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

THIRD SECTION

CASE OF BASIC v. AUSTRIA

(Application no. 29800/96)

JUDGMENT

STRASBOURG

30 January 2001

FINAL

30/04/2001

In the case of Basic 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 L. LOUCAIDES,
Mr P. KŪRIS,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 16 March 1999, 20 June 2000 and 9 January 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 29800/96) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of the Federal Republic of Yugoslavia, Mr Husein Basic ("the applicant"), on 8 January 1996.

2. The applicant was represented by Mr K. Bernhauser, a lawyer practising in Vienna (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.

3. The applicant alleged that proceedings relating to the seizure and forfeiture of a watch had lasted unreasonably long.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 16 March 1999 the Chamber declared the application admissible [*Basic v. Austria* (dec.), no. 29800/96, ECHR 1999-II.].

7. On 20 June 2000 the Chamber decided to request the parties to submit further observations, which the applicant did on 18 July and the Government on 19 July 2000.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The seizure of the watch and the criminal proceedings against the applicant

8. On 17 February 1990 the Salzburg police carried out a search in a gambling house. The applicant was found in possession of, *inter alia*, a precious watch lacking an Austrian stamp (*Punzierung*). On 18 February 1990 the police questioned the applicant, who stated that the watch had been pledged to him for gambling debts.

9. On 19 February 1990 the Salzburg police filed an information against the applicant on suspicion of receiving goods for which no import duties had been paid (*fahrlässige Abgabenhehlerei*) and handed the watch over to the Salzburg Customs Office (*Zollamt*), which ordered its seizure (*Beschlagnahme*) with a view to its possible forfeiture (*Verfall*). Subsequently, on 26 February 1990, a certain E.W. contacted the Customs Office and claimed to be the owner of the watch. On 8 March 1990 the Customs Office received written submissions from the applicant who claimed that he had had no reason to suspect that no import duties had been paid on the watch.

10. On 13 April 1990 the applicant, represented by counsel, requested the Salzburg Customs Office to restore the watch to him. The Customs Office did not react. A second request made on 16 July 1991 was equally unsuccessful.

11. On 17 January 1992 the Salzburg Customs Office opened criminal proceedings against the applicant on suspicion of having negligently received goods for which no import duty had been paid.

12. On 8 May 1992 the Customs Office issued a penal order (*Strafverfügung*) against the applicant finding him guilty of the above offence.

13. On 16 November 1993 the Salzburg Customs Office, upon the applicant's objection (*Einspruch*), held a hearing, at the close of which it decided to discontinue the proceedings on the ground that it had not been proved that the applicant had acted negligently when he acquired the watch.

B. The criminal proceedings against E.W. and the forfeiture of the watch

14. Meanwhile, on 3 September 1991 the Salzburg Customs Office had also opened criminal proceedings against E.W. on suspicion of evading import duties as regards the watch.

15. On 23 January 1992 the Customs Office invited the applicant to join these proceedings as a private party (*Nebenbeteiligter*). On the same day he was heard by the Customs Office which refused to lift the seizure of the watch.

16. On 8 May 1992 the Customs Office issued a penal order against E.W. It found him guilty of having evaded import duties as regards the watch and imposed a fine on him. Further, it ordered its forfeiture.

17. On 15 September 1993 the Customs Office held a hearing, upon E.W.'s objection. At its close it found E.W. again guilty of evading import duties. It also confirmed the forfeiture of the watch.

18. On 6 May 1994 E.W. appealed against this decision. It appears that the applicant requested the restoration of the watch. 29 August 1994 was fixed as a date for the appeal hearing. However, the hearing had to be postponed as the summons could not be served on E.W.

19. On 25 January 1995 the Appeals Board of the Salzburg Regional Directorate of Finance (*Finanzlandesdirektion*), after holding a hearing, partly upheld and partly dismissed E.W.'s appeal. It confirmed that he was guilty of evading import duties, but reduced the fine. It confirmed the forfeiture of the watch and stated that it took effect against the applicant. According to the relevant provisions of the Tax Offences Act (*Finanzstrafgesetz)*, ownership of forfeited items passes to the Federation when the forfeiture order becomes final and any rights of third parties are extinguished. The decision was served on E.W. and on the applicant on 7 March 1996.

C. The object liability proceedings

20. On 18 March 1994 the Salzburg Main Customs Office (*Hauptzollamt*), in so-called object liability proceedings (*Sachhaftungs-verfahren*), issued a decision seizing the watch as a security for the payment of the import duties evaded by E.W.

21. On 28 June 1995 the Salzburg Main Customs Office issued a preliminary decision on the applicant's appeal (*Berufungsvorentscheidung*). On 20 July 1995 the applicant requested the Salzburg Regional Directorate of Finance to decide on his appeal.

22. On 28 April 1997 the Salzburg Regional Directorate of Finance quashed the decision of 18 March 1994. It found in particular that the watch at issue had already been seized by the Salzburg Customs Office on

19 February 1990 in order to secure its possible forfeiture in the context of criminal proceedings against E.W. and the applicant. The watch had thereafter remained in the custody of the Customs Office. Thus, there was no room for its renewed seizure in the context of object liability proceedings. The decision was served on the applicant on 21 May 1997.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Federal Constitution

23. Under Article 130 of the Federal Constitution (*Bundes-verfassungsgesetz*) the Administrative Court decides, *inter alia*, on applications (*Beschwerden*) in which it is alleged that the administrative authorities have breached their duty to decide.

24. Article 132 of the Federal Constitution, in its relevant part, reads as follows:

> "An action for breach by the administrative authorities ... of the duty to decide can be lodged by anyone entitled as a party in administrative proceedings to enforce that duty. An action for breach of the duty to decide is inadmissible in administrative criminal proceedings, except private prosecutions and prosecutions in respect of tax offences."

B. General Administrative Procedure Act

25. 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. ..."

In proceedings under the Tax Offences Act an application for transfer of jurisdiction to the superior authority is excluded.

C. Administrative Court Act

26. 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."

27. According to the Constitutional Court's judgment of 30 September 1989 (published in the official collection of that court's decisions, *VfSlg* 12167/89), the Administrative Court may receive applications against the administration's failure to decide under Article 132 of the Federal Constitution, taken in conjunction with section 27 of the Administrative Court Act, also where an authority of first instance has failed to give a decision within the statutory six-month time-limit, provided that no other remedy (such as a request for a transfer of jurisdiction) lies against the failure to decide.

28. According to statistical information provided by the Government, between 1 January 1998 and 31 December 1999, the Administrative Court dealt with a total of 825 applications against the administration's failure to decide.

29. In 67.2% of the cases (555 out of 825), the proceedings resulted in the respondent authority giving a decision within four months from the time the application was lodged with the Administrative Court. The Administrative Court took about a month to issue the order to the respondent authority to give the decision within a three-month time-limit (section 36 § 2 of the Administrative Court Act). In these cases, the proceedings before the Administrative Court were discontinued, either because the applicant's claim had been satisfied (515 out of 825 cases) or because the applicant, having achieved his aim, withdrew the action (40 out of 825 cases).

In 6.7% of the cases (55 out of 825), the respondent authority failed to comply with the Administrative Court's order and the Administrative Court had itself to give a decision on the merits under section 42 § 4 of the Administrative Court Act. It did so after an average duration of the proceedings before it of two years and almost three months.

The remaining 26.1% of the cases (215 out of 825) were rejected by the Administrative Court for lack of jurisdiction or on other grounds of inadmissibility.

THE LAW

THE GOVERNMENT'S PRELIMINARY OBJECTION

30. The Government maintained that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention, the relevant part of which reads as follows:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

The Government contended that the applicant should have filed an application against the administration's failure to decide with the Administrative Court in accordance with Article 132 of the Federal Constitution. In particular, he should have done so as regards the failure of the Salzburg Customs Office to decide within the statutory six-month time-limit on his request of 13 April 1990 for restoration of the watch and as regards the failure of the Salzburg Regional Directorate of Finance to decide within the same time-limit on his appeal against the decision of 18 March 1994.

31. The Government argued that the Court's decision in *Tomé Mota v. Portugal* (dec.), no. 32082/96, ECHR 1999-IX) supported their view that an application against the administration's failure to decide constituted an effective remedy. In particular, they pointed out that the administrative

authorities are under an obligation to decide on any request made by a party within six months. In proceedings under the Tax Offences Act, where no other remedy, such as a request for a transfer of jurisdiction, lies against the failure to decide within the general six-month time-limit, the party is entitled to lodge directly with the Administrative Court an application against the administration's failure to decide under Article 132 of the Federal Constitution. Further, the Government emphasised that this remedy is particularly suitable to speed up the proceedings as it aims at the issuing of a decision. Within a month receiving the application, the Administrative Court orders the relevant authority to decide within a maximum of three months. In the vast majority of cases the administrative authorities comply with this order. Thus, the remedy offers a sufficient degree of effectiveness.

32. The applicant contested the Government's view. He maintained in particular that considerable delays were caused by the Salzburg Customs Office, that is, the first-instance authority. He argued that under Article 132 of the Federal Constitution, taken in conjunction with section 27 of the Administrative Court Act, an application against the administration's failure to decide only lies where the "highest authority" fails to decide, and that he could, thus, not make use of this remedy.

33. The Court recalls that in the area of exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 68).

34. In its admissibility decision of 16 March 1999, the Court dismissed the Government's argument. In doing so it relied in essence on the Commission's case-law according to which measures available to an individual which might speed up the proceedings are matters which fall to be considered in the context of the merits of an application relating to the length of proceedings rather than in the context of the exhaustion of domestic remedies (see *Moreira de Azevedo v. Portugal*, application no. 11296/84, Commission decision of 14 April 1988, Decisions and Reports 56, p. 126, with further references).

However, in the meantime, the Court has found in *Tomé Mota* (decision cited above) that a request under Articles 108 and 109 of the Portuguese Code of Criminal Procedure to speed up the proceedings was an effective

remedy for the purposes of Article 35 § 1 of the Convention. As there are a number of similarities between this remedy and the remedy at issue in the present case, the Court finds that it is required to review the question whether the application against the administration's failure to decide under Article 132 of the Federal Constitution constituted an effective remedy.

35. The Court notes that Portuguese law provides time-limits within which each stage of the criminal proceedings has to be completed. If they are not complied with, the person concerned may file a request to speed up the proceedings which, if successful, may, *inter alia*, result in a decision fixing a time-limit within which the competent court or public prosecutor has to take a particular procedural measure, such as closing the investigations or setting a date for a hearing. Given the strict time-limits within which the authorities have to decide upon a request to speed up the proceedings, the use of this remedy does not itself contribute to the length of the proceedings.

36. Similarly, Austrian law provides in the field of administrative proceedings that the competent authority has, unless provided otherwise, to decide within six months upon any request by a party. If this time-limit is not complied with, the party may – in a case like the present one where the possibility to request a transfer of jurisdiction to the higher authority is excluded – lodge an application under Article 132 of the Federal Constitution with the Administrative Court. If deemed admissible, it results in an order addressed to the authority to give the decision within three months, a time-limit which can be extended only once.

37. The Court further notes the information given by the Government and not contested by the applicant, namely, that in the vast majority of cases the use of the application under Article 132 of the Federal Constitution does not cause a further delay in the proceedings, as the Administrative Court usually takes no more than a month to issue its order. In 67.2% of the cases which were examined in 1998 and 1999, the applications were successful as the authority complied with the orders, which means that within four months from lodging the application under Article 132 of the Federal Constitution the applicants received the requested decision. Only in 6.7% of the cases did the authority fail to comply with the order, with the consequence that the Administrative Court had to give a decision on the merits itself, its proceedings lasting on average two years and almost three months. The remaining 26.1% of the cases were rejected on various grounds of inadmissibility (see paragraph 29 above).

38. The Court finds that there are no fundamental differences which would distinguish the application under Article 132 of the Austrian Federal Constitution under review in the present case from the remedy which was at issue in *Tomé Mota*, cited above. Having regard to the fact that under Austrian law administrative authorities are, as a general rule, under a duty to decide on a party's request within six months, and noting that the use of the

application under Article 132 of the Federal Constitution does not normally lead to a further delay in the proceedings, the Court concludes that this application constitutes an effective remedy as regards a complaint about the length of proceedings.

39. However, the applicant argued that this remedy only lies against a failure of the "highest authority" and was thus not available as regards the delays caused by the first-instance authority in the present case. In this connection, the Court notes that the Government have adduced certain case-law of the Constitutional Court according to which the application under Article 132 of the Federal Constitution also lies against a first-instance authority's failure to decide where – as in the present case – a request for a transfer of jurisdiction under section 73 of the General Administrative Procedure Act is excluded (see paragraph 27 above). The applicant, for his part, has not submitted any case-law supporting his position. Thus, the Court is satisfied that the remedy at issue was also available to the applicant. There is no indication of any circumstances which might have absolved the applicant from exhausting this remedy.

40. In sum, the applicant should have made use of the application under Article 132 of the Federal Constitution. However, he did not do so at any stage of the proceedings and has therefore failed to give the domestic authorities the opportunity intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely, the opportunity of preventing or putting right the alleged violation (see *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 19, § 36). The objection that domestic remedies have not been exhausted is therefore well-founded.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that, by reason of the failure to exhaust domestic remedies, it is unable to take cognisance of the merits of the case.

Done in English, and notified in writing on 30 January 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	J.-P. COSTA
Registrar	President