



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

FIRST SECTION

**CASE OF JULIUS KLOIBER SCHLACHTHOF GMBH
AND OTHERS v. AUSTRIA**

(Applications nos. 21565/07, 21572/07, 21575/07 and 21580/07)

JUDGMENT

STRASBOURG

4 April 2013

FINAL

04/07/2013

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

In the case of Julius Kloiber Schlachthof GmbH and Others v. Austria,

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

Isabelle Berro-Lefèvre, *President*,

Elisabeth Steiner,

Khanlar Hajiyeu,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Linos-Alexandre Sicilianos,

Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 12 March 2013,

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

PROCEDURE

1. The cases originated in four applications (nos. 21565/07, 21572/07, 21575/07 and 21580/07) 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 four companies registered in Austria, namely Julius Kloiber Schlachthof GmbH (“the first applicant company”), Fa. Pöll Günter (“the second applicant company”), Pöll-Fleisch GmbH (“the third applicant company”) and Schweinespezialbetrieb Innviertel GmbH (“the fourth applicant company”), on 3 and 8 May 2007.

2. The applicants were represented by Mr J. Hofer and Mr T. Humer, lawyers practising in Wels. 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 companies complained in particular that proceedings concerning the imposition of surcharges on unpaid contributions by the national agricultural marketing association, Agrarmarkt Austria, had not been decided by a tribunal within the meaning of Article 6 § 1 of the Convention.

4. On 23 October 2008 the applications were communicated to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant companies carry out the slaughter of cattle and pigs, which makes them liable under the Agricultural Market Act (*Agrarmarktgeseztz*) to pay agricultural marketing charges, calculated on the basis of the number of animals slaughtered, to Agrarmarkt Austria (“AMA”), the national agricultural marketing board.

6. In 2006 AMA issued payment orders against the applicant companies. On 5 July 2006 it ordered the first applicant company to pay outstanding contributions for the years 2003 and 2004 in the amount of 56,573.62 euros (EUR) and, in addition, imposed a surcharge for failure to pay, amounting to 10% of the unpaid contributions. On 30 May 2006 it ordered the second applicant company to pay outstanding contributions for the years 2004 and 2005 in the amount of EUR 12,556.43 and imposed a surcharge of 10%. On the same date it ordered the third applicant company to pay outstanding contributions for the years 2005 and 2006 in the amount of EUR 5,936.01, imposing a surcharge of 10%, and ordered the fourth applicant company to pay outstanding contributions for the years 2005 and 2006 in the amount of EUR 96,050.48, imposing a surcharge of 60%.

7. The applicant companies appealed against these orders. They argued that the above system was contrary to European Union rules on state aid. They also asked for oral hearings to be held in their appeals.

8. The Federal Minister of Agriculture, Forestry, the Environment and Water (*Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*), acting as the appeal authority, dismissed the applicant companies’ appeals on 17 July 2006 without holding a hearing.

9. The applicant companies argued that AMA contributions were levied for financing activities, such as AMA’s quality programme, which were not in compliance with EU law. However, the Federal Minister found that, after a decision of the European Commission of 30 June 2004 (C(2004)2037), the applicant companies had been in a position to know precisely which charges they had to pay. In that decision, the European Commission had stated that it had no objection to AMA’s quality assurance scheme and quality mark, registered as state aid under notification number NN 34A/2000 (“*Qualitätsprogramme und das AMA-Biozeichen und das AMA-Gütesiegel*”), because that state aid was in accordance with the Common Market provided for in the Treaty establishing the European Community (“the EC Treaty”). The Federal Minister referred further to the Administrative Court’s decision no. 2005/17/230 of 20 March 2006, in which the court had also found that the levying of AMA contributions was in compliance with the relevant provisions of EU law. The Federal Minister further held that it had not been

necessary to hold a hearing, because a hearing was only held if a decision had been taken by a panel on an appeal against the decision of a tax office or a regional directorate of finance, which was not the case here.

10. Thereupon, the applicant companies lodged complaints with the Constitutional Court and the Administrative Court against the Federal Minister's decision. Before the Constitutional Court they complained that the surcharges imposed had violated their constitutional right to property. Before the Administrative Court, they complained that the appeal authority had not been a court within the meaning of the case-law of the European Court of Justice, with the result that they had been prevented from having the lawfulness of the European Commission's decision of 30 June 2004 reviewed by the European Court of Justice in proceedings under Article 234 of the EC Treaty. As regards the imposition of the surcharges, the applicant companies complained that the findings of fact made by the authorities in imposing those surcharges had been insufficient. In particular the authorities had failed to establish whether the objective and subjective elements of the offence (*objektiven und subjektiven Tatbildvoraussetzungen*) had been met. Relying on Article 6 of the Convention, they further complained that there had not been a public hearing and that the criminal charges against them had not been decided by an impartial tribunal established by law (*"es ist kein unparteiisches, auf Gesetz beruhendes Gericht über den erhobenen strafrechtlichen Vorwurf eingeschritten"*). As the authorities imposing the surcharges had failed to hold an oral hearing, the applicant companies asked the Administrative Court for a public hearing.

11. On 25 September 2006 the Constitutional Court declined to deal with the applicant companies' complaints under Article 144 of the Federal Constitution for lack of prospects of success.

12. The Administrative Court dismissed the applicant companies' complaints on 30 January 2007 in separate decisions and held as follows:

"The present case does not differ in [substance] to the [case] decided by the Administrative Court on 20 March 2006, no. 2005/17/230. Pursuant to Section 43(2) of the Administrative Court Act reference is made to it.

For the reasons set out in that decision, the breach of law complained of by the applicant company also does not exist in the present case, for which reason it can be dismissed without further proceedings *in camera*.

For the reasons set out in the decision referred to, Article 6 of the Convention is also of no relevance here."

II. RELEVANT DOMESTIC LAW

13. The relevant provisions of the Federal Act Establishing the Market Regulation Institution "Agrarmarkt Austria", Federal Law Gazette 376/1992 (*Bundesgesetz über die Errichtung der Marktordnungsstelle "Agrarmarkt*

Austria”, BGBl 276/1992 – “the AMA Act”), the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), a summary of the Administrative Court’s decision no. 2005/17/230 of 20 March 2006, to which reference is made in the present judgment, and an abstract of the Constitutional Court’s judgment G 181/86 of 14 October 1987 are reproduced in the Court’s judgment in the case of *Steininger v. Austria*, no. 21539/07, §§ 13-28, 17 April 2012.

THE LAW

I. JOINDER OF THE APPLICATIONS

14. Given that these four applications concern similar facts and raise essentially identical issues under the Convention, the Court shall consider them together and render a single judgment, in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE LACK OF A TRIBUNAL

15. The applicant companies, which complained solely about the proceedings concerning the surcharges that they had been required to pay in excess of the contributions due, submitted that those proceedings had not been decided by a tribunal. They relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

A. Admissibility

1. *Applicability of Article 6 of the Convention*

16. The Government argued that the complaint was incompatible *ratione materiae* with the provisions of the Convention because Article 6 had not applied to the proceedings in question. The imposition of parafiscal charges, such as the marketing contributions levied by AMA and surcharges in the event of non-payment, had not concerned the determination of civil rights and obligations within the meaning of Article 6 § 1. The Government maintained that proceedings concerning surcharges could only be regarded as criminal proceedings within the meaning of Article 6 § 1 in certain

circumstances, as the Court had found in the case of *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-XIII. According to this judgment, the test for qualifying proceedings as criminal within the meaning of Article 6 was based on three elements, namely the qualification of the provision in domestic law as criminal, the character of the offence and the severity of the penalty the person concerned risked.

17. The Government maintained, however, that the first condition had not been met, because the imposition of a surcharge under domestic law was part of ordinary administrative law. Moreover, the AMA Act contained a different provision providing for a criminal sanction, namely section 211 of the AMA Act. As regards the nature of the surcharges, the relevant provisions of the AMA Act showed, in the Government's view, that a surcharge was primarily a lump-sum payment intended to cover the cost of the additional work that had to be performed by AMA upon non-payment of a contribution, namely conducting formal administrative proceedings, and could not therefore be regarded as a penalty. In addition, the third criterion had not been met. Considering that the amounts imposed had not exceeded 60% of the unpaid contributions, the Government argued that the sanction could not be considered particularly severe.

18. The applicant companies argued that Article 6 had applied to the proceedings in question because the surcharges imposed by AMA under section 21g of the AMA Act had clearly had a punitive element, with the result that the proceedings had concerned the determination of a criminal charge.

19. The Court observes that the applicant companies were ordered by AMA to pay surcharges, as they had failed to pay marketing contributions, which are parafiscal contributions.

20. In the case of *Steininger* (cited above), the Court, referring to the *Jussila* case (also cited above), found that Article 6 under its criminal head applied to proceedings concerning the imposition of surcharges for taxes such as the contributions levied by AMA (see *Steininger*, cited above, §§ 34-37). The Court sees no reason to come to a different conclusion in the present cases and therefore concludes that Article 6 applies under its criminal head.

21. Thus, the Government's objection that the applicant companies' claims were incompatible *ratione materiae* with the provisions of the Convention has to be dismissed.

2. Exhaustion of domestic remedies

22. The Government submitted that the applicant companies had not exhausted domestic remedies as regards their complaint under Article 6 of the Convention, as they had failed to argue during the domestic proceedings that those proceedings were not being decided by a tribunal within the meaning of Article 6.

23. This was disputed by the applicant companies, which claimed that they had made use of all available domestic remedies.

24. The Court observes that the applicant companies argued in their complaints to the Administrative Court that the criminal charges against them had not been decided by an impartial tribunal established by law, and relied in this respect on Article 6 of the Convention. The Court therefore considers that this matter was brought sufficiently to the attention of the domestic authorities and thus rejects the argument that the applicants failed to exhaust domestic remedies.

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

B. Merits

1. The parties' submissions

26. The Government argued that, even if Article 6 had applied to the proceedings in question, there had not been a breach of this provision. They submitted that, according to the settled case-law of the Court, the requirements for a body to be characterised as a tribunal under Article 6 § 1 of the Convention would be fulfilled if the body had full jurisdiction to review all questions of law and fact relevant to the legal dispute at issue. In the present case, the Administrative Court had issued the decision in the surcharge proceedings. As it had considered the applicant companies' complaints on the merits, point by point, without ever having to decline jurisdiction when replying to them, that court had qualified as a tribunal for the purposes of Article 6 § 1 (relying on *Zumtobel v. Austria*, 21 September 1993, § 32, Series A no. 268-A).

27. The applicant companies did not comment on this point.

2. The Court's assessment

28. The Court reiterates that Article 6 § 1 of the Convention guarantees a right to a public hearing by an independent and impartial tribunal established by law. According to the Court's case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence applying the law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements: independence, in particular of the executive; impartiality; the duration of its members' terms of office; and the guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 itself (see *Belilos v. Switzerland*, 29 April 1988, § 64, Series A

no. 132). Where a penalty is criminal in nature there must be the possibility of review by a court which satisfies the requirements of Article 6 § 1, even though it is not inconsistent with the Convention for the prosecution and punishment of minor offences to be primarily a matter for the administrative authorities (see *Baischer v. Austria*, no. 32381/96, § 23, 20 December 2001, and *Malige v. France*, 23 September 1998, § 45, *Reports of Judgments and Decisions* 1998-VII).

29. The Court reiterates further that decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 of the Convention must be subject to subsequent review by a "judicial body that has full jurisdiction" (see *Umlauf v. Austria*, 23 October 1995, § 37, Series A no. 328-B, with further references).

30. In the present case, AMA ordered the applicant companies to pay surcharges, and the Federal Minister of Agriculture, Forestry, the Environment and Water, acting as an appeal authority, decided on their appeal against the payment orders. While the former is a public law body in which some administrative powers are vested, the latter is an administrative and governmental authority. Neither of them qualifies as a tribunal.

31. In the *Steininger* case (cited above), the Court found that neither the Administrative Court nor the Constitutional Court qualified as a tribunal. As regards the Constitutional Court, it held in § 48 of its judgment as follows:

"The Constitutional Court, which did not to entertain the applicant company's complaint for lack of prospect of success, cannot be considered a "judicial body that has full jurisdiction" for the purposes of the present proceedings, which are criminal in nature (see *Umlauf*, cited above, § 38), even though it has on occasions been considered a tribunal in relation to civil claims (see *Pauger v. Austria*, 28 May 1997, § 59, *Reports of Judgments and Decisions* 1997-III, and *Kugler v. Austria*, no. 65631/01, § 50, 14 October 2010)."

32. As regards the Administrative Court, the Court, after having outlined its case-law on the matter, concluded in § 56 of its judgment as follows:

"In the present case, however, the power of review of the Administrative Court is limited (...) and has already been found by the Court insufficient for regarding it a tribunal within the meaning of the Convention in respect of proceedings that were of a criminal nature for the purposes of the Convention. In this respect the Court cannot overlook that the Austrian Constitutional Court itself has considered that the limited review (*die (bloß) nachprüfende Kontrolle*) carried out by the Administrative Court was insufficient in respect of criminal penalties within the meaning of the Convention (...)."

It concluded that the review by Administrative Court could not be qualified as adequate "full review" of the applicant company's criminal conviction by an administrative authority.

33. The Court considers that in view of the similarities of the facts of the case and of the complaint raised by the applicant companies, these findings also apply in the present case. It finds, therefore, that in the proceedings in

question, which were criminal in nature, the applicant companies did not have access to a tribunal within the meaning of Article 6 § 1.

34. There has accordingly been a violation of Article 6 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE LACK OF A HEARING

35. The applicant companies complained further under Article 6 § 1 of the Convention that there had not been a public hearing in the surcharge proceedings.

36. The Government contested that argument.

37. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

38. Having regard to the conclusions above, namely that the surcharge proceedings were not conducted before a tribunal within the meaning of Article 6 § 1 of the Convention, the Court considers that it is not necessary to examine whether there has been a violation of Article 6 on account of the lack of a public hearing, because only a hearing before a body which qualifies as a tribunal would have served a meaningful purpose (see *Alge v. Austria*, no. 38185/97, § 29, 22 January 2004).

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

Admissibility

39. The applicant companies also complained under Article 1 of Protocol No. 1 to the Convention that the surcharges had not been proportionate to the aim sought. Article 1 of Protocol No. 1 reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

40. The Government argued that the applicant companies had not exhausted domestic remedies, as in the proceedings before Constitutional Court they had merely mentioned that their “fundamental right to the protection of their property” had been violated without, however, making any substantive arguments in this respect. In any event, there had not been a

breach of Article 1 Protocol No. 1, as the Contracting States have a wide margin of appreciation as regards the levying of taxes and other contributions and the interference with the applicant companies' rights, if any, had been proportionate, as no excessive burden had been imposed on them.

41. This was disputed by the applicant companies, which maintained that they had properly exhausted domestic remedies. They also argued that the surcharges imposed on them had been excessive, because, given their amount, they could not be considered as merely covering additional administrative costs incurred as a result of the non-payment of the contributions.

42. The Court observes first that in the proceedings before the Constitutional Court the applicant companies merely mentioned that their "fundamental right to the protection of their property" had been violated, without giving any further details. However, it need not examine whether this constituted proper exhaustion of domestic remedies, as this complaint is in any event inadmissible for the following reasons.

43. The Court reiterates that as regards the right of States to enact such laws as they deem necessary for the purpose of "securing the payment of taxes", provided for in Article 1 of Protocol No.1, the legislature must be allowed a wide margin of appreciation (see *Gasus Dosier- und Förder-technik GmbH v. the Netherlands*, 23 February 1995, § 60, Series A no. 306-B). According to the Court's well-established case-law, the second paragraph of Article 1 of Protocol No. 1 must be construed in the light of the principle laid down in the Article's first sentence. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued (*ibid*, § 62). That balance will be lacking where the person concerned has to bear an individual and excessive burden (see *Wieczorek v. Poland*, no. 18176/05, § 59, 8 December 2009).

44. In the present case, the first to third applicant companies had to pay surcharges in the amount of 10% of the unpaid contributions and the fourth applicant company 60%. Considering the wide margin of discretion afforded to the Contracting States and the amounts involved, the Court cannot find that these amounts constituted individual and excessive burdens imposed on the applicant companies.

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

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

46. Lastly, the applicant companies complained under Article 6 § 3 (a) of the Convention that they had not been informed in detail of the duty to pay contributions. Under Article 7 of the Convention they complained that, despite the decision of the European Commission of 30 June 2004, the extent to which contributions had to be paid had remained unclear, and the relevant provision of the AMA Act and the payment orders based on it had therefore lacked legal certainty. Under Article 13 they complained that they could only have avoided paying the surcharges by paying the allegedly illegal contributions and therefore that they had not had an effective remedy at their disposal. Under Article 14 read in conjunction with Article 1 of Protocol No. 1 they complained of discrimination because the same penalty could apply irrespective of the amount of contributions that had gone unpaid.

47. 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 these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant companies claimed compensation for pecuniary damage, consisting of the amount of the surcharges they had had to pay.

51. The Government commented that there was no causal link between the violation alleged and the pecuniary damage claimed by the applicant companies. It was by no means certain that the applicant companies would not have had to pay surcharges, had the procedural guarantees considered to have been violated been complied with.

52. The Court agrees with the Government that there is no causal link between the violation of the Convention and the pecuniary damage claimed by the applicant companies. Consequently, it makes no award under this head.

B. Costs and expenses

53. As regards costs and expenses incurred in the domestic proceedings, the first applicant company claimed 2,673.44 euros (EUR), the second applicant company EUR 2,396.32, the third applicant company EUR 2,257.76 and the fourth applicant company EUR 4,498.20. All applicant companies further claimed EUR 1,006 each for costs incurred in the proceedings before the Court. All these amounts do not include value-added tax (VAT).

54. The Government argued that the costs claimed for the domestic proceedings were excessive.

55. 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.

56. The Court considers that the costs claimed both in respect of the domestic proceedings and the proceedings before the Court were necessary and reasonable as to quantum and awards them in full. It therefore awards the following amounts to the applicant companies for costs and expenses, plus any tax that may be chargeable to the applicant companies on this amount: the first applicant company EUR 3,679.44, the second applicant company EUR 3,402.32, the third applicant company EUR 3,263.76 and the fourth applicant company EUR 5,504.20.

C. Default interest

57. The Court considers it appropriate that the default interest rate 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. *Decides* to join the applications;
2. *Declares* the complaint that the surcharge proceedings were not decided by a tribunal and the lack of a public hearing admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the complaint that the surcharge proceedings were not decided by a tribunal;

4. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention as regards the complaint concerning the lack of a public hearing during the surcharge proceedings;
5. *Holds*
 - (a) that the respondent State is to pay to the applicant companies, within three months of the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, plus any tax that may be chargeable to the applicant companies, in respect of costs and expenses:
 - (i) the first applicant company EUR 3,679.44 (three thousand six hundred seventy nine euros and forty four cents),
 - (ii) the second applicant company EUR 3,402.32 (three thousand four hundred two euros and thirty two cents),
 - (iii) the third applicant company EUR 3,263.76 (three thousand two hundred sixty three euros and seventy six cents),
 - (iv) the fourth applicant company EUR 5,504.20 (five thousand five hundred four euros and twenty cents);
 - (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;
6. *Dismisses* the remainder of the applicant companies' claim for just satisfaction.

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

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President