



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

FIRST SECTION

CASE OF GASSNER v. AUSTRIA

(Application no. 38314/06)

JUDGMENT

STRASBOURG

11 December 2012

FINAL

29/04/2013

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

In the case of Gassner v. Austria,

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

Isabelle Berro-Lefèvre, *President*,

Elisabeth Steiner,

Nina Vajić,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Linos-Alexandre Sicilianos,

Erik Møse, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 20 November 2012,

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

PROCEDURE

1. The case originated in an application (no. 38314/06) 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 Herbert Gassner (“the applicant”), on 21 August 2006.

2. The applicant was represented by Mr K. Dörnhöfer, a lawyer practising in Eisenstadt. 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. On 12 November 2009 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

4. The applicant was born in 1955 and lives in Eisenstadt.

5. The applicant is a judge at the Eisenstadt Regional Court. In July 1997 he made a study visit to the Commission of the European Union in Brussels. The Federal Ministry of Justice paid his travel expenses and granted the applicant two weeks’ special leave, in addition to which he took two weeks of his annual leave.

6. On 9 July 1997 the Federal Minister of Justice informed the applicant on his return that it would not reimburse any of the additional expenses he had claimed in the meantime on 20 June 1997.

7. On 5 September 1997 the applicant formally requested the reimbursement of further costs, incurred during the study visit, in particular the costs for his accommodation in the amount of Austrian schillings 17,699.75 (ATS - 1,284.11 euros (EUR)), and submitted additional records.

8. On 20 March 1998 the Federal Minister dismissed the applicant's request on the grounds that the trip had not been an official journey – this having been made clear by the fact that the applicant had taken some annual leave during that period.

9. On 3 June 1998 the applicant filed a complaint with the Administrative Court. He submitted that the Federal Minister had interpreted the relevant law incorrectly and that if he had properly assessed the evidence he would have concluded that the study visit to Brussels had to be treated as an official journey.

10. On 30 January 2002 the Administrative Court quashed the Federal Minister's decision finding that the President of the Vienna Court of Appeal had been the authority competent to decide on the request for reimbursement at first instance, rather than the Federal Minister.

11. Thereupon, the matter was transferred to the President of the Vienna Court of Appeal who requested the applicant and the Federal Minister to submit explanations regarding the study visit.

12. On 17 September 2002 the applicant lodged a complaint (*Säumnisbeschwerde*) with the Administrative Court against the alleged failure of the President of the Court of Appeal to decide on his request within the statutory six-month time-limit.

13. On 23 October 2002 the Administrative Court rejected the complaint because the applicant had not made a prior request under Section 73 of the General Administrative Procedure Act for jurisdiction to be transferred to the Federal Minister of Justice as the authority responsible for hearing appeals.

14. On 29 November 2002 the President of the Vienna Court of Appeal dismissed the applicant's request for reimbursement of the costs of his accommodation in Brussels on the grounds that the applicant had not been given instructions for an official journey and had not performed any official duties during his stay in Brussels. Therefore he was not entitled to reimbursement of his costs.

15. On an unspecified date the applicant appealed against that decision to the Federal Minister of Justice.

16. On 4 February 2003 the Federal Minister dismissed the applicant's appeal, confirming the findings in the first-instance decision.

17. On 14 April 2003 the applicant filed a complaint with the Administrative Court against the Federal Minister's decision. He submitted

that while acknowledging that his trip had been in the interest of his official duties (*dienstliches Interesse*), the Minister had incorrectly assumed that the applicant's study visit was not to be treated as an official journey. The applicant did not ask for a hearing before the Administrative Court.

18. On 24 February 2006 the Administrative Court dismissed the applicant's complaint, finding that the Minister had correctly assessed the evidence before him and had correctly concluded that the applicant's study trip had not been treated as an official journey.

II. RELEVANT DOMESTIC LAW

19. Civil servants are entitled under the Rules on Expenses for Official Journeys (*Reisegebührenvorschrift*) to reimbursement of their expenses for official journeys. Under Section 2 § 1 of these Rules it is an official journey if a civil servant travels to a place which is different from his official duty station (*Dienstort*) in order to comply with a given instruction (*Dienstauftrag*).

20. Section 73 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) deals with the administrative authorities' duty to decide. Its relevant part reads as follows:

“(1) Subject to any contrary provision in the administrative regulations, the authorities must give a decision on applications by parties ... and appeals without unnecessary delay and at the latest six months after the application or appeal has been lodged.

(2) If the decision is not served on the party within this time-limit, jurisdiction will be transferred to the competent superior authority upon the party's written request. ...”

21. The relevant provisions of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) relating to the application against the administration's failure to decide read as follows:

Section 27

“An application under Article 132 of the Federal Constitution for breach of the duty to decide (application against the administration's failure to decide) can be lodged only when the highest authority to which an application can be made in administrative proceedings, either by way of an appeal or an application for transfer of jurisdiction, ... has been applied to by a party and has not made a decision on the matter within six months. ...”

Section 36

“(2) On an application against the administration's failure to decide under Article 132 of the Federal Constitution the relevant authority is to be ordered to give a decision within three months and either produce to the Administrative Court a copy of the decision or state why in its opinion there has not been a breach of the duty to decide. The time-limit can be extended once if the administrative authority can show that there are relevant reasons why it is impossible to reach a decision within the prescribed time-limit. If a decision is made within the prescribed time-limit, the

proceedings in respect of the application against the administration's failure to decide shall be stayed."

Section 42

"(1) Subject to any contrary provision of this Federal Act, the Administrative Court shall give a judgment in all cases.

...

(4) In respect of applications under Article 132 of the Federal Constitution, the Administrative Court may initially limit its judgment to a decision on specific relevant points of law and order the authority to make a decision consistent with the determined points of law within a specified time-limit which must not exceed eight weeks. If the Administrative Court does not use that possibility or the authority in question fails to comply with the order, the Administrative Court shall rule on the application against the administration's failure to decide by giving a judgment on the merits, for which it shall have full discretion in the administrative authority's stead."

THE LAW

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

22. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

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

23. The Government contested that argument.

A. Admissibility

1. Whether Article 6 of the Convention applies to the present case

24. The Government argued that Article 6 of the Convention did not apply to the proceedings at issue, because the applicant, as a judge, exercised State authority and therefore belonged to a group of public servants excluded from the scope of Article 6. Moreover, they submitted that the proceedings did not concern an ordinary labour law dispute, as the fundamental question was whether the applicant's study visit was to be considered as an official journey or not – a question which did not constitute a civil law claim.

25. This was disputed by the applicant.

26. The Court reiterates its finding in the case of *Vilho Eskelinen and Others v. Finland* [GC], no.63235/00, §62, ECHR 2007-IV that in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant excluding him from the protection embodied in Article 6, two conditions must be fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest (see *Vilho Eskelinen and Others cited above* § 62, and *Sabeh El Leil v. France* [GC], no. 34869/05, § 38, 29 June 2011).

27. In the present case the Court considers that the first condition is not met since the applicant did have access to a domestic court, namely the Administrative Court, regarding the dispute over the reimbursement of his travel expenses. It is therefore not necessary to examine whether the second condition indicated above is met. The Court therefore concludes that Article 6 in its civil limb does apply to the proceedings at issue. Accordingly, the Government's objection in this respect must be rejected.

2. *Whether domestic remedies were exhausted*

28. The Government submitted that the applicant had failed to exhaust the domestic remedies, arguing that he had failed to apply for a transfer of jurisdiction pursuant to section 73 of the General Administrative Proceedings Act and had also failed to file a complaint with the Constitutional Court about the duration of the proceedings at issue.

29. This was disputed by the applicant.

30. The Court reiterates that a request for transfer of jurisdiction constitutes, in principle, an effective remedy which must be used in respect of complaints about the length of proceedings before administrative authorities (see *Egger v. Austria* (dec.), no. 74159/01, 9 October 2003). However, it has also found on numerous occasions that, as regards remedies against the excessive length of proceedings, there has been no form of relief – either preventive or compensatory – available in respect of delays which have occurred before the Administrative Court (see *Stempfer v. Austria*, no. 18294/03, § 48, 26 July 2007; *Schutte v. Austria*, no. 18015/03, § 38, 26 July 2007; *Vitzthum v. Austria*, no. 8140/04, § 31, 26 July 2007; and *Hauser-Sporn v. Austria*, no. 37301/03, § 40, 7 December 2006).

31. The Court observes that the case was pending for a substantial period of time before the Administrative Court, namely between 14 April 2003 and 24 February 2006, during which period the applicant was unable to make use of the remedy indicated by the Government in order to speed up the proceedings. In these circumstances the Court considers that it would not be reasonable to expect the applicant to have filed a request for transfer of jurisdiction during the remaining periods (see *Holzinger v. Austria* (no. 2), no. 28898/95, §§ 21-22, 30 January 2001).

32. As regards the Government's further argument that the applicant should have lodged a complaint with the Constitutional Court about the length of the proceedings, the Court has consistently held that domestic remedies must be exhausted only if they are shown to be effective, sufficient and accessible (see *Mifsud v. France* (dec.) [GC], no. 57220/00, ECHR 2002-VIII).

33. The Court notes that the applicant did not raise the issue of the length of proceedings in a complaint to the Constitutional Court. However, as the Court has 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, rather than 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 required to make use of that remedy. In conclusion, the Court dismisses the Government's objection of non-exhaustion.

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

B. Merits

35. The period to be taken into consideration began on 29 November 2002, when the President of the Vienna Court of Appeal dismissed the applicant's request for reimbursement, as this had been the first time in the proceedings that a competent authority decided on the applicant's claim for travel expenses. It was from that moment that a "dispute" arose within the meaning of Article 6 § 1 of the Convention (see *König v. Germany*, 28 June 1978, § 98, Series A no. 27, and *Morscher v. Austria*, no. 54039/00, § 38, 5 February 2004; *Bachmayer v. Austria*, no 36650/05, § 35, 28 October 2010). It ended on 24 February 2006, when the Administrative Court eventually dismissed the applicant's complaint. The proceedings therefore lasted three years, two months and twenty-six days and came before three levels of jurisdiction.

36. 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 applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

37. The Court considers that the case was not particularly complex and that the applicant's conduct did not give rise to any substantial delays in the proceedings. As regards the conduct of the authorities, the Court finds that,

while the relevant period in its totality does not appear particularly long, the period during which the case was pending before Administrative Court from 14 April 2003 to 24 February 2006 (i.e. two years ten months and ten days) may raise an issue under Article 6 of the Convention.

38. The Court observes that the subject matter of the dispute did not concern an ordinary labour law dispute in which the applicant's employment or important features thereof were at stake. Rather it related to reimbursement of costs from one singular trip the applicant had made and whether that trip had been an official one or not. The Court therefore considers that the matter was not of any particular importance for the determination of the applicant's civil rights. The Court does not see any important question of principle involved in the domestic proceedings instituted by the applicant for the reimbursement of travel expenses. Since, moreover, the relevant overall period does not appear excessively long, the Court concludes that there has been no violation of the relevant time requirement under Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

39. The applicant complained under Article 6 about the lack of a public oral hearing in his case and about the alleged unfairness of the proceedings in that the authorities had failed to examine a witness called by him. Under Article 13 he also complained that he had not had access to a proper tribunal because the Administrative Court did not qualify as one; he also complained, under Article 14 that the outcome of the proceedings had been arbitrary and had violated his right to protection from discrimination.

40. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously admissible the complaint concerning the length of the proceedings and inadmissible the remainder of the application;
2. *Holds* by four votes to three that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 11 December 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Isabelle Berro-Lefèvre
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion by Judges Berro-Lefèvre, Vajić and Møse is annexed to this judgment.

I.B.L
A.M.W

JOINT DISSENTING OPINION OF JUDGES
BERRO-LEFÈVRE, VAJIĆ AND MØSE

1. We are unable to find that there has been no violation of the applicant's right to a hearing within a reasonable time under Article 6 § 1 of the Convention in the present case.

2. In our view, the starting-point of the period to be taken into consideration was well before 29 November 2002, when the President of the Vienna Court of Appeal dismissed the applicant's request for reimbursement (see paragraph 14 of the judgment).

This opinion is based on the fact that the applicant's request had initially been dismissed by the Federal Minister and the subsequent proceedings were a necessary continuation of that action.

The period to be taken into consideration in order to determine whether the length of the proceedings was reasonable therefore began on 3 June 1998, when the applicant filed a complaint with the Administrative Court. It was from that moment that a "dispute" arose for the purposes of Article 6 § 1 of the Convention (see paragraph 9).

The period ended on 24 February 2006, when the Administrative Court eventually dismissed the applicant's complaint. The proceedings therefore lasted seven years, eight months and twenty-one days at three levels of jurisdiction.

3. The protracted length of the proceedings was due to the fact that there were substantial delays, imputable to the authorities in particular, while the case was pending before the Administrative Court.

It first took the Administrative Court almost three years and seven months – from 3 June 1998 to 30 January 2002 – to quash the Federal Minister's decision because it had been made by the wrong authority (see paragraph 10 of the judgment). In the subsequent proceedings the case, which was of no particular complexity, lay dormant before the Administrative Court from 14 April 2003 until 24 February 2006 (see paragraphs 17-18).

This second period of inactivity would in itself have sufficed to find a violation in the present case even if, as argued by the majority, the starting-point of the period to be taken into consideration had been 29 November 2002.

4. Thus, having regard to the facts of the case and the Court's case-law on the subject, we do not find any reason to reach a different conclusion in the present case from those in cases raising similar issues, where the Court has frequently found violations of Article 6 § 1 of the Convention (see, for instance, *Ludescher v. Austria*, no. 35019/97, § 22, 20 December 2001;

Strobel v. Austria, no. 25929/05, § 27, 4 June 2009; and *Almesberger v. Austria*, no. 13471/06, § 27, 10 December 2009).

We are therefore of the opinion that the length of the proceedings in the present case was excessive and failed to meet the “reasonable time” requirement.