



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

FIRST SECTION

CASE OF WURZER v. AUSTRIA

(Application no. 5335/07)

JUDGMENT

STRASBOURG

6 March 2012

FINAL

06/06/2012

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

In the case of Wurzer v. Austria,

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

Nina Vajić, *President*,
Peer Lorenzen,
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 14 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 5335/07) 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 Anna Wurzer (“the applicant”), on 12 January 2007.

2. The applicant was represented by Mr K. Kocher, a lawyer practising in Graz. 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 9 April 2009 the President of the First Section decided to give notice of the application 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 Floing, where she owns a house. Her neighbours (Mr and Mrs R.) own two plots of land opposite her house.

A. The neighbour's proceedings for a building permit and authorisation of use

5. It appears that on 2 February 1972 Mr and Mrs R. obtained a decision on designation of use of their land (*Widmungsbewilligung*) and on 10 March 1972 they obtained permission (*Baubewilligung*) to construct a guest-house. Mr and Mrs R. changed the construction plans and built a dance-hall and adjoining rooms in the basement of the house. On 29 April 1976 the Mayor (*Bürgermeister*) of Floing retroactively granted a building permit and authorised this use of the building (*Benutzungsbewilligung*). The authorisation of use applied to the rooms in the basement of Mr and Mrs R.'s house, which were then used as a discotheque. According to the applicant, this led to noise emissions and heavier traffic on the road leading to the applicant's and Mr and Mrs R.'s houses.

6. The applicant was not considered to be a party to the proceedings in respect of the building permit and thus was not able to lodge her objections with the relevant authorities.

7. In mid-1988 the Regional Government instructed the Mayor that the applicant (and some other neighbours) were parties to the proceedings and thus would have to be served the decision on the designation of use of land of 2 February 1972 and the building permit of 10 March 1972. The Mayor did not serve the decisions on the applicant; in mid-1989 he was instructed again to serve the decisions, which he refused. On 2 October 1989 the applicant applied to the Mayor to be served the decisions. On 13 November 1989 she received the decisions.

8. The applicant appealed against the building permit and decision of authorisation of use of 29 April 1976. The Municipal Council partly set aside the decisions on 28 March 1991, holding that the building was in breach of the area zoning plan in force since 27 May 1986 and that the building was in contravention of the building permit and the designation decision. Thus, parts of the authorisation of the use of the building (in the present case the alterations to the rooms for their use as a discotheque) were set aside.

9. Mr and Mrs R. raised objections (*Vorstellung*) to the setting aside of the decision, arguing, *inter alia*, that the Municipal Council should have obtained data on the noise emissions coming from the discotheque, and that the applicant should have been considered a party to the proceedings only if the noise emissions had exceeded a certain level. They also argued that they had entered into a settlement agreement with the applicant (see paragraph 13 below), according to which she would tolerate the discotheque against payment of a certain amount of money. Furthermore when the noise levels were measured the noise was found not to exceed the usual noise levels in the area.

10. The objections were dismissed by the Styrian Regional Government by decision of 16 October 1991; Mr and Mrs R. complained to the Administrative Court. By decision of 12 March 1992 the Administrative Court granted suspensive effect to Mr and Mrs R's complaint.

11. On 24 September 1992 the Administrative Court confirmed the setting aside of the authorisation of use. It held that the authorisation of use was in fact an additional building permit and the neighbours (in this case the applicant) were parties to these proceedings. It also confirmed the Regional Government's view that the area in which Mr and Mrs R. were running their discotheque was a residential area in which discotheques were prohibited.

B. Further application for a building permit

12. Meanwhile, on 27 August 1991 Mr and Mrs R. had applied for an alteration to their building and for a change of the authorised use of their building as a dance bar. The application was refused by the Mayor on 30 November 1993; an appeal to the Regional Government also failed on 21 December 1995. No further remedies were lodged, so this set of proceedings was terminated with final effect.

C. The settlement agreement

13. On 2 July 1980 the applicant and Mr and Mrs R. had entered into a settlement agreement (*gerichtlicher Vergleich*) according to which Mr and Mrs R. undertook that at night no noise exceeding 35 decibels would reach a room in the upper floor of the applicant's house, and undertook to pay compensation to the applicant. The applicant undertook to withdraw her appeal in the proceedings on the permission of commercial use of the site (*Betriebsanlagengenehmigung*) before the Weiz District Authority and to withdraw her appeal against the Mayor's designation permit of 4 April 1979. Mr and Mrs R. undertook not to carry out the project to enlarge the discotheque rooms; the applicant undertook to agree to an amended project which was subject to the application of permission for commercial use of the site before the Weiz District Authority, in which a decision had been issued on 15 April 1980.

D. The proceedings under section 40 of the Styrian Buildings Act

14. On 8 March 1996 Mr and Mrs R. applied for a decision that the discotheque was built in accordance with the law. They relied on section 40 of the Styrian Buildings Act (*Steiermärkisches Baugesetz*), according to which a building can be declared to have been constructed lawfully if it was erected between 1 January 1969 and 31 December 1984 and if certain further conditions have been fulfilled. The application was rejected by the

Mayor on 2 September 1996 and an appeal was rejected by the Municipal Council on 9 April 1997. Mr and Mrs R. submitted an objection to the Regional Government, which set aside the decision on 30 September 1997 and referred the case back to the Municipal Council. It held that the Municipal Council should have taken into consideration whether the building theoretically could have been authorised at the time of its construction. It appears that no further decision was taken by the Municipal Council.

15. The applicant was not considered to be a party at first. When she found out that there had been proceedings, she applied on 22 and 23 March 2005 to have the decisions served on her. The rescinded decision of the Mayor of 2 September 1996 was served on her on 4 April 2005 and the Regional Government's decision of 30 September 1997 was served on her 18 April 2005.

16. The applicant made a complaint against the Regional Government's decision of 30 September 1997 to the Constitutional Court on 27 May 2005, which refused to deal with the complaint on 10 October 2005. The case was transferred to the Administrative Court.

17. On 27 June 2006 the Administrative Court rejected the complaint. It rejected the applicant's arguments, but upheld the Regional Government's reasoning that section 40 of the Styrian Buildings Act applied to buildings for which no building permission could be provided and to buildings for which permission had been refused; any other interpretation might put people who tried to obtain a building permit, even if in vain, at a disadvantage *vis-à-vis* those who had never even tried to obtain a building permit. The decision was served on the applicant's counsel on 14 July 2006. As a result of the decision of the Administrative Court, the case was placed once more before the Municipal Council.

18. In September 2007 an expert's opinion was obtained on the question whether Mr and Mrs R.'s building could have been permissible under the area zoning plan in force at the time of the construction of the building. It was sent to the applicant's counsel on 15 October 2007 for comments.

19. On 25 January 2008 the Municipal Council rejected Mr and Mrs R.'s appeal against the Mayor's decision of 2 September 1996 (the decision that the building would not be authorised under section 40 of the Styrian Buildings Act); Mr and Mrs R. appealed against the refusal. The appeal decision was not served on the applicant. On 8 April 2008 the Regional Government set aside the decision of 25 January 2008 and remitted the case to the Municipal Council.

20. On 29 September 2008 the Municipal Council allowed Mr and Mrs R.'s appeal and thus their application of 8 March 1996 that the building be declared lawfully constructed, and a building permit and authorisation of use were granted.

21. The applicant submitted an objection (*Vorstellung*) to the decision to allow the appeal. On 18 December 2008 the Regional Government sustained the objection and set aside the decision of 29 September 2008 since the authorities had failed to take noise emissions and other disturbances into consideration; however it also stated that from a zoning planning point of view the discotheque would be permissible.

22. The applicant appealed against the Regional Government's decision to the Constitutional Court on 2 February 2009. She contested the finding that the discotheque would be permissible from a zoning planning point of view. By decision of 2 March 2009 the Constitutional Court refused to deal with the case for lack of prospects, as the case neither appeared to contain questions of constitutional law nor was the contested decision based on a law appearing to be in violation of constitutional rights.

23. The applicant did not apply to have the case transferred to the Administrative Court.

24. By a decision of 9 July 2009 the Municipal Council again allowed Mr and Mrs R's appeal and held that their building was lawful under section 40, paragraphs 2 and 3 of the Styrian Buildings Act. On 11 February 2010 the Regional Government dismissed the applicant's objection against this decision. On 14 June 2010 the Constitutional Court refused to deal with the applicant's complaint and transferred the case to the Administrative Court.

25. The Administrative Court requested the applicant to supplement her complaint, which she did on 24 August 2010. On 2 November 2010 the Regional Government submitted observations. On 9 November 2011 the Administrative Court dismissed the applicant's complaint. The decision was served on 18 November 2011.

II. RELEVANT DOMESTIC LAW

26. Section 40 of the Styrian Buildings Act provides as follows:

§ 40: Lawful existence

“(1) Existing physical structures and heat-producing appliances for which a building permit was necessary at the time of their construction shall, where evidence of such a permit cannot be supplied, be deemed lawful if they were erected before 1 January 1969.

(2) Any physical structures and heat-producing appliances which were erected between 1 January 1969 and 31 December 1984 and would have been permissible at the time of their construction shall likewise be deemed lawful.

(3) The assessment of lawfulness for the purposes of subsection (2) above shall be carried out on an application by the owner of the building or *ex officio*. It shall take into account the applicable legal position at the time of the construction. If the requirements in subsection (2) are satisfied, the authority must issue a declaration of

lawfulness. The declaration shall be treated as equivalent to a building permit and authorisation of use...”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

27. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement and that the proceedings had been unfair. Article 6 § 1 of the Convention, which in so far as relevant, 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...”

A. The complaint about the duration of the proceedings

28. The Government contested the argument that the proceedings had lasted an unreasonably long time.

1. Admissibility

(a) Whether the six-month time-limit of Article 35 (1) of the Convention was respected

29. The Government argued that only the proceedings under section 40 of the Styrian Buildings Act (see section d) above) could be examined. The other proceedings were separate and not connected to each other. They were concluded in 1992, 1980 and 1995 respectively, and the applicant had thus failed to lodge an application with the Court within the six-month time-limit after their final decision provided for by Article 35 § 1 of the Convention. *In event*, the Government argued that the applicant had failed to exhaust domestic remedies.

30. The applicant argued that the proceedings should be seen as one, as they were all directed against the operation of the discotheque on the neighbouring land.

31. The Court agrees that there were different sets of proceedings, and the various proceedings are thus to be seen separately (see *Emsenhuber v. Austria* (dec.), no. 54536/00, 11 September 2003; and *Ebmer v. Austria* (dec.), no. 28519/05, 4 February 2010).

32. The first three sets of proceedings ended by decisions of 24 September 1992 (see above, paragraph 11), 21 December 1995 (see above, paragraph 12) and 2 July 1980 (see above, paragraph 13), respectively. The application with the Court was lodged on 12 January 2007, thus significantly more than six months after the final decisions in these proceedings. The fourth set of proceedings under section 40 of the Styrian Buildings Act was terminated in November 2011 (see above, paragraph 25) and was therefore still pending when the application was lodged. In respect of this set of proceedings, the applicant has complied with the six-month rule.

33. Consequently, the complaints about the duration of all the sets of proceedings except for the one under section 40 of the Styrian Buildings Act, are inadmissible as lodged outside the six-month time-limit provided for by Article 35 § 1 of the Convention.

(b) Whether domestic remedies were exhausted

34. In respect of this last set of proceedings, the Government contested that the applicant had exhausted domestic remedies, as she had never complained about the duration to the Constitutional Court despite having repeatedly lodged complaints before that court.

35. The applicant stated that she had complained under Article 6 to the Constitutional Court, which had led to the decision of the Constitutional Court of 10 October 2005. Furthermore, the Constitutional Court is under a duty to find violations of rights guaranteed by constitutional law out of its own motion.

36. The Court has constantly held that domestic remedies have to be exhausted if they are effective, sufficient and accessible (see *Mifsud v. France* (dec.) [GC], no. 57220/00, ECHR 2002-VIII).

37. The Court notes that the applicant did not raise the issue of the length of proceedings explicitly in her complaints to the Constitutional Court. However, as the Court held in the cases of *Stechnauer v. Austria*, no. 20087/06, § 34, 28 January 2010, and *Puchstein v. Austria*, no. 20089/06, § 31, 28 January 2010, such a complaint to the Constitutional Court has a merely declaratory effect and does not have preventive or compensatory effects. Thus, this type of remedy does not fulfil the criterion of effectiveness in the light of the principles developed by the Court, and an applicant is not bound to make use of that remedy. In conclusion, the Court dismisses the Government's objection of non-exhaustion.

(c) Whether the applicant can claim to be a victim of a violation

38. The Government finally argued that the applicant could not be considered a victim. The applicant was an "omitted party" (*übergangene Partei*) in the proceedings under section 40 of the Buildings Act. Being an "omitted party" meant that she was a party to the proceedings but was not

summoned to hearings and did not have the procedural rights of parties. Also, no decision was issued *vis-à-vis* her, and she was not served any of the decisions. From a legal point of view, the applicant did not suffer any disadvantage from having been an omitted party, as the decisions did not have any effect on her. In any event the Government maintained that she could only claim to be a victim of a violation of her human rights after the decisions were served on her, i.e. after 18 April 2005.

39. The applicant argued that she had been affected by the operation of the discotheque ever since it started.

40. The Court finds that the Government arguments can be split into two parts, the first one being whether the applicant can claim to be a victim of a violation, as the proceedings concerned her neighbours' building project, and the second one being the question of when the proceedings at issue started. Turning to the question as to whether the applicant can claim to be a victim of a violation, the Court reiterates that it held in the case of *Emsenhuber v. Austria* (dec.), no. 54536/00, 11 September 2003:

“The Court firstly reiterates that proceedings for the granting of a building permit to a particular person also involve the determination of a civil right of the neighbour who opposes a building permit. The Court considered that in such proceedings pecuniary interests of the opposing neighbour could be at stake and therefore found the civil right limb of Article 6 § 1 to be applicable (see *Ortenberg v. Austria*, judgment of 25 November 1994, Series A no. 295-B, pp. 48-49, § 28).”

41. The Court reiterates, furthermore, that a declaration of lawfulness under Section 40 of the Styrian Buildings Act shall be treated as equivalent to a building permit and authorisation of use. The Court thus considers that the applicant can claim to be a victim of a violation of her civil rights. However, the question of the relevant starting point of the proceedings under Section 40 of the Buildings Act is so closely connected with the merits of the complaints that it should be joined to the merits.

42. 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.

2. Merits

43. The applicant maintained that all proceedings should be considered cumulatively, and thus had lasted for more than thirty years.

44. The Government argued that according to the Court's case-law, in administrative proceedings a dispute about a civil right begins when an applicant challenges an authority's decision. The applicant had been an “omitted party” at first and was served the decisions on 5 April and 18 April 2005. These decisions were then challenged by the applicant on 27 May 2005, thus it is only from this date that the proceedings started.

45. The Court reiterates that, in administrative proceedings, in which the administrative authorities' decisions are a necessary precondition for bringing the case before a "tribunal" the point in time when a "dispute" within the meaning of Article 6 § 1 arises is, as a rule, taken as the starting point of the proceedings (see, for instance, *Morscher v. Austria*, no. 54039/00, § 38, 5 February 2004).

46. In a previous case, concerning an "omitted party" in administrative proceedings on a request for approval of a sales contract relating to real property, the Court accepted the date of the decision by which the competent authority had refused approval as the starting point of the proceedings. That decision, given on the request of the seller, had erroneously not been served on the applicants who, being the buyers of the property at issue, could consequently not be entered into the land register. In its reasoning the Court noted in particular that the refusal of the approval of the sales contract had had a direct bearing on the applicants' civil rights (see *Rieberer and Engleitner v. Austria* (dec.), no. 8749/02, 7 October 2004).

47. In the present case, the Court observes that none of the decisions taken at the stage of the proceedings when the applicant was an "omitted party" had a direct bearing on her civil rights. First, the mayor had rejected her neighbours' request to have their building declared lawful under section 40 of the Styrian Buildings Act. Then, the Municipal Council had dismissed their appeal and, subsequently, the Regional Government had referred the case back to the Municipal Council, which apparently took no further decision. In March 2005 the applicant, having learned that proceedings were pending, requested that the decisions be served on her. On 27 May 2005 she lodged a complaint against the Regional Government's decision with the Constitutional Court. The Court therefore considers that a "dispute" within the meaning of Article 6 § 1 of the Convention only arose on that date, which should consequently be taken as the starting point of the proceedings. These proceedings ended on 18 November 2011 when the Administrative Court's judgment was served on the applicant. They have therefore lasted almost six and a half years and have come before three levels of jurisdiction.

48. 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).

49. The Court finds that the present case was not particularly complex. The applicant's conduct did not give rise to any significant delays. As to the conduct of the authorities, it is noted that partly the length of the proceedings is due to the fact that the case was repeatedly remitted to the Municipal Council. Furthermore, delays which are attributable to that

authority occurred: In particular, after the Administrative Court had referred the case back to Municipal Council by decision of 27 June 2006, it took the latter more than one and a half years to issue a new decision on 25 January 2008.

50. Having examined all the material submitted to it and having regard to its case-law on the subject, the Court considers that in the instant case, the overall length of the proceedings was excessive and failed to meet the “reasonable time” requirement. There has accordingly been a breach of Article 6 § 1 in that respect.

B. The complaint of unfairness of the proceedings

51. The applicant complained that the proceedings had been unfair, as she had not been considered a party to them at first.

52. The Court reiterates that it can only examine the applicant’s complaints in respect of the proceedings under Section 40 of the Styrian Buildings Act, as the application was lodged outside the six-month time-limit in respect of the other sets of proceedings (see paragraphs 32-33 above).

53. The Court refers to its above finding that, at the stage of the proceedings when the applicant was an “omitted party”, no decisions were taken which had a direct bearing on her civil rights and that a “dispute” over the applicant’s civil rights only arose once she had learned about the proceedings and lodged a complaint against the Regional Government’s decision (see above, paragraph 47). The proceedings were then remitted to the Municipal Council. There is no indication that the applicant could not submit all her arguments in the subsequent proceedings or that they were otherwise unfair.

54. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION AND ITS PROTOCOLS

55. Relying on Article 8 of the Convention, the applicant complained that Mr and Mrs R’s building and the operation of the discotheque had led to noise emissions and increased traffic on the road, thus violating her right to respect for her private life and her home. Furthermore, she complained under Article 1 of Protocol No. 1 that, because of the noise levels on the neighbours’ land and the authorities’ inactivity tolerating the noise emissions, she was restricted in the use she could make of her property.

56. Again, the Court can only examine the applicant’s complaints as far as they relate to the proceedings under Section 40 of the Styrian Buildings Act. In these proceedings, the question of noise emissions was one of the

points examined (see above, paragraph 21). The mere fact that the authorities decided in favour of the applicant's neighbours finding that their building was lawful does not disclose any indication of a violation of Article 8 of the Convention or of Article 1 of Protocol No. 1. The applicant has not further substantiated her complaint. In particular she has not claimed that the noise emissions from the discotheque exceeded the threshold fixed in the relevant laws or in the settlement agreement she had concluded with her neighbours in 1980.

57. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 33,000 euros (EUR) in respect of non-pecuniary damage.

60. The Government contested the claim as excessive and pointed out that the Court can also find that the finding of a violation constitutes just satisfaction in itself.

61. The Court considers that the applicant must have sustained non-pecuniary damage related to the violation found. Ruling on an equitable basis, it awards her EUR 1,500 under that head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

62. The applicant also claimed EUR 8,132.76 for the costs and expenses incurred before the domestic courts and EUR 7,689.60 for those incurred before the Court.

63. The Government contested these claims, arguing that the costs and expenses incurred in the domestic proceedings did not serve to prevent the long duration of the proceedings. Moreover, the costs claimed for the proceedings before the Court were not in line with the awards the Court usually makes.

64. 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 are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

65. 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 under section 40 of the Styrian Buildings Act 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 of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one-thousand five hundred 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 6 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President