a conviction for an administrative fine has become final, under section 54b of the Code of Administrative Offences, it is not within the discretion of the authorities to order imprisonment in lieu of payment of the fine (see paragraph 15 above). On the contrary, as explained by the Constitutional Court in its case-law (see paragraph 16 above), the authority must first attempt to enforce payment of the fine or make comprehensive enquiries into the financial situation of the convicted person. Furthermore, that person must be informed of the imminent enforcement of the prison sentence and be given the opportunity to avoid it by paying the amount of the fine due and to also request to pay the fine in instalments.

43. The Court consequently considers that imprisonment in default of payment constitutes an exceptional measure under domestic law, the enforcement of which is subject to a number of procedural safeguards. In particular, the convicted person must be clearly made aware of this risk and given the appropriate means to avoid it. In such circumstances, it must be considered a measure substantially different from imprisonment as the primary sanction and therefore does not prevent the offence the applicant has been convicted of being regarded as minor within the meaning of Article 2 § 2 of Protocol No. 7. The Court further considers that neither the amount of the fine imposed nor the maximum fine the applicant risked incurring appear in themselves sufficient to consider that the offence was not minor. The Court is also mindful that within the domestic administrative criminal system, the underlying offence is not considered to be of serious nature (see paragraph 38 above). The applicant also did not claim that he was not able to pay the fine or that the amount of the fine imposed did not sufficiently take into consideration his financial situation.

44. Having regard to this conclusion, it is not necessary to examine the Government's argument that the complaint before the Constitutional Court provided the applicant with an appeal procedure satisfying the requirements of Article 2 § 1 of Protocol No. 7.

45. The Court concludes that there has been no violation of Article 2 of Protocol No. 7.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints concerning the inability to appeal to the Supreme Administrative Court admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 2 of Protocol No. 7 to the Convention.

Done in English, and notified in writing on 26 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Andrea Tamietti
Registrar

Yonko Grozev
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Vehabović is annexed to this judgment.

Y.G.R
A.N.T.

DISSENTING OPINION OF JUDGE VEHABOVIĆ

With great regret I am unable to share the views of the majority of the Chamber.

It is evident that the offence of which the applicant was convicted did not carry a custodial sentence as the main punishment, but the question whether an offence for which the law prescribes a term of up to two weeks' imprisonment in default of payment is to be considered "minor", as the majority concluded, is the point of departure.

I am of the opinion that the determining factor is not the maximum amount of the fine or the actual fine imposed, but rather the full range of sanctions applicable, which included potential imprisonment. The decisive element is the potential sanction in the abstract rather than the actual sanction imposed, as in the case of *Gurepka no. 2* (no. 38789/04, §§ 12 and 33, 8 April 2010). In the case of *Putz v. Austria* (22 February 1996, *Reports of Judgments and Decisions* 1996-I), the situation differs from the present case as regards the nature of the offence and the punishment as well as the procedure for converting the monetary sanction into a custodial sentence. In that case, the imposition of a default prison term was directly at stake as a consequence of the applicant's conviction under the Road Traffic Act.

Irrespective of whether it is a primary or secondary punishment, a person's potential imprisonment carries consequences which are of a serious nature and which cannot be considered "minor" within the meaning of Article 2 of Protocol No. 7 (see *Kamburov v. Bulgaria,* no. 31001/02, § 26, 23 April 2009).

I share the opinion of the Court expressed in the case of *Shvydka v. Ukraine* (no. 17888/12, § 50, 30 October 2014), in which it held that where the right to a review under Article 2 of Protocol No. 7 exists, it should be effective in the same way as the right of access to a court enshrined in Article 6 § 1 of the Convention, given the prominent place held in a democratic society by the right to a fair trial. As also expressed in point 18 of the Explanatory Report to Protocol No. 7, the courts of appeal or cassation can be considered to fulfil the requirements of a review by a higher tribunal, while no mention is made of constitutional courts in this context. It appears in this case that the Constitutional Court limited the applicant's ability to allege a violation of his rights, and that he could only complain of the incorrect application of the law or procedural errors if they reached the level of arbitrary application of the law. That obviously limited the scope of review by the Constitutional Court as compared to the Supreme Administrative Court. Furthermore, the Constitutional Court did not even agree to consider the applicant's request for lack of prospects of success, and took the view that the case did not require specific constitutional consideration to decide on the legal issues.

In these circumstances I have no option but to disagree with the majority in this case. I am of the opinion that the applicant did not have the benefit of an effective review of his criminal matter by a higher tribunal for the purposes of Article 2 § 1 of Protocol No. 7.