



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

FIRST SECTION

CASE OF VON PEZOLD v. AUSTRIA

(Application no. 5339/07)

JUDGMENT

STRASBOURG

28 October 2010

FINAL

11/04/2011

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

In the case of von Pezold v. Austria,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 7 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 5339/07) 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, Ms Elisabeth von Pezold (“the applicant”), on 10 November 2006.

2. The applicant was represented by Kosch & Partner, lawyers 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 for European and International Affairs.

3. On 23 October 2008 the President of the First Section decided to communicate the complaints concerning the length of the proceedings and their alleged unfairness 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**

4. The applicant was born in 1947 and lives in Prague. She is the owner of some 3,000 hectares of forest situated in Pöls.

A. The opening of the various sets of proceedings at issue

5. By decision of 13 July 1998 the Styria Regional Health Insurance Board (*Gebietskrankenkasse*) ordered the applicant to pay surcharges on social security contributions amounting to 960,500 Austrian schillings (ATS), equivalent to 69,802 euros (EUR). Referring to an investigation into the payment of contributions (*Beitragsprüfung*) carried out in March 1998, it found that the applicant had, in 105 cases, failed to comply with her obligation to register employees with the social security system.

6. The applicant filed an objection (*Einspruch*) on 12 August 1998, arguing that it had not yet been established that the persons concerned were subject to compulsory insurance. She submitted that the persons concerned were not employees but limited partners in the von Pezold limited partnership (*Kommanditgesellschaft*). Finally, she argued that the amount of the surcharges was excessive.

7. On 22 September 1998 the Regional Health Insurance Board issued a decision with the following content:

Point I: contained a retroactive finding of compulsory insurance in respect of 41 persons. The Health Insurance Board found it established that these persons had been the applicant's employees within the meaning of section 4 of the General Social Security Act (*Allgemeines Sozial-versicherungsgesetz*) at specified periods between 1993 and 1996. Referring to the file concerning the investigation into the payment of contributions which had been carried out between November 1997 and March 1998, the file concerning investigations (*Betriebsprüfung*) by the Judenburg Tax Office and the results of a salary tax investigation (*Lohnsteuerprüfung*) by the tax authorities, the Regional Health Insurance Board held that the von Pezold limited partnership was a sham company, aimed at concealing the fact that the workers were in reality employed by the applicant.

Point II: ordered the applicant to pay arrears in social security contributions in the amount of some 4 million ATS (about EUR 293,000) for the above-mentioned employees.

8. The applicant filed an objection against the decision on 22 October 1998, challenging the finding of compulsory insurance. She complained in particular that she had not been given an opportunity to submit her arguments and that the Regional Health Insurance Board had failed to establish relevant facts concerning the question whether or not the persons concerned worked in a relationship of personal and economic dependency, as required by section 4 of the General Social Security Act. In that connection she requested to hear Mr S., her forest administrator, Mr von Pezold, who had participated in running her forestry operation, and Mr K. as witnesses.

B. The continuation of the proceedings relating to the retroactive finding of compulsory insurance and the suspension of the proceedings for the payment of social security surcharges and arrears in social security contributions

9. Subsequently, the proceedings concerning the surcharges on social security contributions fixed by the decision of 13 July 1998 and the proceedings concerning the payment of arrears in social security contributions fixed in point II of the decision of 22 September 1998 were suspended, pending the decision on the question whether or not the persons concerned were subject to compulsory insurance. According to the Government, the applicant agreed to the suspension of these two sets of proceedings.

10. On 17 October 2001 the Styria Regional Governor held a hearing on site, at the applicant's property in Pöls.

11. According to the minutes of the hearing, which were issued on 12 April 2002, the following persons were present: an official of the Office of the Regional Government conducting the hearing, a representative of the Regional Health Insurance Board, the applicant's counsel, Mr von Pezold, Mr S., Mr W. and Mr K. The minutes contain a summary of facts and some legal considerations. No witness statements are recorded, and the minutes contain no decision on the applicant's request to hear witnesses.

12. The applicant lodged an objection against the minutes, arguing in particular that they were not written in due form and did not make it clear whether or not witnesses were heard and, if so, what statements they made.

13. The Styria Regional Governor did not take a decision on the applicant's objection against the decision of 22 September 1998 (point I) within the statutory six-month time-limit.

14. On 15 November 2002 the applicant filed a request for transfer of jurisdiction (*Devolutionsantrag*) with the Federal Minister for Social Security, Generations and Consumer Protection. The Minister did not take a decision within the statutory six-month time-limit.

15. The applicant filed an application under Article 131 of the Federal Constitution against the administration's failure to decide (*Säumnisbeschwerde*). On 24 June 2003 the Administrative Court (*Verwaltungsgerichtshof*) granted the application, ordering the Federal Minister to issue a decision within three months.

16. Subsequently, on 12 August 2003, the Federal Minister dismissed the applicant's objection against the Regional Health Insurance Board's decision of 22 September 1998 (point I), confirming that the workers concerned were subject to compulsory insurance. It referred in detail to the different files on which the Regional Health Insurance Board had relied and in particular to the file of the Judenburg Tax Office concerning the salary tax investigation. Its decision, which had meanwhile been confirmed on

appeal, had found it established that the sums paid to the limited partners of the von Pezold limited partnership were in reality salaries subject to salary tax.

17. Furthermore the Federal Minister noted that the Regional Health Insurance Board had repeatedly requested the applicant, who was assisted by counsel, to submit documents. It had tried to hear the limited partners as witnesses, but it had been impossible to summon any of them since they were all foreigners and none had a known address in Austria. It had heard three witnesses, including Mr S., the applicant's forest administrator, Mr G., who had been a trainee at the applicant's forestry site for three months in 1995, and Mr St. It had duly assessed the statements made by these witnesses and accordingly concluded that the persons concerned had worked in the applicant's forestry against remuneration, being bound to certain working hours and to the instructions of the foreman. They had thus worked in a relationship of personal and economic dependency, which qualified them as employees.

18. The applicant lodged a complaint with the Administrative Court on 13 October 2003. She complained about defects in the procedure, claiming in particular that the witnesses she had requested had not been questioned at the hearing on 17 October 2001. Moreover she complained that the decision had wrongly applied the law in finding that the persons concerned qualified as employees.

19. The administrative authorities concerned filed their statements in reply on 7 November and 22 December 2003, and submitted the relevant administrative files on 31 December 2003.

20. On 21 December 2005 the Administrative Court dismissed the applicant's complaint as being unfounded. It considered that the authorities had duly assessed the evidence before them and had not been required to hear further witnesses or to carry out further investigations. The Administrative Court's judgment was served on the applicant's counsel on 14 February 2006.

C. The resumption of the proceedings for the payment of social security surcharges and of the proceedings for the payment of arrears in social security contributions

21. Subsequently the Styria Regional Governor resumed the proceedings which had been adjourned. In two separate decisions of 10 April 2006 the Styria Regional Governor dismissed the applicant's objection against the Regional Health Insurance Board's decision of 13 July 1998, concerning the surcharges on social security contributions, and her objection against the Regional Health Insurance Board's decision of 22 September 1998 (point II), concerning the payment of arrears in social security contributions.

22. The applicant lodged complaints with the Constitutional Court (*Verfassungsgerichtshof*) against both decisions. She repeated her complaint that the proceedings relating to the issue of compulsory insurance had been defective and that she had not been given a reasonable opportunity to submit her arguments. In particular, the witnesses requested by her had not been heard. Furthermore, she complained under Article 1 of Protocol No. 1 that the social security contributions she was required to pay were excessive.

23. On 6 June 2006 the Constitutional Court refused to deal with both complaints, considering that they had no prospects of success. The decisions were served on the applicant's counsel on 19 June 2006.

II. RELEVANT DOMESTIC LAW

Section 4 of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz*) regulates obligatory affiliation to the social security system. Pursuant to Section 4 § 1 (1) employees are affiliated to the health and accident insurance and the old-age pension schemes. Section 4 § 2 defines an employee as any person who is occupied against remuneration in a relationship of personal and economic dependency.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE ALLEGED UNFAIRNESS OF THE PROCEEDINGS

24. The applicant complained that the proceedings were unfair, submitting that the authorities did not give her an opportunity to adduce evidence in her favour, and in particular that the witnesses she had requested had not been examined at the only hearing held by the appellate authority. She relied on Article 6 § 1 and Article 13 of the Convention.

The Court finds that the complaint is to be examined under Article 6 § 1 of the Convention which, so far as relevant in the present case, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair .. hearing within a reasonable time by [a] ... tribunal ...”

Admissibility

25. The Government argued that the proceedings at the origin of the present application were to be regarded as three different sets of proceedings: first, the proceedings concerning the retroactive finding concerning compulsory insurance; second, the proceedings determining the amount of surcharges to be paid; and third, the proceedings concerning the payment of arrears in social security contributions. The first set of proceedings had settled a decisive preliminary question for the other two sets of proceedings. Consequently, the other two sets of proceedings had been adjourned until the question of compulsory insurance had been determined with final effect.

26. Insofar as the applicant complained about the alleged unfairness of the proceedings, because of the alleged failure to hear certain witnesses, the Government argued in the first place that the applicant had failed to comply with the six-month rule. They noted that the proceedings relating to the retroactive finding concerning compulsory insurance, in which the hearing of the witnesses had been requested, were terminated with final effect by the Administrative Court's judgment of 21 December 2005, which had been served on the applicant on 14 February 2006, while the applicant had not introduced her application until 10 November 2006.

27. Insofar as the applicant might be understood to be complaining that the witnesses requested were not heard in the other two sets of proceedings, namely those concerning the payment of surcharges and those concerning the payment of arrears in social security contributions, the Government argued that the applicant had failed to exhaust domestic remedies as she had not lodged a complaint with the Administrative Court against the Regional Governor's decisions of 10 April 2006.

28. The applicant contested the Government's argument. In her view it was artificial to consider the three sets of proceedings separately, as they all related to the same subject matter.

29. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with a matter "within a period of six months from the date on which the final decision was taken. The six-month rule marks out the temporal limits of supervision carried out by the Convention organs and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

30. In the present case the applicant complains that the proceedings were unfair, in particular in that the authorities failed to hear witnesses requested by her at the only hearing.

31. The Court notes that the applicant had requested the hearing of her forest administrator Mr S., Mr Pezold and Mr K in respect of the question whether the persons concerned had worked in a relationship of personal and

economic dependency and were thus to be regarded as employees subject to compulsory insurance pursuant to section 4 of the General Social Security Act. The hearing referred to by the applicant was held by the Regional Governor on 17 October 2001 in the context of the proceedings relating to the retroactive finding concerning compulsory insurance. Those proceedings were terminated by the Administrative Court's judgment of 21 December 2005, which determined with final effect the question whether the 41 persons concerned were to be regarded as the applicant's employees and were therefore subject to compulsory insurance. That judgment was served on the applicant on 14 February 2006.

32. The Court finds that the applicant, who introduced her application on 10 November 2006, failed to comply with the six-month rule as far as the above complaint about the alleged unfairness of the proceedings is concerned.

33. Furthermore, the Court observes that there is no indication in the file that the applicant requested to hear the said witnesses or any other witnesses in the context of the other two sets of proceeding. It is therefore not necessary to deal with the Government's argument that she failed to exhaust domestic remedies as she did not lodge a complaint to the Administrative Court against the Regional Governor's decisions of 10 April 2006.

34. It follows that the complaint about the alleged unfairness of the proceedings has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

II. THE ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LENGTH OF THE PROCEEDINGS

A. Admissibility

35. The Government argued also in respect of the length of the proceedings that the three sets of proceedings had to be regarded separately. They asserted that the proceedings concerning a retroactive finding of compulsory insurance were terminated by the Administrative Court's judgment of 21 December 2005 and that the applicant had therefore failed to introduce her complaint about the length of that set of proceedings within the six-month time-limit, as she did not lodge the application until 10 November 2006.

36. The applicant asserted that the proceedings had to be considered as a whole.

37. The Court observes that proceedings concerning the payment of surcharges on social security contributions and the proceedings for payment of arrears in social security contributions were adjourned pending the

termination of the proceedings concerning the retroactive finding of compulsory insurance (see paragraph 9 above). The latter proceedings determined a decisive preliminary question for the other two sets of proceedings which were resumed once this set of proceedings was terminated by the Administrative Court's judgment of 21 December 2005. The latter two sets of proceedings were terminated by the Constitutional Court's decisions of 6 June 2006, which were served on the applicant's counsel on 19 June 2006.

38. The Court therefore finds that the proceedings were so closely linked to each other that they have to be considered as a whole when it comes to the assessment of their duration. It notes that the applicant introduced her application on 10 November 2006, that is less than six months after the termination of the proceedings by the Constitutional Court's decisions of 6 June 2006. It therefore dismisses the Government's objection that the applicant failed to comply with the six-month rule.

39. 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

40. The applicant maintained that the duration of the proceedings was excessive and that undue delays were attributable to the authorities.

41. The Government looked at the three sets of proceedings separately. They asserted that the proceedings concerning the retroactive finding of compulsory insurance, which started on 22 September 1998 and were terminated by the Administrative Court's decision of 21 December 2005, were highly complex, which followed on the one hand from the large number of persons concerned (41 employees) and on the other hand from the company's structure as a limited partnership. As to the proceedings pending before the Styria Regional Governor, the Government stated that they could not provide an explanation for their duration of almost four years. The duration of the proceedings before the Administrative Court of almost two years was explained by the applicant having made various complex submissions and, in particular, by the excessive workload faced by the Administrative Court. The said court itself had drawn attention to its workload problem, which it considered "notorious and structural". In that connection the Government provided a statistical overview of the Administrative Court's workload: with 63 judges, the Administrative Court had determined more than 19,000 cases in the relevant period between 2003 and 2005. In addition, the Government submitted that the Administrative Court had taken various organisational measures in order to combat the problem of excessive duration of proceedings.

42. Concerning the proceedings for the payment of surcharges and the proceedings concerning the payment of arrears in social security contributions, the Government argued that they had been suspended following the applicant's objections to the Regional Health Insurance Board's decisions (on 12 August and 22 October 1998, respectively) and were only continued after the Administrative Court's decision of 21 December 2005. They ended with the Constitutional Court's decisions of 6 June 2006 and had thus lasted merely six months and two weeks.

43. The Court reiterates that the proceedings in the present case were closely linked and are to be considered as whole for the calculation of their duration. The proceedings at issue therefore started on 13 July 1998 with the first decision of the Regional Health Insurance Board and ended on 19 June 2006 when the Constitutional Court's decisions were served. Thus, they lasted altogether 7 years and 11 months, before three levels of jurisdiction.

44. The Court reiterates that the reasonableness of the length of 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).

45. The Court accepts that the case was of a certain complexity, concerning forty-one employees and being linked to further sets of proceedings conducted by the tax authorities.

46. However, the Court notes that substantial delays are imputable to the authorities. In particular, the case was pending for more than four years before the Styria Regional Governor. During that period only one hearing was held but no decision was taken. The Government have not provided any satisfactory explanation for this delay. Upon the applicant's request for transfer of jurisdiction, the Federal Minister became competent to decide in November 2002. He only gave a decision in August 2003, after the applicant had made use of a further remedy, namely the complaint against the administration's failure to decide. The Administrative Court took more than two years to decide – from October 2003 until December 2005.

47. In reply to the Government's argument relating to the Administrative Court's excessive workload, the Court notes that such arguments have already been raised in previous cases. Even though the Court appreciates the efforts made by the Administrative Court to deal with its case-load expeditiously, it would reiterate that it is for Contracting States to organise their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes within a reasonable time (see, for instance, *Almesberger v. Austria*, no. 13471/06, § 27, 10 December 2009, and *Otto v. Austria*, no. 12702/08, § 24, 22 October 2009).

48. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case.

49. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

50. Lastly, the applicant complained under Article 1 of Protocol No. 1 about her obligation to pay substantial sums in social security contributions for persons who were considered to be her employees and thus subject to compulsory insurance.

51. The Court observes that the applicant has failed to substantiate her complaint.

52. It follows that it is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant claimed 267,207.04 euros (EUR) in respect of pecuniary damage, namely reimbursement of the social security contributions which she had to pay, plus interest of EUR 88,268.08. She did not claim any non-pecuniary damage.

55. The Government asserted that there was no causal link between the alleged violation of the “reasonable time” requirement and the damage claimed.

56. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It therefore rejects this claim. As the applicant has not made a claim for non-pecuniary damage no award is made under this head either.

B. Costs and expenses

57. The applicant also claimed EUR 17,053.79 for the costs and expenses incurred before the domestic authorities and in the proceedings before the Court.

58. The Government commented that the applicant had not sufficiently specified her claim in respect of the costs incurred in the domestic proceedings. In respect of the proceedings before the Court, the Government argued that the case only related in part to the alleged excessive length of the proceedings.

59. 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.

60. Regarding the domestic proceedings, the Court notes that only the costs for the request for transfer of jurisdiction and for the application against the administration's failure to decide (see paragraphs 14 and 15 above) were incurred in order to prevent the excessive length of the proceedings. According to the bill of fees submitted by the applicant the costs for these remedies amounted in total to EUR 5,724.41, inclusive of value-added tax (VAT). The Court awards this sum in full.

61. In respect of the Convention proceedings the applicant submitted a bill of EUR 2,349 including VAT. The Court notes that only the complaint concerning the length of the proceedings was declared admissible. The Court considers it reasonable to award the applicant the sum of EUR 1,500 inclusive of VAT under this head.

62. In sum the Court awards the applicant 7,224.41 under the head of costs and expenses. This sum includes VAT.

C. Default interest

63. 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 7,224.41 (seven thousand two hundred and twenty-four euros and forty-one cents) 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 amount 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 28 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President