



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

THIRD SECTION

CASE OF HOLZINGER v. AUSTRIA (No. 1)

(Application no. 23459/94)

JUDGMENT

STRASBOURG

30 January 2001

In the case of Holzinger v. Austria (no. 1),

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,

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 9 January 2001,

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

PROCEDURE

1. The case was referred to the Court by an Austrian national, Mr Adolf Holzinger (“the applicant”), on 26 February 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). It originated in an application (no. 23459/94) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 by the applicant on 25 November 1993.

The Commission declared the application partly admissible on 10 September 1997. In its report of 21 October 1998 (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.

2. The applicant's request to the Court referred to former Article 48 of the Convention as amended by Protocol No. 9, which Austria had ratified. The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

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. On 31 March 1999 a 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 of the Court. It was, thereupon, assigned to the Third

Section. Within that Section, the Chamber was constituted in accordance with Rule 26 § 1.

4. In accordance with Rule 59 § 3, the President of the Chamber invited the parties to submit written observations on the issues of the case. The Government submitted such observations on 6 July 1999 and 27 March 2000, the applicant on 3 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 16 May 1988 the applicant introduced proceedings in the Salzburg District Court (*Bezirksgericht*) against a former lawyer for the sum of 30,000 Austrian schillings (ATS). The District Court rejected the claim on 20 May 1988 because it considered that it had no jurisdiction. On 1 June 1988 it quashed its previous decision and, upon the applicant's request (*Überweisungsantrag*), remitted the case to the Regional Court (*Landesgericht*). On 8 August 1988 the Regional Court instructed the applicant to submit his claim through a lawyer, which he did on 13 September 1988.

7. On 23 November 1988 the Regional Court found that the judge who had been in charge of the case was not impartial, and quashed all procedural steps taken after 7 July 1988.

8. A defence pleading was lodged on 21 December 1988 and, on 22 February 1989, at the applicant's request, the Regional Court adjourned the proceedings pending the outcome of a different action, the proceedings only to be resumed on application by the parties. On 30 June 1989 the applicant's lawyer requested that the proceedings be resumed and increased the claim to ATS 449,417.23. The Regional Court returned the request on 4 August 1989 with the instruction to formulate it properly.

9. A hearing which had been set down for 20 December 1989 was adjourned when the judge in charge of the case changed.

10. On 31 March 1990 the defendant gave up his professional activities, and the proceedings had to be adjourned for a lawyer to be appointed. On 6 June 1990 the applicant requested the court to order the defendant to appoint a lawyer, and on 13 June it did so. The defendant failed to appoint a lawyer within the time-limit. On 9 November 1990 the court announced that, in view of the defendant's failure to appoint a lawyer, the proceedings were resumed. A hearing was fixed for 11 December 1990.

11. At the hearing on 11 December 1990 the proceedings had to be commenced again because of a change of judge. The defendant was neither present nor represented, and the applicant's representative asked for judgment to be entered by default. The court adjourned the proceedings in order to allow consideration to be given to additional papers submitted by the applicant's representatives. On 23 January 1991 the Regional Court permitted the defendant, who had produced a medical certificate in respect of 11 December 1990, to remain in the proceedings.

12. On 16 October 1991 the applicant wrote to the court requesting that the proceedings be resumed. On 18 October the parties were summoned to a hearing set for 26 November 1991. That hearing was postponed as the applicant had informed the court that he would be absent from 18 November 1991 to 28 January 1992. On 12 March 1992 the applicant again asked for the proceedings to be resumed. On 23 March the parties were summoned to a hearing set for 7 May 1992. At the end of that hearing the proceedings were adjourned, and on 18 May 1992 the applicant asked for them to be resumed soon as he was to be away from 9 September to 20 November 1992. On 25 May 1992 the court set the next hearing for 7 July 1992, when the applicant replied to questions, his representative submitted a series of documents and the proceedings were again adjourned.

13. The next hearing took place on 26 November 1992, at the end of which the judge declared the trial closed. The judgment, 18 February 1993, was received by the applicant's representative on 4 March 1993. The court found that the applicant's action was statute-barred. The applicant's appeal of 18 March 1993 was returned by the court on 1 April 1993 as it had not been duly signed by a lawyer. The appeal was re-submitted on 28 April. The defendant's reply was dated 26 May 1993, and by a judgment dated 29 September 1993 the Linz Court of Appeal dismissed the applicant's appeal, confirming the Regional Court's judgment. The judgment stated that no further appeal (*Revision*) was possible. The applicant's representative received the decision on 4 November 1993.

14. An application by the applicant for legal aid for an extraordinary appeal dated 9 November 1993 was rejected on 11 November 1993 as the proceedings had ended.

15. On 6 May 1994 the Linz Court of Appeal dismissed a challenge by the applicant to a decision of the Regional Court of 11 November 1993 by which the defendant had been permitted to enforce a costs order against him.

II. RELEVANT DOMESTIC LAW

16. Section 91 of the Courts Act (*Gerichtsorganisationsgesetz*), which has been in force since 1 January 1990, provides as follows.

“(1) If a court is dilatory in taking any procedural step, such as announcing or holding a hearing, obtaining an expert's report, or preparing a decision, any party may submit a request to this court for the superior court to impose an appropriate time-limit for the taking of the particular procedural step; unless sub-section (2) of this section applies, the court is required to submit the request to the superior court, together with its comments, forthwith.

(2) If the court takes all the procedural steps specified in the request within four weeks of receipt, and so informs the party concerned, the request is deemed withdrawn unless the party declares within two weeks after service of the notification that it wishes to maintain its request.

(3) The request referred to in sub-section (1) shall be determined with special expedition by a Chamber of the superior court consisting of three professional judges, one of whom shall preside; if the court has not been dilatory, the request shall be dismissed. This decision is not subject to appeal.”

THE LAW

THE GOVERNMENT'S PRELIMINARY OBJECTION

17. As they had done before the Commission, the Government maintained that the applicant had failed to exhaust domestic remedies as he had not made an application under section 91 of the Courts Act. In the Government's view, such an application was an effective remedy as its use would have reduced the length of the proceedings.

18. In his memorial, the applicant maintained that he had exhausted all available domestic remedies as he had filed an appeal against the Regional Court's judgment of 18 February 1993. In his view, a section 91 request should not be considered an effective domestic remedy.

19. The Commission found that an application under section 91 did not constitute an effective remedy under former Article 26 of the Convention, but that it was relevant to the question whether, in all the circumstances, the proceedings had taken an unreasonably long time. An application under section 91 was an interlocutory application to a court whereby a higher court was requested to fix an adequate time-limit for taking a procedural measure which the court below had failed to take. Since it could not give rise to any finding as to the length of the proceedings as a whole, nor make redress, for example by means of compensation, for any unreasonable delay to date, it could not be regarded as an effective remedy.

20. The Court is not persuaded by the Commission's arguments. The Court considers that there is an important difference between the question of the status of victim within the meaning of Article 34 of the Convention and

the issue of exhaustion of domestic remedies within the meaning of Article 35 of the Convention.

21. The issue of whether someone may (still) claim to be a victim of an alleged violation of the Convention entails on the part of the Court essentially an *ex post facto* examination of the situation of the person concerned in the course of which the question whether he or she has received reparation for damage caused – comparable to just satisfaction as provided for under Article 41 of the Convention – is an important issue. It is the Court's settled case-law that where national authorities have found a violation and their decision constitutes appropriate and sufficient redress therefor, the party involved can no longer claim to be a victim within the meaning of Article 34 of the Convention. In *Tews v. Austria*, for example, which concerned a complaint about the length of civil proceedings, the Court found that the Austrian courts had, implicitly, established a violation of the applicant's right to expeditious court proceedings and, by awarding him compensation, had offered sufficient and appropriate redress. Thus, the applicant could no longer claim to be a victim of a violation of Article 6 § 1 of the Convention on account of the length of the proceedings (*Tews v. Austria* (dec.), no. 25903/94, 30 November 1999, unreported).

22. The same questions do not arise in connection with Article 35 of the Convention in relation to complaints about the length of proceedings, as there the focus lies on the prevention of a breach of the Convention and not on recognition by the domestic authorities of a violation which has occurred or the grant of reparation for such a violation. What is important is whether a given remedy is capable of speeding up proceedings or preventing them becoming unreasonably long. Admittedly, the issue of the length of proceedings under Article 6 of the Convention does not relate to one specific domestic decision which is then examined by the Court as to its compatibility with the obligations set out under the Convention, but rather to a situation which develops over a certain period of time. Thus, the effectiveness of a remedy which has to be used for the purposes of Article 35 may depend on whether it has a significant effect on the length of the proceedings as a whole. However, as the Convention organs have repeatedly held in the past, in case of doubt as to the effectiveness of a remedy, it has to be used (see *Raif v. Greece*, application no. 21782/93, Commission decision of 26 June 1995, Decisions and Reports 82-A, p. 5, and *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 68).

23. These considerations are confirmed by the Court's case-law in *Tomé Mota v. Portugal*. In that case, which concerned the length of criminal proceedings, the Court, reconsidering the Commission's case-law on the issue, found that an application under Articles 108 and 109 of the Portuguese Code of Criminal Procedure was an effective remedy as regards complaints about the length of proceedings (*Tomé Mota v. Portugal* (dec.),

no. 32082/96, ECHR 1999-IX). Articles 108 and 109 of the Portuguese Code of Criminal Procedure – like section 91 of the Austrian Courts Act – envisage an interlocutory application by which the Judicial Service Commission or the Attorney-General are requested to fix a time-limit for taking a procedural measure which the competent court or public prosecutor have failed to take. Since Mr Tomé Mota failed to file such an application, the Court considered that he had failed to exhaust domestic remedies.

24. In the present case, the proceedings started on 16 May 1988 and ended at first instance on 4 March 1993. The decision on the applicant's appeal was given on 4 November 1993. Section 91 of the Courts Act entered into force on 1 January 1990, while the first-instance proceedings were pending. It was from that moment on that the applicant could have made an application under this provision. However, he did not do so.

As regards the seventeen-month period prior to that date, and taking into account the steps taken by the domestic courts and the parties during that period, the Court cannot find that this lapse of time in itself could give rise to a breach of Article 6 § 1 of the Convention on account of the length of the proceedings.

25. The Court therefore finds that in the circumstances of the case an application under section 91 of the Courts Act must be considered an effective and sufficient remedy which the applicant has not used. Accordingly, domestic remedies were not exhausted in the instant case.

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