



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

THIRD SECTION

CASE OF EISENSTECKEN v. AUSTRIA

(Application no. 29477/95)

JUDGMENT

STRASBOURG

3 October 2000

In the case of Eisenstecken v. Austria,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KÜRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Mrs H.S. GREVE,
Mr M. UGREKHELIDZE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 September 2000,

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

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), by an Italian national, Mr Herbert Eisenstecken (“the applicant”), on 10 January 2000 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention). It originated in an application (no. 29477/95) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 by the applicant on 19 September 1995.

The Commission declared the application partly admissible on 10 April 1997 and 22 October 1998. In its report of 8 September 1999 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry.], it expressed the unanimous opinion that there had been a violation of Article 6 § 1.

The applicant was represented by Mrs E. Posch, a lawyer practising in Innsbruck (Austria). The Austrian Government (“the Government”) were represented by their Agent, Mr H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs. The Italian Government, having been informed by the Registrar of their right to intervene (former Article 48 (b) of the Convention and Rule 35 § 3 (b) of former Rules of Court B), indicated that they did not intend to do so.

2. The applicant complained that in the real property transaction proceedings to which he was a party the authorities did not hold a public hearing.

3. On 4 February 2000 a panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. and Rules 100 § 1 and 24 § 6 of the Rules of

Court, that the application would be examined by one of the Sections of the Court. It was, thereupon, assigned to the Third Section. Within that Section, the Chamber that would consider the case was constituted as provided in Rule 26 § 1.

4. In accordance with Rule 59 § 3, the President of the Chamber invited the parties to submit a memorial on the issues in the case. The Registrar received both parties' memorials on 4 May 2000.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 7 March 1985 the applicant concluded with E. a contract for property to vest in a third person on the owner's death (*Übergabevertrag auf den Todesfall*) under which the applicant would receive the farming estate of E. situated in Mils after the latter's death.

7. On 15 December 1992, after the death of E., the applicant filed a request with the local Real Property Transactions Authority for Mils (*Grundverkehrsbehörde*) at the office of the Innsbruck District Administration (*Bezirkshauptmannschaft*) for the approval of the contract and submitted that he intended to work the land himself. On 23 July 1993 the Real Property Transactions Authority approved the contract concluded with E.

8. On 2 August 1993 the Real Estate Transactions Officer (*Landesgrundverkehrsreferent*) at the Office of the Regional Government (*Amt der Landesregierung*) for Tyrol exercised his right of appeal to the Regional Real Property Transactions Authority (*Landesgrundverkehrsbehörde*). On 10 August 1993 the administrator of the deceased's estate also appealed.

9. On 14 October 1993 the applicant requested an oral hearing. On 2 December 1993 the Regional Real Property Transactions Authority held a hearing in camera.

10. On 7 July 1993 a new Tyrol Real Property Transactions Act was adopted, which came into force on 1 January 1994. According to this Act the name and composition of the Regional Real Property Transactions Authority were changed.

11. On 28 February 1994 the newly established Regional Real Property Transactions Commission (*Landes-Grundverkehrskommission*) granted the appeal of the Real Estate Transactions Officer and refused to approve the

contract with E. As regards the appeal of the administrator of the deceased's estate, the Regional Real Property Transactions Commission found that he lacked legal standing.

12. On 13 April 1994 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He complained, *inter alia*, that the Regional Real Property Transactions Commission had adopted its decision without offering him the opportunity of presenting his arguments in the course of an oral hearing before this body.

13. On 27 February 1995 the Constitutional Court dismissed the applicant's complaint. Referring to its own case-law, the court found that an oral hearing in the present case was not obligatory.

II. RELEVANT DOMESTIC LAW

14. Under the Tyrol Real Property Transactions Act 1983 (*Grundverkehrsgesetz*), a contract concerning the transfer of ownership of real property was subject to approval by the real property transactions authorities if agricultural and forestry land was involved or if the purchaser did not possess Austrian nationality (sections 1 and 3). If approval was withheld, the acquisition was null and void (section 16(1)).

15. On 1 January 1994 a new Real Property Transactions Act (dated 1993) came into force. According to the 1983 Act, the authority of second and final instance had been the Regional Real Property Transactions Authority (*Landesgrundverkehrsbehörde*). In the 1993 Act the Regional Real Property Transactions Authority was replaced by the Regional Real Property Transactions Commission (*Landes-Grundverkehrskommission*).

16. The procedure before the real property transactions authorities is governed by the General Administrative Procedure Act 1950 (*Allgemeines Verwaltungsverfahrensgesetz*). Section 40(1) of this Act deals with oral hearings and provides as follows:

“Oral hearings shall be held in the presence of all known parties and the necessary witnesses and experts. If oral hearings have to be combined with an inspection of the location, they should, if possible, be held there or otherwise at the seat of the authority or another location which in the circumstances appears most suitable.”

17. It is the consistent practice of administrative authorities to hold oral hearings *in camera* unless the law provides otherwise, as it is commonly understood that the principle of publicity does not extend to administrative proceedings (see Walter/Mayer, *Grundriss des österreichischen Verwaltungsverfahrenrechts*, 6th edition, Vienna 1995, pp. 114-15).

18. Article 90 § 1 of the Federal Constitution provides:

“Hearings by trial courts in civil and criminal cases shall be oral and public. Exceptions may be prescribed by law.”

THE LAW

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

19. The applicant complained that in the real property transaction proceedings to which he was a party the authorities did not hold a public hearing as required by Article 6 § 1 of the Convention, the relevant parts of which provide:

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

A. Applicability of Article 6 § 1

20. Article 6 is applicable to real property transactions proceedings (see the *Ringeisen v. Austria* judgment of 16 July 1971, Series A no. 13, p. 39, § 94, and the *Sramek v. Austria* judgment of 22 October 1984, Series A no. 84, p. 17, § 34). This is not disputed by the parties.

B. Compliance with Article 6 § 1

1. Austria's reservation in respect of Article 6

21. In their memorial the Government asserted that the Court could not entertain the complaint based on the fact that there was no public hearing in the real property transaction proceedings, since those proceedings were covered by the Austrian reservation in respect of Article 6 of the Convention, worded as follows:

“The provisions of Article 6 of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitution Law.”

22. The applicant did not comment on this point. The Commission, in its report of 8 September 1999, referred to its previous case-law, according to which the reservation was not valid as it did not comply with the criteria set out in Article 64 of the Convention, but did not consider this issue further as, in its view, the Government had failed to raise it in their observations.

23. The Court observes however that, in the observations filed with the Commission, the Government, without giving further explanations, had stated that Article 6 of the Convention was not applicable to the present case because of the reservation. Accordingly, the Government are not estopped from raising this question before the Court. Therefore, the Court has to

examine whether Austria's reservation is in conformity with Article 57 of the Convention which reads as follows:

“1. Any State may, when signing [the] Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.”

24. On several occasions the Court has already considered the question of the compatibility of declarations and reservations with Article 57 (former Article 64) of the Convention (see, for example, the *Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132; the *Weber v. Switzerland* judgment of 22 May 1990, Series A no. 177; the *Chorherr v. Austria* judgment of 25 August 1993, Series A no. 266-B; the *Gradinger v. Austria* judgment of 23 October 1995, Series A no. 328-C). In the case of *Ettl and Others* the Court, referring to its *Ringeisen* judgment, considered the Austrian reservation in respect of Article 6 valid and applicable to proceedings before land reform boards (see the *Ettl and Others v. Austria* judgment of 23 April 1987, Series A no. 117, p. 19, § 42, and the *Ringeisen* judgment cited above, pp. 40-41, § 98). Neither in the case of *Ettl and Others* nor in the *Ringeisen* case did the Court examine whether the reservation complied with the criteria laid down in Article 57 of the Convention.

However, in the subsequent *Belilos* case the Court examined whether a reservation met the requirements under Article 57 of the Convention. There, the Court held that Article 57 § 1 of the Convention requires “precision and clarity” and that the requirement that a reservation shall contain a brief statement of the law concerned is not a “purely formal requirement but a condition of substance which constitutes an evidential factor and contributes to legal certainty” (op. cit., p. 26, § 55, and pp. 27-28, § 59). This stricter approach was confirmed in the *Weber* judgment (op. cit., p. 19, § 38).

25. In the subsequent case of *Fischer v. Austria*, the Court did not find it necessary to examine the validity of the Austrian reservation in respect of Article 6, but held that the reservation did not prevent it from examining the applicant's complaint that the refusal to hold a hearing before the Administrative Court violated Article 6 of the Convention, because the provision on which the refusal was based was not in force at the time the reservation was made (see the *Fischer v. Austria* judgment of 26 April 1995, Series A no. 312, pp. 19-20, § 41; see also the *Stallinger and Kuso v. Austria* judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-II, p. 679, § 48, and the *Pauger v. Austria* judgment of 28 May 1997, *Reports* 1997-III, pp. 902-03, § 54).

26. In the cases of Bulut, Szücs and Werner, the Court also left open the question of the validity of the reservation in issue (see the Bulut v. Austria judgment of 22 February 1996, *Reports* 1996-II, p. 358, § 43; the Szücs v. Austria judgment of 24 November 1997, *Reports* 1997-VII, p. 2480, § 40; and the Werner v. Austria judgment of 24 November 1997, *Reports* 1997-VII, p. 2509, § 42).

27. In the present case the Government emphasised that, in contrast to the above-mentioned Fischer case, section 40 of the General Administrative Procedure Act 1950, which provides that hearings before administrative bodies be held in camera, was in force in 1958 when Austria ratified the Convention and made the reservation in question. Furthermore, they contend that even if Article 90 of the Federal Constitution referred only to “civil and criminal cases”, the reservation was applicable in general to cases before tribunals within the meaning of Article 6 § 1 of the Convention when those tribunals determined questions of “civil rights”, as that concept has been interpreted by the Convention organs. The same conclusion could be reached by looking at the intention of the federal government at the time of making the reservation. The applicant did not comment on this point.

28. The Court accepts that section 40 of the General Administrative Procedure Act was in force in 1958 and that this provision regulates proceedings which fall within the ambit of Article 90 of the Federal Constitution to which the Austrian reservation refers. However, apart from the applicability of the reservation, the Court has to examine its validity. In other words, whether the reservation satisfies the requirements of Article 57 of the Convention.

29. In this respect, the Court notes that the reservation in issue does not contain a “brief statement” of the law which is said not to conform to Article 6 of the Convention. From the wording of the reservation it might be inferred that Austria intended to exclude from the scope of Article 6 all proceedings in civil and criminal matters before ordinary courts – and even all kinds of other quasi-judicial bodies – in so far as particular laws allowed for non-public hearings. However, a reservation which merely refers to a permissive, non-exhaustive, provision of the Constitution and which does not refer to, or mention, those specific provisions of the Austrian legal order which exclude public hearings, does not “afford to a sufficient degree 'a guarantee ... that [it] does not go beyond the provision expressly excluded' by Austria” (see the Gradinger judgment cited above, p. 65, § 51, and the Chorherr judgment cited above, pp. 34-35, § 20). Accordingly, the reservation does not satisfy the requirements of Article 57 § 2 of the Convention.

30. This conclusion is a sufficient basis for finding the reservation invalid, without it being necessary to examine further whether there has been compliance with the other requirements of Article 57.

2. Merits of the complaint

31. The Court notes that none of the competent authorities – the local Real Property Transactions Authority, the Regional Real Property Transactions Authority or the newly established Regional Real Property Transactions Commission – held a public hearing in the present proceedings. The Court must examine whether the lack of a public hearing before these authorities was compatible with Article 6 § 1 of the Convention.

32. The Government submitted that the applicant had waived his right to an oral hearing because, after the Real Property Transactions Act 1993 had come into force, he had not expressly requested a further hearing before the Regional Real Property Transactions Commission. In any event, in the circumstances of the case no hearing was required by Article 6 § 1 as there were no important questions of fact or law to resolve which would have necessitated a public hearing, nor was such a hearing required in the public interest.

33. As regards the Government's first argument, the Court finds that it is irrelevant whether or not the applicant requested an oral hearing in the appeal proceedings because oral hearings under section 40(1) of the General Administrative Procedure Act are, in any event, not public. In this respect, the Court recalls that the question whether or not an applicant has requested a public hearing becomes irrelevant for the purpose of examining compliance with Article 6 § 1 of the Convention when the applicable domestic law excludes the holding of such hearings (see the *Diennet v. France* judgment of 26 September 1995, Series A no. 325-A, p. 14, § 31).

34. As regards the Government's second argument, the Court would point out that the applicant was, in principle, entitled to a hearing under Article 6 § 1 as none of the exemptions laid down therein applied to his case (see the *Håkansson and Stureson v. Sweden* judgment of 21 February 1990, Series A no. 171-A, p. 20, § 64). As regards the particular circumstances of the case which, in the Government's view, would justify no hearing being held, the Court observes that the matter in issue, the approval of a contract under the Tyrol Real Property Transactions Act, does not appear to be a highly technical matter better dealt with in written proceedings (see the *Schuler-Zraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58).

35. Furthermore, the Court is not persuaded that there were exceptional circumstances which would justify the absence of a public hearing. In this respect, the Court observes that the applicant, when replying to the appeal lodged by the Real Estate Transactions Officer, requested an oral hearing and the Regional Real Property Transactions Authority obviously found the request justified when it held the hearing on 2 December 1993. The Court also cannot overlook the importance of what was at stake for the applicant, namely the approval by the real property transactions authorities of a

contract which would have conferred ownership of substantial parcels of land on the applicant.

36. In conclusion, the Court finds that the failure of the real property transactions authorities to hold a public hearing in the applicant's case constituted a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. The applicant submitted that the pecuniary damage resulting from the improper procedure to which he was subjected amounted to 12,000,000 Austrian schillings (ATS). This was the value of the land in issue in the real property transaction proceedings. The Government opposed this claim.

39. The Court rejects the claim as it cannot speculate as to the outcome of the proceedings had a public hearing taken place (see *Lughofer v. Austria*, no. 22811/93, §22, 30 November 1999, unreported).

B. Costs and expenses

40. The applicant further claimed a total of ATS 181,606.40 in respect of costs and expenses incurred in the domestic proceedings and in those before the Convention organs. ATS 100,629.80 of this amount relate to the proceedings before the Commission and the Court. In the Government's view, the applicant's claims were excessive.

41. The Court finds that compensation for costs incurred in the domestic proceedings may only be granted in so far as they were necessary in trying to prevent the violation found (see the *König v. Germany* judgment of 10 March 1980 (*Article 50*), Series A no. 36, p. 17, § 20). In the present case, it does not appear from the applicant's submissions that any specific costs were incurred in relation to the demand for an oral hearing. This part of the claim must therefore be rejected. As regards the costs for the proceedings before the Convention organs, the Court observes that the applicant was only partly successful with his application. Making an assessment on an equitable basis, the Court awards the applicant ATS 40,000 for costs and expenses.

C. Default interest

42. 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* that the respondent State is to pay the applicant, within three months, for costs and expenses, ATS 40,000 (forty thousand Austrian schillings), and that simple interest at an annual rate of 4% shall be payable on this sum from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 October 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President