



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

THIRD SECTION

CASE OF G. S. v. AUSTRIA

(Application no. 26297/95)

JUDGMENT

STRASBOURG

21 December 1999

[This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.]

In the case of G.S. v. AUSTRIA,

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

Mr P. KÜRIS, *President*,
Mrs F. TULKENS,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 14 December 1999,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 3 June 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (26297/95) against Austria lodged with the Commission under former Article 25 by Mr G.S., an Austrian national, on 9 December 1994. The applicant is represented by Mr M. Pochendorfer, a lawyer practising in Ried-im-Innkreis. The Government of Austria are represented by their Agent, Mr F. Cede, Ambassador, Head of the International Law Department at the Federal Ministry of Foreign Affairs. The applicant asked the Court not to reveal his identity.

The Commission’s request referred to former Articles 44 and 48 and to the declaration whereby Austria had recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach of Article 6 § 1.

2. On 7 July 1999 the Panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the application would be examined by one of the Sections. It was, thereupon, assigned to the Third Section.

3. The Chamber constituted with the Section included *ex officio* Mr W. Fuhrmann, the judge elected in respect of Austria (Article 27 § 2 of the Convention and Rule 26 § 1 (a) of the Rules of Court) and Mr P. Küris, Acting President of the Section (Rule 12). The other members designated by the latter to complete the Chamber were Mrs F. Tulkens, Mr K. Jungwiert, Mrs H.S. Greve, Mr K. Traja and Mr M. Ugrehelidze.

4. In accordance with Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues in the application. The Registrar received the applicant's memorial on 21 October 1999 and the Government's memorial on 25 October 1999.

5. After consulting the Agent of the Government and the applicant, the Chamber decided not to hold a hearing in the case.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 21 September 1988 the applicant applied to the Provincial Governor (*Landeshauptmann*) for Upper Austria for the grant of a licence to run a pharmacy in Ried-im-Innkreis.

7. On 23 May 1990 the Provincial Governor for Upper Austria dismissed the application. The Governor, having regard to observations filed by sixteen neighbouring municipalities and by the Upper Austrian Board of Pharmacists (*Apothekerkammer*), noted that two pharmacies existed already in the town concerned and a third licence had meanwhile been granted to another pharmacist, Ms. W. Taking into account the population, no further licence could be granted.

8. On 22 June 1990 the applicant lodged an appeal with the Federal Ministry for Health, Sports and Consumer Protection (*Bundesministerium für Gesundheit, Sport und Konsumentenschutz*).

9. On 17 July 1990 the Provincial Governor dismissed the applicant's request to participate as a party in the proceedings regarding the licence which had been granted to another pharmacist. His appeal to the Federal Ministry for Health, Sports and Consumer Protection was to no avail.

10. On 30 April 1991 the applicant lodged an application against the administration's failure to decide (*Säumnisbeschwerde*) with the Administrative Court (*Verwaltungsgerichtshof*), complaining that the Ministry for Health, Sports and Consumer Protection had not decided on his appeal of 22 June 1990 within the statutory six-month time-limit.

11. On 12 June 1991 the Federal Ministry for Health, Sports and Consumer Protection dismissed the applicant's appeal against the decision of 23 May 1990.

12. On 30 July 1991 the applicant filed an appeal with the Austrian Administrative Court. On 16 October 1991 the Ministry for Health, Sports and Consumer Protection filed observations and, on 2 June 1992, Mrs W., who participated in the proceedings as an interested party (*mitbeteiligte Partei*) filed observations.

13. At some time after the introduction of his appeal with the Administrative Court, the applicant obtained a licence to run a pharmacy in Obernberg-am-Inn.

14. By letter of 5 December 1995, the applicant informed the Administrative Court that, following an agreement with the pharmacist Mrs W., he withdrew his appeal. On 11 December 1995 the Administrative Court terminated the proceedings.

II. RELEVANT DOMESTIC LAW

15. The relevant law is to be found in the Pharmacy Act (*Apothekengesetz*) 1907, RGBL. Nr. 5/1907 (*Reichsgesetzblatt*, Official Gazette of the Austrian Empire), as last amended in 1993, BGBl. Nr. 96/1993 (*Bundesgesetzblatt*, Federal Official Gazette).

16. As regards the running of pharmacies, the legislator considered that, on the one hand, pharmacies render medical services in the public interest and, on the other hand, they are commercial enterprises. In order to avoid speculation in an open market, the legislator opted for a licensing system, based on need.

Section 10 of the Pharmacy Act provides as follows.

"1. A licence to open a new pharmacy is to be granted upon request if

- (1) a medical practitioner is permanently exercising his profession in the municipality where the new pharmacy is to be set up; and
- (2) there is a need for a new pharmacy.

2. There is in particular no need for a new pharmacy if

- (1) the number of persons to be supplied by the pharmacy to be set up is less than 5,500, or
- (2) the distance between the new pharmacy to be set up and the nearest existing pharmacy is less than 500 meters, or
- (3) the number of persons who continue to be supplied by one of the pharmacies existing in the vicinity will decrease as a result of the new pharmacy and drop below 5,500."

17. According to section 13, the owner of a pharmacy and the manager in charge are obliged to run the pharmacy without interruption.

18. Under section 19 § 1 (1), a licence to run a pharmacy may be revoked if the pharmacy has not become operational within one year of receipt of the licence.

19. Article 6 of the Austrian Basic Law (*Staatsgrundgesetz*) provides that all citizens have liberty of movement and the freedom to choose their place of residence, that they are entitled to acquire real estate of any kind and freely dispose of it, and that, in accordance with the relevant legislation, they can exercise any profession (*Erwerbszweig*).

PROCEEDINGS BEFORE THE COMMISSION

20. The applicant applied to the Commission on 9 December 1994. He alleged a violation of Article 6 § 1 of the Convention on account of the length of the proceedings concerning his request for a licence to run a pharmacy.

21. The Commission declared the application (no. 26297/95) admissible on 10 September 1997. In its report of 3 March 1999 (former Article 31 of the Convention), it expressed unanimously the opinion that there had been a breach of Article 6 § 1 of the Convention.

FINAL SUBMISSIONS TO THE COURT

22. In their memorial, the Government asked the Court to find that Article 6 § 1 was not applicable to the proceedings at issue, or alternatively, that there was no violation of Article 6 § 1 of the Convention.

23. The applicant requested the Court to find a violation of Article 6 § 1 of the Convention.

AS TO THE LAW

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

24. The applicant complained about the length of the proceedings relating to his request for a licence to run a pharmacy. He relied on Article 6 § 1 of the Convention which, so far as relevant, provides as follows:

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

A. Applicability of Article 6 § 1

25. The applicant maintained that the proceedings at issue concerned his civil rights within the meaning of Article 6 § 1. He submitted that the grant of a licence to run a pharmacy has a direct influence on a pharmacist's possibilities to exercise his or her profession, and that the licence itself is a property right.

26. The Government, for their part, contested the applicability of Article 6 § 1. They argued in particular that the Pharmacy Act considered the

running of a pharmacy not only as a commercial undertaking but also as a public health facility. In accordance with its aim to ensure a regular medical supply for the population, it introduced a licencing system, whereby the grant of a licence depended exclusively on public interest considerations. Such considerations also underlie a number of other provisions of the Pharmacy Act. The Government also referred to case-law of the Constitutional Court according to which the grant of a licence to exercise a gainful profession was a State measure which, in the Austrian legal tradition, was rooted in public law. In sum, the Government contended that in the regulation of the profession of pharmacists in Austria, the public-law features prevailed over the elements of private law.

27. The Commission found that the proceedings at issue in the present case concerned a right recognised under Austrian law, namely the right to be granted a licence to run a pharmacy. Further, having regard to the Court's case-law in comparable cases, it found in essence that, whilst the profession of pharmacist in Austria had certain public-law features, the private-law aspects prevailed (see *mutatis mutandis* the König v. Germany judgment of 28 June 1978, Series A no. 27, p. 29-33, §§ 86-96; the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, p. 21-22, §§ 47-48; the Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 14-16, §§ 27-29; the Benthem v. the Netherlands judgment of 23 October 1985, Series A no. 97, p. 15-16, §§ 33-36; the Kraska v. Switzerland judgment of 19 April 1993, Series A no. 254-B, p. 48-49, §§ 24-27 and the De Moor v. Belgium judgment of 23 June 1994, Series A no. 292-A, p. 15-16, §§ 42-47). Thus, the right to exercise the profession of a pharmacist was a "civil right" within the meaning of Article 6 § 1.

28. The Court sees no reason to disagree with the conclusion reached by the Commission. It concludes, therefore, that Article 6 § 1 of the Convention applies.

B. Compliance with Article 6 § 1

29. The applicant maintained that the length of the proceedings, in particular the length of the proceedings before the Administrative Court, was in breach of the "reasonable time" requirement laid down in Article 6 § 1 of the Convention. He recalled that the proceedings before the Administrative Court were terminated without a decision on the merits when he withdrew his complaint following an agreement with the other pharmacist who had applied for and been granted a licence to run a pharmacy in the same town. He claimed, in particular, that he entered into the said agreement on account of the length of the proceedings. As regards the fact that he had meanwhile obtained a licence to run a pharmacy in

another location, he alleged that the running of a pharmacy in that location was less profitable.

30. The Government contended that the proceedings for granting a licence to run a pharmacy are rather complex. Thus, the Administrative Court had to examine a voluminous file.

Further, the Government submitted that the length of the proceedings before the Administrative Court was mainly due to a considerable rise in the number of complaints between 1990 and 1995 which led to an overburdening of the Administrative Court. However, the legislator took a number of measures to alleviate the workload of the Administrative Court. In particular, Independent Administrative Panels were set up in the Austrian provinces as of 1 January 1991. Complainants must now turn to these Panels prior to seizing the Administrative Court. If a decision of an Independent Administrative Panel is challenged before the Administrative Court, the latter may reject the appeal if it is of minor importance. Moreover, the number of Administrative Court judges and non judicial personnel has been increased.

Finally, the Government argued that the proceedings before the Administrative Court were of little significance for the applicant, as he had obtained a licence to run a pharmacy in another location some six months after lodging his complaint with that court.

31. The Court recalls that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant in the litigation (see as a recent authority, the *Humen v. Poland* judgment of 15 October 1999, to be published in *Reports 1999*, § 60).

32. As to the duration of the proceedings the Court, like the Commission, considers that the date to be taken into consideration as a starting point is at the latest 22 June 1990, when the applicant lodged his appeal against the refusal of the licence (see *mutatis mutandis*, *Duclos v. France* judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2180, § 54). On 30 July 1991 the applicant seized the Administrative Court. The proceedings ended on 11 December 1995, when the Administrative Court terminated the proceedings after the applicant had withdrawn his complaint. Thus, they lasted more than five years and five months.

33. The Court notes that the applicant complains mainly about the duration of the proceedings before the Administrative Court. The proceedings before the Administrative Court lasted more than four years and four months, with a period of total inactivity of three and a half years from 2 June 1992 until the termination of the proceedings on 11 December 1995.

34. The Court accepts that the proceedings were of some complexity. However, this argument has little weight as regards the proceedings before the Administrative Court which never proceeded to an examination of the merits of the case.

35. As regards the Government's argument that the long delay before the Administrative Court was due to a rise in applications between 1990 and 1995, the Court recalls 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 relating to civil rights and obligations within a reasonable time (see, for instance, the *Vocatur v. Italy* judgment of 24 May 1991, Series A no. 206-C, p. 32, § 17). The Court notes that the respondent State has taken certain measures to reduce the workload of the Administrative Court, particularly with the introduction of Independent Administrative Panels. This measure took effect at the beginning of 1991. Nevertheless, the applicant's case remained pending until the end of 1995 when it was terminated, without a decision on the merits, after the withdrawal of the appeal, following an agreement with the other pharmacist involved. In these circumstances, the applicant's argument that he entered into the said agreement due to the length of the proceedings appears justified.

36. As to the conduct of the applicant, the Court finds that no delays are attributable to him. Finally, as regards the question of what was at stake for the applicant, the Court cannot subscribe to the Government's argument that the matter was of little significance to him after he had obtained a licence to run a pharmacy in another location. It notes the applicant's allegation that the running of a pharmacy in this other location was less profitable. In any event, the fact remains that the proceedings at issue in the present case affected the applicant's possibilities to exercise his profession.

37. In sum, the Court finds that the length of the proceedings as a whole, and in particular the length of the proceedings before the Administrative Court, exceeded a "reasonable time". It follows that there has been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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. Damages

39. The applicant claimed Austrian schillings (ATS) 15,000 for non-pecuniary damages on account of the length of the proceedings. He further submitted that he had suffered pecuniary damages, which he could not specify, as his income as a pharmacist in Ried-im-Innkreis would have been much higher than this income as a pharmacist in Obernberg-am-Inn.

40. The Government have not commented on these claims.

41. As to the applicant's claim for alleged pecuniary damages, it is not for the Court to speculate what would have been the outcome of the proceedings had they been terminated within a reasonable time. As to the claim for non-pecuniary damages the Court finds it reasonable and, therefore, awards it in full.

B. Costs and expenses

42. The applicant claimed an overall amount for costs and expenses of ATS 46,281.60, composed of ATS 15,247.20 for that part of the domestic proceedings concerning the Administration's failure to decide, and ATS 31,034.40 for the proceedings before the Convention organs.

43. The Government did not comment on this claim.

44. The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see for instance the *Bladet Tromsø and Stensaas v. Norway* judgment of 20 May 1999, to be published in *Reports* 1999, § 80). The Court finds that the applicant's claim for costs in respect of part the domestic proceedings fulfills these requirements and therefore awards the sum claimed, i.e. ATS 15,247.20. As regards his claim for the costs of the proceedings before the Convention organs, the Court, having regard to the sums usually granted in length of proceedings cases and making an assessment on an equitable basis, awards the applicant ATS 20,000.

45. In sum, the Court awards the applicant ATS 35,247.20 for costs and expenses.

C. Default interest

29. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts:
 - (i) 15,000 (fifteen-thousand) Austrian schillings for non-pecuniary damages;
 - (ii) 35,247.20 (thirty-five thousand two hundred and forty-seven) Austrian schillings and 20 groschen for costs and expenses;
 - (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 21 December 1999, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. Dollé
Registrar

P. Kūris
President