



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

THIRD SECTION

CASE OF PALLANICH v. AUSTRIA

(Application no. 30160/96)

JUDGMENT

STRASBOURG

30 January 2001

FINAL

30/04/2001

In the case of PALLANICH 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. KÜRIS,
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. 30160/96) 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 an Austrian national, Mr Georg Pallanich (“the applicant”), on 4 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, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that criminal proceedings against him relating to charges of smuggling 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 of the Rules of Court.

6. By a decision of 16 March 1999 the Chamber declared the application admissible.

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

8. On 17 May 1991 the Walserberg Customs Office (*Zollamt*) opened criminal proceedings against the applicant under the Tax Offences Act (*Finanzstrafgesetz*) concerning charges of attempted smuggling, and heard him as a suspect.

9. On 23 May 1991 the Customs Office transmitted the information (*Strafanzeige*) to the Criminal Department of the Salzburg Customs Office.

10. On 19 June 1991 the Criminal Department of the Salzburg Customs Office, in summary proceedings, issued a penal order (*Strafverfügung*) against the applicant finding him guilty of attempted smuggling in that he had, on 17 May 1991, when crossing the border between Germany and Austria in his car, failed to declare various goods with a total value of Austrian schillings (ATS) 13,742. The Customs Office imposed a fine of ATS 3,500 on the applicant and, in case of default, two days' imprisonment. Further, it ordered the forfeiture of the sum of ATS 13,742 which had been deposited as a security for the goods concerned.

11. On 26 July 1991 the applicant filed an objection (*Einspruch*) against the penal order. Thereupon, the Criminal Department of the Salzburg Customs Office, after having carried out investigations, fixed 9 October 1991 as the date for hearing the applicant's case and informed the applicant's counsel accordingly.

12. On 9 October the Criminal Department of the Salzburg Customs Office held the hearing. Neither the applicant nor his counsel appeared.

13. On 11 November 1991 the Criminal Department of the Salzburg Customs Office, noting that the applicant had, without an excuse, failed to appear at the hearing, convicted him of attempted smuggling, imposing a fine of ATS 3,500, with two days' imprisonment in default. It also upheld the forfeiture of the sum which had been deposited as a security for the goods concerned.

14. On 14 January 1992 the applicant filed an appeal with the Salzburg Regional Directorate of Finance (*Finanzlandesdirektion*). He submitted, in particular, that he had not declared the goods in question to the customs authorities since he had not intended to import them into Austria but only to transport them through Austria.

15. On 8 June 1995 the Criminal Department of the Salzburg Regional Directorate of Finance dismissed the applicant's appeal. This decision was served on the applicant's counsel on 5 July 1995.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Federal Constitution

16. 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.

17. Article 132 of the Federal Constitution, so far as relevant, 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

18. Section 73 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) deals with the administrative authorities' duty to decide. So far as relevant, it 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

19. 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.”

20. According to the Constitutional Court’s judgment of 30 September 1989 (published in the official text collection VfSlg 12167/89) the Administrative Court can be seized with an application 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 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.

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

22. In 67,2 % of the cases (555 of 825) the proceedings resulted in the respondent authority giving a decision within four months from the time when the Administrative Court was seized. The Administrative Court took about a month to issue the order to the respondent authority to give the decision within a three-months time-limit (section 36 § 2 of the Administrative Court Act). In these cases the proceedings before the Administrative Court were discontinued as the applicant's claim was satisfied (515 of 825 cases), or on the ground that the applicant, having achieved his aim, withdrew the action (40 of 825 cases).

In 6,7 % of the cases (55 of 825 cases) 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 of 825) were rejected by the Administrative Court for lack of jurisdiction or for other grounds of inadmissibility.

THE LAW

THE GOVERNMENT'S PRELIMINARY OBJECTION

23. The Government maintained that the applicant failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention which, so far as relevant, 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 Regional Directorate of Finance to decide upon his appeal of 14 January 1992 within the statutory six month time-limit. They pointed out that the Regional Directorate of Finance was the “highest authority” within the meaning of section 27 of the Administrative Court Act, as under the Tax Offences Act, no request for a transfer of jurisdiction can be made to the Federal Ministry of Finance.

24. The Government argued that the Court's decision in *Tomé Mota v. Portugal* (no. 32082/96, Section IV decision of 02.12.99, 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 seize the Administrative Court directly with 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 from being seized, 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 the this order. Thus, the remedy also offers a sufficient degree of effectiveness.

25. The applicant contested the Government's view. He argued that under Article 132 of the Federal Constitution an application against the administration's failure to decide only lies where the "highest authority" fails to decide. He claimed that the Regional Directorate of Finance was subordinate to the Federal Ministry of Finance and was, therefore, not the "highest authority". In the alternative, the applicant argued that the application against the administration's failure to decide was not an effective remedy, as the Administrative Court first has to order the administrative authority to give a decision and will only decide on the merits of the case when the administrative authority fails to comply with this order.

26. 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 the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 68).

27. 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 were 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 (cf. no. 11269/84, Dec. 14.4.88, D.R. 56, p. 115 at p. 126 with further references).

However, in the meantime the Court has found, in the above-mentioned *Tomé Mota v. Portugal* decision, 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.

28. 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.

29. 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, which can be renewed only once.

30. 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 such an order. In 67,2 % of the cases which were examined in the last two years, 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 appellant 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 for various grounds of inadmissibility (see paragraph 22 above).

31. 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 the *Tomé Mota v. Portugal* decision. 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 of the proceedings, the Court concludes that this application constitutes an effective remedy as regards a complaint about the length of proceedings.

32. 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 Regional Directorate of Finance in the present case. In this respect, 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 lower 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 20 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.

33. 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 the *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
Registrar

J.-P. COSTA
President