

THE REPUBLIC OF AUSTRIA Vienna Provincial Court of Appeal
18 Bs 244/II f

The Vienna Provincial Court of Appeal, presided over in this case by Judge Dostal, president of the senate, as chair person, and Judges Bruzek and Heindl as senate members has, in the criminal proceedings against **G.K** on the grounds of section 7(1-2) *Artenhandelsgesetz* [Trade in Endangered Species Act], and sections 146, 147(1)(1-2), and 148 *Strafgesetzbuch* (StGB) [Criminal Code] reached the following

Decision

concerning the appeal of VIER PFOTEN - Stiftung für Tierschutz - gemeinnützige Privatstiftung [Four Paws foundation for animal welfare – non-profit private foundation] against the decision of the Wiener Neustadt Provincial Court of 19 August 2011, GZ 31 Hr 220/II m-54, in a closed hearing:

The appeal is **dismissed**.

Reasoning

The Wiener Neustadt prosecution service is conducting preliminary proceedings against G. K. on the ground of suspected repeated offences under section 7(1-2) Trade in Endangered Species Act, and the crime of serious commercial fraud under sections 146, 147 (1)(1-2), and 148 Criminal Code. The proceedings are based on a complaint of the Federal Criminal Police Office, dated 8 February 2010 (ON 2).

According to the evidence to date, G. K. is suspected of contravened the Trade in Endangered Species Act by committing the following acts without the required permission or certification (section 7(1)(1) Trade in Endangered Species Act):

1. Purchasing a no longer determinable number of Egyptian vultures and other protected birds of prey (not from breeding programmes) from unknown offenders between 2000 and 2003 in Prein an der Rax and Bristol, UK, exporting these to the UK by using forged CITES documents, and selling them to M. H.;

2. Purchasing two Egyptian vultures carrying the ring numbers 7129R0237 and 7129R0233, and not stemming from breeding programmes, from unknown offenders at a point in time in 2006 yet to be determined, in Prein an der Rax and other places, selling these to F..... KV B. v. R., Netherlands, by using forged CITES documents, and exporting them to the Netherlands.

The accused is also suspected of inducing M. H. to commit acts, namely the payment of a purchase price of EUR 3,500 in UK pounds sterling per Egyptian vulture, between 2002 and 2003 in repeated advances in Bristol and other places in England yet to be determined, with the intention of unlawfully enriching himself through the actions of the defrauded H. by misrepresenting that the birds of prey offered by the accused stemmed from breeding in captivity, i.e. misrepresentation of the facts. In consequence, M. H. suffered an economic loss yet to be determined, but certainly exceeding EUR 3,000. The accused committed this fraud by using fake certificates, namely forged CITES documents, for the deceit. He committed this serious fraud (section 147(1)(1) Criminal Code) with the intention of providing himself with a continuous income through repetition of these acts.

A statement of the facts was submitted by the appellant on 2 February

2011 (ON 40) in which, mostly on no substantive grounds and without any further details concerning the locations, timing and means of the acts, it was stated that there is a suspicion that G. K. purchases, sells, offers for sale, imports, exports, transports, keeps and exhibits protected species, under the pretence that the animals are not protected but may freely be traded. In this document, Four Paws foundation for animal welfare joined the criminal proceedings as a civil party seeking compensation in an amount of EUR 1,000. It stated that it pursues the general interest of animal protection and, that it has incurred “heavy costs” by reason of the accused’s numerous and repeated contraventions of the *Tierschutzgesetz* [Animal Protection Act], Trade in Endangered Species Act and Criminal Code, and by reason of the accused’s recalcitrance.

On 8 June 2011 (ON 49), the appellant filed a petition seeking transmission of a copy of the proceedings.

By order of the Wiener Neustadt prosecution service dated 16 June 2011 (ON 52), the notice of joinder submitted by Four Paws foundation for animal welfare pursuant to section 67(2) *Strafprozessordnung* (StPO) [Code of Criminal Procedure] and the petition for access to documentary evidence through production of a complete copy of the proceedings were rejected.

The appellant only appealed against the rejection of the petition for access to documentary evidence by filing a written petition on 1 July 2011 (ON 53) on the ground of impairment of rights under section 106(1) Code of Criminal Procedure. By way of explanation, it contended that it is a victim in the meaning of section 65(1)(c) Code of Criminal Procedure which, pursuant to section 68(2) Code of Criminal Procedure, entitles it to access to records, regardless of its civil party status.

In the contested decision, the Court of First Instance rejected the appeal on the ground of impairment of rights.

The communication of the appellant (ON 56) appealing against said decision is timely, but is not upheld.

Under section 65(1)(c) Code of Criminal Procedure, which is the relevant provision here, a victim in the meaning of this Act is any person who may have suffered harm as a result of a criminal offence, or whose judicially protected interests may otherwise have been impaired. This provision applies to both natural and legal persons (*Kier*, WK [Wiener Kommentar] on section 65(1) Code of Criminal Procedure Rz 18 [Richterzeitung]).

As the Court of First Instance has correctly recognized with regard to the requirements for any harm suffered (section 65(1)(c) Code of Criminal Procedure), it is evident in this case that the appellant has not suffered any direct economic loss as a result of the criminal offences that the accused is alleged to have committed. Consequential damages are deemed to be any “third party harm”, which does not fall within the scope of the breached criminal provision, but has arisen in an auxiliary sphere. However, such cases of consequential damages are only to be considered as harm in the meaning of section 65(1)(c) Code of Criminal Procedure if they require compensation to be made under civil law provisions, i.e. only in exceptional cases governed by law. We also agree with the judge of first instance that such an exceptional case constituting consequential damages expressly worthy of compensation under civil law provisions does not exist, and that the appellant therefore cannot be deemed to be a victim as a result of any harm caused in this case.

We are thus left to examine whether the appellant’s “judicially protected legal interests may otherwise have been impaired” (section 65(1)(c), second

circumstance Code of Criminal Procedure). The Court of First Instance has again correctly decided that the appellant cannot be deemed a victim in this regard. Although persons are not only considered to be victims in the meaning of para. c where their individual legal interests have been violated but also where – although the alleged criminal act has primarily affected general interests – it has also impaired individual interests which at least also fall within the scope of protection of the act which protects said general interests (ibid Rz 29), a direct impairment of the appellant's interests cannot be established in the present case. This is because it requires the individual to have been particularly directly and individually concerned, which is less likely in proportion to the size of the group which is the alleged victim of the criminal offence in question.

In the light of the application of the "mischief rule" to the definition of "victim" (ibid 4), which allows public authorities, institutions and persons involved in criminal proceedings to terminate the proceedings after a reasonable period of time, it would be excessive to classify all groups and individuals working in the field of or ideologically committed to animal protection as victims of the alleged acts. This narrow interpretation of "victim" in the Code of Criminal Procedure is supported by materials relating to the *Strafprozessreformgesetz* [Criminal Procedure Reform Act], pursuant to which, under section 65(1)(c) Code of Criminal Procedure, not moral, but purely material interests should be considered (explanatory remarks 25 exhibit no. 22, GP [legislative period] 93).

From this it can be inferred that Parliament did not intend the interpretation of "victim" to be as broad as the appellant contends. Otherwise, comparable judicial proceedings would be virtually impossible to conduct due to the court's official duty to notify all victims of the continuation of proceedings, or to invite all victims to the main proceedings, etc. (section 66(1) Code of Criminal Procedure). This is clearly demonstrated in the present case with regard to the fact that there are countless natural and legal persons morally associated with the broad issue of animal protection.

In response to the appellant's contention that it is primarily to be deemed a victim under the Aarhus Convention, which Austria is allegedly bound by European and international law to observe, we state the following:

The Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) was drafted by the UN Economic Commission for Europe (UNECE), and entered into force on 30 October 2001. It has been signed by 40 countries, and ratified by 36 countries (including Austria on 17 January 2005) as well as the EU. The aims and content of the Aarhus Convention are to uphold the right of the general public to participate in decision-making procedures concerning environmental matters, and thereby to contribute to the protection of every person's right to live in an environment adequate to his or her health and wellbeing.

In this connection, among other things the Aarhus Convention provides for participation of the public in certain decisions concerning specific activities, and access to legal or other procedures to challenge the substantive and procedural legality of any decision, act or omission (Mauerhofer, *NGOs und Einzelpersonen im UVP-Feststellungsverfahren*, RdU 2006, page 9).

The EU has enacted directives on the basis of the Aarhus Convention, such as relevant Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, which was to be implemented by 25 June 2005 and requires Member States to ensure that public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I., and to determine the detailed arrangements for public participation for public participation under this Article so as to enable the public to prepare and participate effectively.

International conventions and EU directives generally do not apply directly, but must be transposed into national law to be binding on individuals.

Amendments were made to several federal and provincial acts in Austria to transpose EU directives relating to the Aarhus Convention. The *Umweltinformationsgesetz* [Environmental Information Act] and the *Umweltverträglichkeitsprüfungsgesetz* [Environmental Impact Assessment Act] were, for instance, amended. No transposition of the EU directives relating to the Aarhus Convention occurred in the sphere of criminal law, including the law relating to judicial procedure. This means that the Aarhus Convention remains without any direct effect on the legal status of victims under the Code of Criminal Procedure.

International law and EU directives have legal effect regardless of their transposition to the extent that national law rules should be interpreted as best possible in line with international and European law rules by taking into consideration these legal norms. However, this does not benefit the appellant in the present case as the wording in both the Aarhus Convention and EU directives is very vague, allowing individual Member States considerable latitude in its implementation in national legislation. As a result, the definition of “victim” in the Code of Criminal Procedure is unaffected, even with regard to the interpretation of indirect effects.

For this reason, as demonstrated, the Four Paws foundation for animal welfare cannot be granted the legal status of a victim in the present judicial proceedings. However, such status is a condition of the right to the right to inspect documentary evidence sought by the appellant (cf. section 66(1)(2) in conjunction with section 68 Code of Criminal Procedure), which is why the Court of First Instance has rejected the appeal on grounds of impairment of rights correctly in accordance with the facts of the case and the law.

In addition, it is noted that there is also no right to inspect documentary evidence under section 77(1) Code of Criminal Procedure. We refer to the relevant reasoning of the Court of First Instance to avoid repetition (pp. 10ff./ON 54).

The appeal is therefore dismissed.