



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

FIRST SECTION

CASE OF FRAGNER v. AUSTRIA

(Application no. 18283/06)

JUDGMENT

STRASBOURG

23 September 2010

FINAL

23/12/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Fragner v. Austria,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 2 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 18283/06) 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 Arnold Fragner (“the applicant”), on 4 May 2006.

2. The applicant was represented by Mr M. Lechner, a lawyer practising in Lochau. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that the proceedings concerning his doctor's fees had not been dealt with within a reasonable time and that the Regional Appeals Commission which dealt with his case had not been impartial or independent.

4. On 19 June 2008 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant lives in Engelhartstetten.

6. The applicant is a practitioner of general medicine. He has an individual contract with the Lower Austrian Health Insurance Board (*Niederösterreichische Gebietskrankenkasse*).

7. One part of the contract between the applicant and the Lower Austrian Health Insurance Board is the Remuneration Regulation (*Honorarordnung*) which states that certain types of examinations will only be reimbursed if they are performed by a specialist doctor.

8. In 1995 the applicant treated two patients carrying out minor surgical interventions. He claimed payment for these treatments from the Lower Austrian Health Insurance Board, submitting that the surgical interventions had been so urgent that he could not obtain the necessary visa from a chief physician (*Chefarztgenehmigung*). Moreover, the restriction excluding general practitioners from administering certain types of therapy (*Fachgruppenbeschränkung*) was arbitrary and against honest practices (*gute Sitten*).

9. The Lower Austrian Health Insurance Board refused to pay the fees claimed as the applicant is not a specialist doctor but a general practitioner.

10. Thereupon, on 2 May 1996, the applicant claimed fees in the amount of 1,770 Austrian Schillings (ATS), approximately 128.63 euros (EUR), before the Joint Arbitration Committee (*Paritätische Schiedskommission*).

11. On 4 September 1996 the Joint Arbitration Committee held a hearing but, because of a tie vote, it could not take a binding decision.

12. Therefore the applicant filed an application for the transfer of jurisdiction (*Devolutionsantrag*) to the Regional Appeals Commission (*Landesberufungskommission*) on 23 September 1996.

13. On 11 December 1996 the Regional Appeals Commission dismissed the applicant's claim as it found that the applicant had failed to obtain the necessary visa from a chief physician.

14. On 9 May 1997 the applicant filed a complaint with Constitutional Court (*Verfassungsgerichtshof*) and on 13 October 1999 that court quashed the Regional Appeals Commission's decision. The Constitutional Court found that the alleged unlawfulness of the restriction excluding general practitioners from administering certain types of therapy was a preliminary question which the Appeals Commission had failed to address.

15. On 3 May 2000 the applicant filed a request for proceedings to be resumed and, on 8 November 2000, the Appeals Commission held an oral hearing in which it decided to appoint an expert for examining the question of urgency of the surgical interventions forming the basis of the dispute.

16. Since the expert did not deliver the report, the applicant, on 15 January 2001, urged the Appeals Commission to continue its examination.

17. After the expert finally delivered the report a further hearing in camera was scheduled for 15 May 2002.

18. At the hearing the applicant's lawyer argued that the applicant was professionally competent to do the interventions at issue and that to give such treatment was his basic contractual obligation. Any conflicting restriction was therefore unlawful.

19. Subsequently the Appeals Commission scheduled a further hearing, this time in public, for 26 November 2003 as in the meantime the Constitutional Court, on 25 November 2002, had found that Article 6 of the Convention required the Appeals Commissions to hold their hearing in public.

20. Thus, on 26 November 2003 a public hearing before the Appeals Commission took place in which the taking of evidence was repeated and the applicant's lawyer argued as in the previous hearing.

21. On 10 December 2004 the Appeals Commission dismissed the applicant's claim. It was not persuaded that there had actually been a situation of emergency allowing the applicant not to obtain the necessary visa from a chief physician beforehand. It also held that the restriction excluding general practitioners from administering certain types of therapy was lawful. This decision was served on the applicant's lawyer on 3 June 2005.

22. On 3 June 2005 the applicant complained to the Constitutional Court, alleging a breach of the principle of equal treatment, and partiality and lack of independence of the Regional Appeals Commission.

23. On 27 September 2005 the Constitutional Court found no violation of the right to a fair trial and upheld the contested decision. It held that the assessors of the Regional Appeals Commission were independent in exercising their function and no circumstances giving rise to doubts about their impartiality and independence had arisen in the present case. This decision was served on counsel on 29 November 2005.

II. RELEVANT DOMESTIC LAW

24. For a detailed description of the legal situation in Austria in this field see *Stechnauer v. Austria*, no. 20087/06, §§ 21-26, 28 January 2010.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE LENGTH OF THE PROCEEDINGS

25. The applicant complained of a violation of Article 6 § 1 of the Convention as the proceedings had not been concluded within a reasonable time. Article 6 § 1, in so far as relevant to the present case, reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by an independent and impartial tribunal ...”

26. The Government contested that argument.

A. Admissibility

27. The Government argued that the applicant had failed to exhaust domestic remedies, as he had not complained to the Constitutional Court about the length of the proceedings. According to the Government, there was constant case-law of the Constitutional Court concerning violations of Article 6 § 1 on account of the length of proceedings. The case they referred to as an example was decided on 30 September 2004. The Government also pointed out that there had been previous decisions of the Constitutional Court in which it stated that the length of proceedings was excessive, albeit in a different area of law.

28. However, the Court reiterates that in the cases of *Stechnauer v. Austria* and *Puchstein v. Austria* it has found that a complaint to the Constitutional Court in order to obtain a decision to the effect that the proceedings had lasted for an unreasonably long time has neither preventive nor compensatory effect in respect of the length of the proceedings, but merely has declaratory effect. Such a remedy could not be considered effective in the light of the principles developed by the Court and therefore an applicant was not bound to make use of that remedy (see *Stechnauer v. Austria*, no. 20087/06, § 34, 28 January 2010 and *Puchstein v. Austria*, no. 20089/06, § 31, 28 January 2010).

29. The Court therefore concludes that the applicant complied with his obligation to exhaust domestic remedies. Thus, the Government's objection on non-exhaustion has to be dismissed.

30. The Court considers, in the light of the criteria established by its case-law on the question of “reasonable time”, and having regard to all the material in its possession, that an examination of the merits of the complaint is required.

B. Merits

31. The applicant argued that the overall duration of the proceedings, which had lasted more than nine years, was not in line with the requirement that proceedings be concluded within a reasonable time.

32. The Government admitted that the overall duration of the proceedings had been long, however they also argued that there had hardly been any lengthy periods of inactivity on the part of the authorities. Also the Regional Appeals Commission had had to deal with complex questions of law, such as compliance with the guarantees of Article 6 § 1 of the Convention. Furthermore a decisive decision of the European Commission of Human Rights, namely the decision in the *Hortolomei* case (see *Hortolomei v. Austria* (dec.), no. 17291/90, 21 May 1997), had only been given at a rather late point in time during the proceedings in the present case.

33. The Court reiterates that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

34. The Court observes that the relevant time started on 2 May 1996, when the applicant filed a request for remuneration of services with the Joint Arbitration Committee and ended on 29 November 2005, when the Constitutional Court's decision was served on the applicant's lawyer. Thus, they lasted for approximately 9 years and 7 months.

35. The case concerned questions of interpretation as regards the individual contract between the applicant and the Lower Austrian Health Insurance Board, the Remuneration Regulation being part of this contract. It cannot be said that this matter was particularly complex, in either the factual or the legal questions that it raised.

36. The applicant's conduct did not contribute to the length of the proceedings.

37. The Court notes that the applicant had to lodge a request for transfer of jurisdiction as the Joint Arbitration Commission failed to decide within the statutory time-limit. Moreover, the first set of proceedings before the Constitutional Court took two years and five months until the Constitutional Court took its decision. Furthermore there was a delay of approximately five years and two months between the Constitutional Court's decision on 13 October 1999 and the next decision issued by the Regional Appeals Commission on 10 December 2004.

38. Having regard to the delays attributable to the authorities and the overall length of the proceedings, the Court finds that the duration of the

proceedings was excessive and failed to meet the “reasonable time” requirement.

39. There has thus been a violation of Article 6 § 1 of the Convention as regards the length of proceedings.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE INDEPENDENCE AND IMPARTIALITY OF THE REGIONAL APPEALS COMMISSION

Admissibility

40. The applicant complained that the Regional Appeals Commission was not independent and impartial as provided in Article 6 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

41. The Government argued that none of the assessors were subject to instructions. The mere participation of persons representing certain interests in the decision-making process of an authority was not a convincing reason to doubt the independence or impartiality of the Regional Appeals Commission. The assessors, who represented certain interests, played an important role in the decision-making process as their expert knowledge and the experience gained in their profession could assist the Chairman of the Regional Appeals Commission, a professional judge, in assessing the specific question and thus contribute to adequate decision-making. There were two assessors proposed by the Association of Social Insurance Boards and two assessors proposed by the Austrian Medical Association, so that a balance between the specific viewpoints and interests was guaranteed.

42. The applicant contested that argument. Even though only employees of Regional Health Insurance Boards that were not parties to the general agreement at issue could be members of the Regional Appeals Commission, there remained doubts as to their independence and impartiality. First of all, two of the assessors were employees of Regional Health Insurance Boards, albeit of Health Insurance Boards of other Austrian regions. Secondly, the contractual provisions that gave rise to the present dispute were identical throughout Austria. Therefore, those members who worked for one of the Regional Health Insurance Boards and sat in the Regional Appeals Commission had to rule on contractual provisions that were identical to provisions contained in their employers' respective Remuneration Regulations.

43. The Court reiterates that in order to determine whether a tribunal can be considered “independent” for the purposes of Article 6 § 1, regard must

be had, *inter alia*, to the following criteria: the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and whether the tribunal presents an appearance of independence. As regards the question of “impartiality” for the purposes of Article 6 § 1, there are two aspects to this requirement, a subjective and an objective one. Under the subjective aspect, the tribunal must be subjectively free of personal prejudice or bias. Under the objective aspect, a tribunal must be impartial from an objective viewpoint, thus it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Furthermore, it must be determined whether there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of a certain importance (see *Morris v. the United Kingdom*, no. 38784/97, § 58, ECHR 2002-I).

44. The Court observes that in the cases of *Stechnauner v. Austria* and *Puchstein v. Austria*, which also concerned the alleged lack of impartiality and independence of the Lower Austria Regional Appeals Commission, it has found that that body qualified as an impartial and independent tribunal within the meaning of Article 6 § 1 of the Convention. In this respect the Court noted that lay assessors who have special knowledge and experience in the relevant field, contribute to a court's understanding of the issues before it and appear in principle to be highly qualified in the adjudication of disputes. As regards the requirements of independence and objective impartiality of assessors sitting on the Regional Appeals Commission, the Court observed that the assessors were appointed by the Federal Minister of Justice and employees of the Regional Health Insurance Board and the Regional Medical Association, which are parties to the general agreement on which the individual contract in dispute is based, could not be assessors in the respective Regional Appeals Commissions. The mere fact that other Regional Health Insurance Boards had provisions in their general agreements which were similar or identical to the provisions of the Remuneration Regulation in dispute did not suffice to cast doubt on the independence and impartiality of the assessors (see *Stechnauner*, cited above, §§ 55, 58, 59; *Puchstein*, cited above, §§ 51, 54, 55).

45. The Court sees no reason to depart from this reasoning, all the more since the specific authority which independence and impartiality was the subject of the Court's examination in the above quoted cases is the same which decided in the present case and the applicant did not raise any additional arguments which might put these findings into question. This being so the Court cannot find that in the present case the Regional Appeals Commission lacked independence and impartiality as required by Article 6 § 1 of the Convention. Accordingly, there is no appearance of a violation of this provision.

46. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

48. The applicant claimed 128.63 euros (EUR) in respect of pecuniary damage and EUR 2,000 for non-pecuniary damage in compensation for the excessive length of the proceedings. As regards the unfairness of the proceedings, the applicant stated that he would be satisfied with the Court's finding of a violation.

49. The Government asserted that there was no causal link between the violations alleged and the pecuniary damage claimed and argued that as regards the claim in respect of non-pecuniary damage, the finding of a violation should constitute sufficient just satisfaction.

50. The Court does not discern any causal link between the violation found and the pecuniary damage claimed; it therefore rejects this claim. However, it awards the applicant EUR 2,000 in respect of the non-pecuniary damage suffered on account of the length of the proceedings.

B. Costs and expenses

51. The applicant also claimed EUR 2,160 for the costs and expenses incurred before the domestic courts and EUR 4,800 for those incurred in the Convention proceedings. Both amounts include Turnover Tax.

52. The Government found the claim excessive.

53. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

54. The Court notes that the costs claimed in respect of the domestic proceedings were incurred for the applicant's complaint to the Constitutional Court in 2004 in which he challenged the independence and impartiality of the Regional Appeals Commission. As the Court has not found a violation in this respect, the costs were not necessarily incurred. The Court therefore rejects the claim. As to the costs of the Convention proceedings, the Court considers it reasonable to award EUR 2,000, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

55. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President