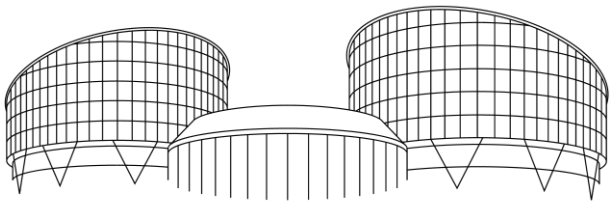

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF C.B. v. AUSTRIA

(Application no. 30465/06)

JUDGMENT

STRASBOURG

4 April 2013

Request for referral to the Grand Chamber pending

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 C.B. v. Austria,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 12 March 2013,

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

PROCEDURE

1. The case originated in an application (no. 30465/06) 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 C.B. ("the applicant"), on 18 July 2006. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry of European and International Affairs.

3. The applicant complained of unfair proceedings and alleged, in particular, that the refusal to admit a private expert opinion into the criminal proceedings conducted against him, the refusal to allow the private expert to testify as a witness, and the refusal to allow three further witnesses to testify in the same proceedings violated his rights under Article 6 §§ 1 and 3 (d) of the Convention.

4. On 10 November 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966 and lives in Maria Enzersdorf.

6. In 2005 the Krems a.d. Donau Regional Court (*Landesgericht Krems a.d. Donau*) conducted criminal proceedings against the applicant, who was accused of both attempted and actual sexual abuse of minors and juveniles, and of offences under the Drug Offences Act.

7. During the proceedings, the Regional Court appointed a neurological and psychiatric expert to examine the applicant, to establish, *inter alia*, whether the applicant fulfilled the conditions for referral to an institution for mentally ill offenders (*Anstalt für geistig abnorme Rechtsbrecher*) pursuant to Article 21 § 2 of the Criminal Code (*Strafgesetzbuch*). The applicant does not appear to have objected to the choice of expert or to the subject matter on which the report was to be obtained. On 4 March 2005 the expert submitted his written opinion, establishing that the applicant was fully criminally responsible and diagnosing a disorder of sexual preferences, paedophilia and narcissistic personality disorder. The opinion was based on an examination of the applicant, the criminal files and the results of an MMPI-2 personality test. The expert found that the applicant's disordered conduct had progressed, in view of the decreasing age of his victims. The opinion concluded that there was a very high risk that the applicant would relapse, with severe consequences. Subsequently, the opinion was served on the applicant's counsel for comments.

8. On 8 June 2005 the applicant's counsel commented on the expert's opinion, submitted the opinion of a private expert, a psychiatrist and neurologist, and requested the court to have it read out to the court-appointed expert at the oral hearing and to appoint another expert in the event that the court-appointed expert did not concur with the private expert's opinion.

9. The opinion of the private expert, dated 12 May 2005, also found that the applicant suffered from homosexual paedophilia, a disorder of his sexual preferences and a sexual maturity crisis. He found, however, that there was no indication of a narcissistic disorder. As regards the prognosis, the expert concluded that there was a low to moderate risk of the applicant reoffending as regards non-violent sexual abuse of children. The private expert commented on the court-appointed expert's opinion and criticised his methods, considering in particular that the factual statements he had made were unclear and were not accompanied by sufficient explanation. Finally, he also questioned the court-appointed expert's interpretation of those factual statements.

10. On 22 June 2005 the court-appointed expert supplemented his opinion in writing and commented on every observation made by the private expert.

11. On 30 June 2005 the Regional Court held an oral hearing in which the court-appointed expert summarised and supplemented his opinion. During the hearing, the applicant's counsel questioned the court-appointed expert at length. The court did not, however, allow questions to be put by counsel which referred to the private expert opinion, or general questions regarding the court-appointed expert's education and competencies. Counsel also made applications for the admission of the private expert opinion to the proceedings and for the private expert to be allowed to testify as a witness. According to the record of the hearing, counsel requested, in particular,

> "... that evidence be heard from Dr W.B., a psychiatric specialist at the D. Clinic, on the subject of the requirements of Article 21 § 2 of the Criminal Code in the context of a psychiatric assessment and case history carried out after the assessment by the court-appointed expert and at a time when the accused's detention for five weeks in an individual cell, a situation which was new to him and to which he was wholly unaccustomed, had come to an end ...
>
> He requested that a further expert opinion be sought on the basis of the provisions of Article 429 § 2 (2) of the Code of Criminal Procedure ("CCP"), which made express reference to the need to seek the opinion of at least one psychiatric expert, and on the basis of Article 439 § 2 of the CCP, according to which at least one expert had to be called in the proceedings, failing which they would be declared null and void. Even after the additional questioning of the court-appointed expert there were grounds to assert that the conditions laid down in Articles 125 and 126 of the CCP had not been met, with the result that no reliable prognosis could be made as to the dangerousness of the accused without a further expert report.
>
> He reiterated his request for Dr W.B.'s expert report and additional observations, contained in the file, to be read out and for B.S., J.H. and A.U. to be called as witnesses to testify that the accused had no difficulty forming relationships, had sufficient empathy and had no pathological need to control others. The appearance of those witnesses was also sought in order to testify that the facts on which the court-appointed expert based his opinion were partly inaccurate and incomplete, and thus defective overall.
>
> The public prosecutor objected to the request. As far as the taking of evidence from Dr W.B. was concerned, this was a means of introducing a private expert opinion into the proceedings and served no other apparent purpose. The other witnesses were to be asked to testify on medical matters that should be assessed by an expert, and were therefore unsuited to that purpose. Matters relating to the psychiatric assessment should also be determined by the expert; an expert opinion was available which, even after several hours' questioning, still appeared consistent. The public prosecutor was therefore also opposed to a second expert opinion being sought. He repeatedly expressed his opposition to having the private expert opinion of Dr W.B. read out in court."

12. The Regional Court dismissed counsel's requests at the hearing and reasoned the dismissal as follows:

> "Decision refusing the requests

(1) As regards the taking of evidence from Dr W.B. concerning the requirements of Article 21 § 2 of the Criminal Code: it is not clear, first, in what capacity Dr W.B. might be examined. The requirements of Article 21 § 2 of the Criminal Code are a legal issue, to be determined solely by the court with the assistance of a court-appointed psychiatric expert. Witnesses are individuals who have to give their own observations regarding facts relevant to the taking of evidence: their role is in no sense to make statements concerning legal or empirical evidence or to speculate, express opinions, make value judgments or draw conclusions. As to the possibility of examining Dr W.B. as a witness on the subject of his psychiatric assessment, it must be pointed out that such assessments are not a matter for witnesses. Since Dr W.B. has prepared a private expert opinion in the present case, he cannot also be regarded as an expert for the purpose of the proceedings, and any statements he might make as a witness concerning the psychiatric assessment would not constitute valid evidence.

(2) As far as obtaining a further expert opinion is concerned: neither provision can be interpreted as imposing a requirement to call a further expert in the proceedings concerning the accused's compulsory psychiatric admission. Here again, then, reference must be made to the provisions of Article 118 § 2 and Articles 125 and 126 of the CCP, according to which the calling of a further expert is required only if the existing findings and opinion are incomplete and inconclusive. This may arise in the event of difficulties in observing the patient and making an assessment; this in turn will arise only if the court-appointed expert is unable to reply with certainty, or at all, to the questions put to him, in which case the possibility of the questions being answered by another expert cannot be ruled out. In the instant case Dr R.B. answered the questions put to him with certainty from the outset. During today's hearing, and especially during questioning by the defence, no important points were left unanswered. It cannot therefore be argued that the expert did not answer the questions conclusively and with certainty. As a result, the criteria laid down in Article 118 § 2, in particular read together with Articles 125 and 126 of the CCP, certainly do not apply and the request must be refused.

(3) As regards Dr W.B.'s private expert opinion and additional observations: the public prosecutor opposed the reading-out of the report. Hence, the conditions laid down in Article 252 § 1 (4) of the CCP do not apply, nor, in any sense, do those of Article 252 § 1 (1).

(4) As to the taking of evidence from witnesses B.S., J.H. and A.U.: the request does not explain why the witnesses in question might possess this knowledge. Furthermore, the assessment of whether an individual has difficulty forming relationships, is lacking in empathy and has a pathological need to control others can only be carried out by an expert, especially since witnesses may not draw conclusions from what they observe. It is not clear why these witnesses should know that the facts were inaccurately or incompletely conveyed by the expert in his opinion, nor has it been explained why they should have anything to contribute on the subject; hence, their evidence is not valid in this regard."

13. Upon a repeated request by counsel to allow the private expert to testify as a witness, the Regional Court decided

"...to refuse the request for Dr W.B. to testify as a witness on the subject of the psychiatric assessment conducted by him, since this was carried out after the assessment by the court-sworn expert. According to Article 134 of the CCP, where there are doubts as to an individual's mental incapacity or a mental disorder is suspected, an assessment of his mental or psychological state by one or, if need be, two doctors must be ordered. This clearly refers to court-appointed experts. This

provision and, of course, the remaining provisions concerning the establishment of findings unambiguously provide that the examination or assessment is a matter exclusively for a court-appointed expert. It follows that Dr W.B., as a private expert, cannot have made any findings within the meaning of the law or, more specifically, of the provisions concerning expert evidence, with the result that his observations as a witness concerning such findings do not constitute valid evidence."

14. On the same day, the Krems a.d. Donau Regional Court, sitting as a panel composed of two professional and two lay judges (*Schöffengericht*), convicted the applicant of both attempted and actual sexual abuse of minors and juveniles and of offences under the Drug Offences Act, and sentenced him to two years' imprisonment. He was also admitted to an institution for mentally ill offenders pursuant to Article 21 § 2 of the Criminal Code.

15. The applicant was found to have sexually abused a minor born in 1992 by sustained touching of his sexual organs on at least ten occasions between 2003 and 2004, and to have enticed two juveniles born in 1988 to carry out sexual acts on approximately twenty-six occasions between 2003 and 2004 by offering them money. He was further found to have provided two juveniles with hashish five times between 1999 and 2002.

16. As regards the psychological expert opinions, the Regional Court found in its reasoning concerning the assessment of the evidence that

"... at the hearing and even beforehand the accused gave the court and Dr R.B., an experienced expert in neurology and psychiatry, a relatively full account of his life ...

On the basis of these extensive materials, Dr R.B. first produced his written opinion, which he presented during the hearing and added to at length and in detail ...

... at the hearing Dr R.B. gave reasons for his opinion in comprehensible, logical and consistent fashion. It is clear even to a lay person that the accused's problems, which have been well established, are of such severity as to constitute a serious personality disorder, even though some of his problems (such as masochistic masturbation) do not necessarily result in criminal behaviour ...

... The expert also confirmed that the accused does not have violent tendencies in the sense of using physical violence. However, it must be borne in mind that, particularly in the sphere of psychology and psychiatry, psychological violence plays an important role. The accused repeatedly abused young people as a result of his disposition, whether by giving them alcohol, showing them pornographic films, offering them money or using his position in society. The expert and, accordingly, the court therefore concluded that it was likely that the accused, on account of his mental disorder and in particular his paedophile tendencies, would commit further offences of the kind with which he has been charged.

The accused and his counsel attempted at first to call the expert's qualifications into question. However, in view of his training and professional experience, these were beyond doubt.

A request was then made for the private expert opinion of Dr W.B. to be read out in court. This request was refused by the court because the parties did not agree on that point and none of the grounds provided for by Articles 125 and 126 of the CCP applied. The defence then had the terms "abnormal sexual preferences" and "perversion" explained to them and the expert reiterated in this context too that the

accused showed no signs of sadistic tendencies. The defence subsequently tried to undermine Dr R.B.'s opinion by claiming that he had not used all the available methods, which had apparently been used by the private expert. After Dr R.B. had answered all the questions asked by the defence in consistent, comprehensible and, above all, comprehensive terms, the request for the private expert's opinion to be read out was repeated. This request was rejected on the same grounds and also, in particular, on the grounds that it was for experts themselves to decide which methods they used to substantiate their opinion, based on the present state of scientific knowledge. Only shortcomings in the procedure described in Articles 125 and 126 of the CCP or circumstances indicating particular difficulties in making a diagnosis or preparing the opinion could justify calling in a further court-sworn expert.

The request to circumvent these provisions by the taking of witness evidence from a private expert also had to be refused, since the latter did not and could not make observations concerning the alleged facts, and the findings are to be established exclusively by the court-appointed expert. For the same reason, the request for B.S., J.H. and A.U. to testify was also superfluous, especially since no specific subjects were even mentioned and, in particular, it was not made clear which of the facts (findings) presented by the expert had supposedly been incomplete or defective...

In sum, it was thus demonstrated that there was no call to question the statements of the expert Dr R.B. regarding the severity of the accused's disorder and his dangerousness, with the result that the court was justified in basing its decision on those statements."

17. On 28 October 2005 the applicant lodged a plea of nullity (*Nichtigkeitsbeschwerde*) and an appeal (*Berufung*) against the judgment.

18. On 22 December 2005 the Supreme Court (*Oberster Gerichtshof*) rejected the plea of nullity and referred the appeal to the Vienna Court of Appeal (*Oberlandesgericht Wien*). As regards the expert opinions, that court found as follows:

"The refusal of the request for a 'a further expert opinion [to] be sought on the basis of the provisions of Article 429 § 2 (2) of the Code of Criminal Procedure ("CCP"), which made express reference to the need to seek the opinion of at least one psychiatric expert, and on the basis of Article 439 § 2 of the CCP, according to which at least one expert had to be called in the proceedings, failing which they would be declared null and void' – which was further based on the assertion that '[e]ven after the additional questioning of the court-appointed expert there were grounds to assert that the conditions laid down in Articles 125 and 126 of the CCP had not been met, with the result that no reliable prognosis could be made as to the dangerousness of the accused without a further expert report' – did not adversely affect the rights of the defence. The panel of professional and lay judges correctly pointed out in its decision based on Article 238 § 1 of the CCP that there were no grounds for calling in a second expert either on account of difficulty in observing the patient or making an assessment, as referred to in Article 118 § 2 of the CCP (which was also applicable to the committal proceedings), or on account of shortcomings in the findings or the opinion of the court-appointed expert (Articles 125 and 126 of the CCP), as the latter had answered all the questions 'conclusively and with certainty'.

For the same reason – and also because it was patently concerned only with an examination that was inadmissible during the hearing – the request for the private expert Dr W.B. to testify as a witness 'on the subject of the requirements of Article 21 § 2 of the Criminal Code in the context of a psychiatric assessment and case history

carried out after the assessment by the court-appointed expert and at a time when the accused's detention for five weeks in an individual cell, a situation which was new to him and to which he was wholly unaccustomed, had come to an end' and 'on the subject of factual observations in connection with the psychiatric assessment of the accused, carried out after the assessment by the court-appointed expert' was correctly rejected, with reference to the settled case-law concerning the content of witness statements and the inadmissibility of statements made by private individuals concerning the legal subject-matter of the proceedings.

The same applies to the refusal of the request for the reading out of the private expert opinion of Dr W.B., which is of no significance in terms of the criminal proceedings.

Likewise, on the basis of the circumstances of the case, which in medical terms is only moderately difficult, and of the additional questioning of the court-appointed expert for over three hours, during which time the defence had sufficient opportunity to explore the issues raised in the private expert opinion, to which they had access, there can be no question of an infringement of the fairness requirement (Article 6 ECHR).

Lastly, the accused has not been adversely affected by the refusal of the request to hear evidence from witnesses B.S., J.H. and A.U. The request did not specify the "facts" on which these persons were supposed to give evidence; hence, the subject to which it related could not be clearly identified. Furthermore, the request did not explain why the persons concerned should be expected to provide information concerning circumstances relevant to the accused's guilt or the legal characterisation; this request therefore (also) related to inadmissible evidence."

19. On 30 March 2006 the Vienna Court of Appeal dismissed the applicant's appeal as unfounded. It stated that the expert's prognosis that there was a risk of the applicant relapsing was convincing and stated further:

"As regards the criticism and the repeated request for the private expert opinion of Dr W.B., obtained by the accused, to be admitted in the proceedings and for a further expert opinion to be sought, these must be rejected first of all on the basis of the findings of the Supreme Court in its decision on the plea of nullity. Even after an in-depth study of the opinion of Dr R.B., the expert appointed by the first-instance court – whose opinion, incidentally, addressed all the criticisms raised in Dr W.B.'s opinion and countered convincingly and in detail all the defence's criticisms based on the private expert opinion – the Court of Appeal could find no grounds for the appointment of another expert in accordance with the provisions of Article 125 or 126 of the CCP. Accordingly, the request for a further expert opinion must be rejected in the first place for lack of legal basis."

20. That appeal judgment was served on the applicant's counsel on 30 May 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Placement in an institution for mentally ill offenders (preventive measures)

21. Article 21 of the Austrian Criminal Code (*Strafgesetzbuch*) provides as follows:

> "1. If a person commits an offence punishable by a term of imprisonment exceeding one year, and if he cannot be punished for the sole reason that he committed the offence under the influence of a state of mind excluding responsibility (Article 11) resulting from a serious mental or emotional abnormality, the court shall order him to be placed in an institution for mentally ill offenders if, in view of his personality, his condition and the nature of the offence it is to be feared that he will otherwise, under the influence of his mental or emotional abnormality, commit a criminal offence with serious consequences.
>
> 2. If such a fear exists, an order for placement in an institution for mentally ill offenders shall also be made in respect of a person who, while not lacking criminal responsibility, commits an offence punishable by a term of imprisonment exceeding one year under the influence of severe mental or emotional abnormality. In such a case the placement is to be ordered at the same time as the sentence is passed."

B. The provisions of the Code of Criminal Procedure, as in force at the relevant time, regarding expert opinions

22. The Code of Criminal Procedure (*Strafprozeßordnung*), as in force at the relevant time, provided that a court, during the proceedings and if the subject matter warranted it, should appoint an expert. The court had to appoint two experts only if the subject matter to be examined was particularly difficult (see Article 118 of the Code of Criminal Procedure). Domestic case-law determined that an allegation that an expert opinion had reached the wrong conclusion was not to be considered to render the subject matter "particularly difficult" within the meaning of the provision (EvBl 1996/125). Such difficulty could arise where an appointed expert was unable to answer a question put before him, if another expert would in all probability be able to answer it.

23. At the relevant time, an expert was appointed at the investigative stage by the investigative judge, or by the court. There was no right for the parties to formally object to the appointment of an expert. However, Article 120 of the Code of Criminal Procedure provided that the parties should be informed of the planned appointment of an expert. If the parties brought forward objections regarding the appointment of the expert in a timely manner, the court could appoint another expert.

24. In its Articles 125 and 126, the Code of Criminal Procedure provided for procedural steps to be taken in the event of a deficient expert opinion in criminal proceedings: the main principles deriving from those provisions

were that in the event of an expert opinion being contradictory or inconclusive, or in the event that two expert opinions clearly differed from each other and another oral examination of the experts could not eliminate the doubts with regard to the conclusions of their opinions, a new expert was to be appointed by the court.

25. A citation from the domestic jurisprudence summarises the general view of Austrian domestic law on criminal procedure as regards private experts' opinions: in a judgment of 21 November 1989 (15Os130/89), the Supreme Court, deciding on a plea of nullity, stated:

> "As regards the procedural objection, it should be made clear from the outset that private expert opinions related to the case, of the kind commissioned by the applicant and submitted with a request for the taking of evidence, can properly serve only to provide the accused and his or her defence counsel with expert clarification on important aspects of the case and thereby enable them to put pertinent questions to the court-appointed experts; where applicable, they may also serve as grounds for obtaining an additional expert opinion (ordered by the court) ... As evidence, however, they have ... by law no procedural significance, since they lack in particular the guarantees of impartiality and judicial supervision of their preparation. Accordingly, they are not to be read out during the trial either."

26. At the material time the Code of Criminal Procedure did not yet include an explicit provision allowing privately commissioned experts to be present at the oral hearing and to thereby assist defendants and their counsel in questioning the court-appointed experts during the hearing. Such a provision was introduced into the Code of Criminal Procedure in 2008 with its new Article 249 § 3. However, also before the reform of the Code of Criminal Procedure, the Austrian Supreme Court had stated in its case-law, with reference to a defendant's rights under Article 6 § 3 (d) of the Convention, that to ensure that the defendant could question an expert effectively during the hearing, he or she could make use of the professional support of a privately commissioned expert, and that expert could not be refused permission to sit next to counsel in the hearing room, albeit without having the right to question the court-appointed expert directly (see judgment 14Os129/05k of the Supreme Court of 19 December 2005, and judgment 13Os34/01 of the Supreme Court of 29 September 2001).

C. Witnesses

27. According to the Code of Criminal Procedure at the material time, a witness testified before the court on his or her perception of the subject matter at issue (see Article 150 of the Code of Criminal Procedure). Again, the amended Code of Criminal Procedure of 2008 codified the principles deriving from the Supreme Court's jurisprudence in the matter and stated in its Article 154 that a witness was a person having directly or indirectly perceived relevant facts regarding the subject matter of the investigation or the proceedings and who should thus testify on those perceptions.

D. Procedural rules on referral to an institution for mentally ill offenders

28. The referral of a defendant to an institution for mentally ill offenders under Article 21 § 2 of the Criminal Code had in principle to be ordered at the same time as the sentence was imposed (see Article 435 of the Code of Criminal Procedure). However, such a referral was null and void if the defendant had not been represented by counsel throughout the proceedings and if the order had been made without hearing at least one psychiatric expert on the matter (see Article 439 in conjunction with Article 429 § 2 no. 2 of the Code of Criminal Procedure).

E. General provisions regarding the reading of documents in criminal proceedings

29. Finally, Article 252 of the Code of Criminal Procedure provided at the material time, *inter alia*, that witness statements or expert opinions were only permitted to be read out in the criminal proceedings if – among other things – both the defendant and the public prosecutor agreed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. The applicant complained that he had not had a fair trial. In support of this he maintained firstly that the domestic courts had wrongly assessed the court-appointed expert's opinion. He further complained that the refusal to admit the private expert opinion to the proceedings as evidence and the refusal to allow the private expert and B.S., J.H. and A.U. to testify as witnesses violated the principle of equality of arms as provided in Article 6 §§ 1 and 3 (d) of the Convention, which reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by 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 ..."

31. The Government contested that argument.

A. Admissibility

32. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

33. The applicant alleged in general that the quality and the conclusions of the court-appointed expert's opinion had been wrongly assessed by the domestic courts. As to the private expert opinion, he considered that the fact that the court-appointed expert had been made aware of the private expert's comments did not suffice for the respect of the principles of a fair hearing, but that the court itself ought to have examined the private opinion in substance and taken a reasoned decision on which opinion to follow in its judgment. However, in the present case the domestic court had refused to admit the private expert opinion into the proceedings as evidence. The applicant also observed that the possibility for a private expert to assist a defendant and counsel during the hearing had only been introduced into the amended Code of Criminal Procedure in 2008. Further, the applicant claimed that allowing the private expert opinion would not have led to a repetition of evidence. The applicant alleged that the private expert was more experienced and had submitted a more extensive opinion based on his examination of him. He also asserted that in view of the unfair decision regarding the private expert opinion by the domestic court, the dismissal of the request to admit B.S., J.H. and A.U. as witnesses to testify regarding the applicant's character had been especially unjust. Lastly, the applicant complained that the Regional Court had not allowed him to put "numerous questions" to the court-appointed expert in the course of the oral hearing.

34. The Government, on the other hand, asserted that the principle of equality of arms had been respected in the criminal proceedings conducted against the applicant. They referred to the detailed opinion submitted by the court-appointed psychiatric expert and the fact that the applicant and his counsel had been afforded the possibility to question the expert at length during the oral hearing. Moreover, the court-appointed expert had supplemented his opinion during the oral hearing and had responded in substance to the criticism voiced by the private expert. The domestic court had further thoroughly reasoned its dismissal of the request for a second expert opinion on the grounds of the conclusiveness of the opinion of the court-appointed expert. To allow an applicant in domestic proceedings to call a private expert as a witness would only lead to an unnecessary repetition of evidence with the goal of obtaining a more beneficial outcome

for the defendant. Furthermore, the private expert could in any event assist the defendant and his counsel during the proceedings and guide them through the questioning of the court-appointed expert. While it was true that this possibility had only been introduced into the law with the criminal procedural reform in 2008, that particular provision had been the codification of what had already been the practice of the Supreme Court. The Government further stated that any decisions dismissing witness requests had been thoroughly and convincingly reasoned by the domestic courts.

2. The Court's assessment

35. Turning first to the applicant's complaint that the domestic courts had wrongly assessed the quality and the conclusions of the court-appointed expert's opinion, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

36. However, the Court observes that the applicant lodged further complaints in relation to a private expert opinion and witness requests. In this regard, the Court identifies three main complaints that are essentially linked: the first one relates to the refusal of the domestic courts to admit a privately commissioned psychiatric expert's opinion into the criminal proceedings. The second complaint contests the domestic court's refusal to admit a privately commissioned psychiatric expert as a witness in the proceedings after his written opinion had been refused as evidence. And finally, the third complaint concerns the domestic courts' refusal to admit the witnesses B.S., J.H. and A.U. to testify on the applicant's behalf in the course of the criminal proceedings.

37. The Court reiterates that the principle of equality of arms – which is one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (see, among other authorities, *G.B. v. France*, no. 44069/98, § 58, ECHR 2001-X).

38. Bearing in mind that the requirements of paragraph 3 (d) of Article 6 of the Convention amount to specific elements of the right to a fair trial guaranteed under paragraph 1 of that Article, the Court will examine the

complaints under both provisions taken together (see *Brandstetter v. Austria*, 28 August 1991, § 42, Series A no. 211, *mutatis mutandis*, *G.B. v. France*, cited above, § 57, and *Aigner v. Austria*, no. 28328/03, § 34, 10 May 2012).

39. The Court further observes that it is not within its province to substitute its own assessment of the facts and of the evidence for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, among many other authorities, *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B; *G.B. v. France*, cited above, § 59, and, more recently, *Gregačević v. Croatia*, no. 58331/09, § 63, 10 July 2012).

40. An expert in general assists in solving a question or problem raised in the proceedings that a judge is unable to solve by him- or herself. How the domestic authorities organise their system for the admission of evidence into criminal proceedings is essentially left to the member States. It is not the Court's role to impose one system over another, but to ensure that the existing system in a given member State provides for sufficient safeguards to guarantee fair proceedings and respect for the equality of arms of the parties involved (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011, and *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010, with further references). As regards its findings on expert opinions in criminal proceedings and the principle of equality of arms, the Court has summarised the relevant criteria as follows (see *Mirilashvili v. Russia*, no. 6293/04, §§ 189 et seq, 11 December 2008):

> "189. The Court reiterates in this connection that Article 6 does not impose on domestic courts an obligation to order an expert opinion to be produced or any other investigative measure to be taken solely because it is sought by a party. It is primarily for the national court to decide whether the requested measure is relevant and essential for deciding a case (see, *mutatis mutandis*, *H. v. France*, judgment of 24 October 1989, Series A no. 162-A, p. 23, §§ 60-61).
>
> 190. However, if the court decides that an expert examination is needed (as in the present case), the defence should have an opportunity to formulate questions to the experts, to challenge them and to examine them directly at the trial. In certain circumstances the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 (see *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, §§ 38 et seq., 5 April 2007).
>
> 191. Still, the exercise of these rights by the defence should be counterbalanced by the interests of proper administration of justice. Article 6 § 1 read in conjunction with § 3 (d) of the Convention does not give the defence an absolute right to the hearing of specific expert evidence. It is for the domestic judge to decide whether an expert proposed by the defence is qualified, and whether his inclusion in the expert team would contribute to the resolution of the case."

41. Applying those principles to the present case, the Court will examine the three identified complaints in turn.

42. As regards the formal admission of the private expert's opinion as evidence into the criminal proceedings against the applicant, the Court firstly observes that the official expert in the proceedings was appointed by the court, and not by the public prosecutor. Thus, the court-appointed expert must be considered not as appearing for one of the parties to the proceedings, but as an independent expert supporting the court in questions that the court – and its judges – was not able to answer for itself. The Court also notes that the applicant did not find any reason in the domestic proceedings to object to the court-appointed expert on principle.

43. When examining the proceedings as they were conducted in the present case, the Court further observes that the problem areas highlighted by the private expert opinion as regards the methods used by the court-appointed expert and the conclusions he drew were first submitted to the court-appointed expert for his written comments. The court-appointed expert subsequently responded to the criticism voiced by the private expert and addressed each issue raised in an addendum to the written expert opinion. As a result, the points of criticism and the arguments responding to them found their way into the body of evidence of the proceedings and therefore also into the decision-making process of the domestic courts. Furthermore, the court-appointed expert was made available for questioning by the applicant and his counsel for more than three hours during an oral hearing. The private expert opinion had prepared the applicant and his counsel for this questioning, had provided them with the necessary specific knowledge on the subject matter and had raised their awareness of possible problem areas in the court-appointed expert's opinion. The applicant and his counsel were therefore adequately prepared to challenge the court-appointed expert's opinion in court. Finally, the Court notes that the domestic courts explained at length why they found that the court-appointed expert's opinion – as submitted in writing and with the additional information obtained in the oral hearing – was comprehensive and conclusive; that the court-appointed expert had managed to dispel any doubts raised by the private expert regarding the basis on which the court-appointed expert's opinion had finally been accepted by the courts as it stood and taken as a decisive factor for the Regional Court's decision as regards the referral of the applicant to an institutional for mentally ill offenders. The material before the Court does not allow it to come to a different conclusion.

44. As regards the second complaint raised by the applicant, concerning the domestic court's refusal to allow the private expert to testify in the proceedings as a witness, the Court notes that the domestic courts carefully and comprehensively reasoned their decision to refuse the applicant's request in this regard. The Court observes that allowing the request would indeed have admitted the private expert opinion into the proceedings by an

alternative route and would therefore have circumvented the prior decision not to admit the private expert opinion into the proceedings as evidence. The Court has stated above that it is not its task to organise the domestic system for admitting evidence in a given member State but to ensure that there are sufficient safeguards available for the applicant to have access to overall fair proceedings (see paragraphs 39 and 40 above). Considering in particular that the court-appointed expert had addressed the alleged problem areas raised by the private expert in writing and orally, and that the applicant and his counsel had had considerable opportunity to question the court-appointed expert, to refer to the alleged problem areas raised by the private expert and to raise any possible doubts as regards the quality and conclusions of the court-appointed expert's opinion, the Court is satisfied that the applicant had ample opportunity to challenge the court-appointed expert, to submit any arguments in his defence and to guarantee his right to equality of arms. The – thoroughly reasoned – refusal to allow the private expert to testify can therefore not have curtailed the applicant's right to a fair hearing.

45. The same is true for the complaint regarding the refusal to allow the witnesses B.S., J.H. and A.U. to testify in the proceedings. In this context, the Court reiterates 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 the defendants seek to adduce. More specifically, it is for them to assess whether it is appropriate to call witnesses. However, in the event that the national courts decide to reject a request for evidence or a witness request on behalf of a defendant, they need to reason their decisions accordingly (see, *mutatis mutandis*, *Vidal*, cited above, §§ 33 and 34). It is not the Court's function to express an opinion on the relevance of the evidence offered and rejected, but to supervise whether the proceedings were fair overall, for which it must ascertain whether the rejection of the witness request by the national courts was based on sufficient reasons (see, *mutatis mutandis*, *Vidal*, cited above, ibid). As regards the present case, the Court notes that the relevant decision was thoroughly reasoned by the Krems a.d. Donau Regional Court during the oral hearing (see paragraph 12 above) and in the judgment (see paragraph 16 above). Moreover, the Supreme Court took careful note of the applicant's complaint in this regard and brought forward sufficient arguments in support of the refusal of the request referring in particular to the vague nature of the request and its lack of substantiation (see paragraph 18 above). Furthermore, even if the Court took it upon itself to assess the quality of the witness request, it would refer to its findings that a witness request must be reasoned, and that a party requesting a witness must also be prepared to explain why the witness is in a position to make a statement concerning a certain question (see for example *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-V). In the

present case the Court would find that the request to allow B.S., J.H. and A.U. to testify was not sufficiently reasoned by the applicant.

46. Lastly, the Court observes that with regard to the applicant's complaint that his request to put "numerous questions" before the court-appointed expert was refused, he failed to substantiate which questions he had been prohibited to ask the court-appointed expert, in what way these questions had been important to him and how they would have helped to establish the truth (see again *Perna*, cited above, ibid).

47. In view of the above, the Court finds that the refusal to admit the private expert opinion into the proceedings, the refusal to allow the private expert to testify as a witness, the refusal of the requests for additional witnesses and the refusal to put certain unspecified questions to the court-appointed expert did not put the applicant in a more unfavourable position than the opposing party and thus did not violate the principle of equality of arms in the criminal proceedings against him. The proceedings conducted against the applicant were therefore fair overall and there was no violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. FURTHER ALLEGED VIOLATION OF THE CONVENTION

48. The applicant further invoked Article 5 of the Convention, but failed to substantiate his complaint under this provision.

49. Thus, in the light of all the material in its possession, and in so far as the matter complained of is within its competence, the Court finds that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention and its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Article 6 of the Convention admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 4 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President