CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF HOLZINGER (NO. 2) v. AUSTRIA

(*Application no. 28898/95*)

JUDGMENT

STRASBOURG

30 January 2001

FINAL

04/04/2001

In the case of HOLZINGER (NO. 2) 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. KURIS,
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 12 October 1999 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. 28895/95) 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. Adolf Holzinger ("the applicant"), on 28 June 1995.

2. 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 in particular that civil proceedings instituted by him in 1987 had been unfair and lasted unreasonably long.

4. On 27 November 1996 the Commission decided to communicate to the respondent Government the applicant's complaint about the length of the proceedings and declared the remainder of the application inadmissible.

5. 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).

6. 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.

7. By a decision of 12 October 1999 the Chamber declared the remainder of the application admissible.

8. On 8 February 2000 the Chamber decided to request the parties to submit further observations, which the Government did on 27 March 2000 and the applicant on 19 May 2000.

9. After having consulted the Agent of the Government and the applicant, the Chamber decided not to hold a hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. On 8 July 1987 the applicant brought proceedings (17 C 1018/87) in the Salzburg District Court (*Bezirksgericht*) against a former lawyer for the sum of AS 11,294.05. The lawyer opposed the proceedings, and a hearing was held on 25 January 1988. The court decided to adjourn the proceedings until other proceedings (20 SW 2/87) had been determined. The latter ended on 15 March 1988, and on 12 April 1988 the applicant requested the continuation of the second proceedings (17 C 1018/87), increasing the amount claimed. On 26 April 1988 the applicant filed an extensive request for the taking of evidence and, at the same time, reduced his claim. On 23 June 1988 the District Court invited the defendant to comment on the applicant's submissions, which he did on 23 November 1988. Meanwhile, on 8 August 1988, the applicant requested the District Court to join the present proceedings with other proceedings (3 Cg 216/88) pending before the same court. On 6 October 1988 the District Court dismissed this request. From November 1988 the applicant was represented by a lawyer but continued to make applications to the court on his own behalf.

11. On 1 November 1988 and again on 4 November 1989 the judge dealing with the applicant's case was replaced.

12. A second hearing took place on 1 December 1989. The court adjourned the case pending the outcome of further parallel proceedings (3 Cg 216/88) against the same defendant. The final decision in the latter proceedings entered into force on 4 November 1993, and on 15 November 1993 the applicant requested the resumption of the previous proceedings. He also increased the amount claimed.

13. On 12 December 1994 a hearing was held in the case. The applicant limited the amount claimed to AS 24,339.80 and submitted further documentation. The court adjourned the hearing for the files in all parallel proceedings to be obtained.

14. On 16 January 1995 the defendant died. On 18 April 1995 the case was adjourned (*unterbrochen*) pursuant to Article 155 of the Code of Civil Procedure (*Zivilprozessordnung*). On 4 May 1995 the applicant applied for

the proceedings to be continued, and on 29 June 1995 the applicant purported to withdraw his action as he (wrongly) thought that it was statute-barred. On 19 March 1997 the applicant applied for the proceedings to be "re-opened" on the ground that his belief that the action was statute-barred derived from misleading information given by the defendant's insurer. On 11 April 1997 the applicant revoked his withdrawal, and again applied for the proceedings to be continued.

15. The Salzburg District Court rejected the applications for continuation, and declined to re-open the proceedings as no final decision had been taken. The applicant appealed.

16. On 23 July 1997 the Salzburg Regional Court (*Landesgericht*) allowed the applicant's appeal in part, and remitted the case to the District Court which, on 20 July 1998, gave judgment in the applicant's favour as to AS 15,157.80 and against him as to AS 9,182. The applicant was awarded his costs. The applicant's appeal against the part of the judgment against him was dismissed by the Salzburg Regional Court on 20 January 1999. The latter judgment was received by the applicant's representative on 4 February 1999.

II. RELEVANT DOMESTIC LAW

17. 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 after 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

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

18. The Government maintained that the applicant had failed to exhaust domestic remedies as he had not made an application pursuant to Section 91 of the Courts Act. In the Government's view such an application is an effective remedy as its use would have reduced the length of the proceedings.

19. In the applicant's view a Section 91 request was not an effective domestic remedy.

20. In the case of Holzinger v. Austria the Court has found that a request under Section 91 of the Austrian Courts Act is, in principle, an effective remedy which has to be used in respect of complaints about the length of court proceedings (*Holzinger v. Austria*, no. 23459/94, 30.01.01, §§ 24-25). It stated, however, that the effectiveness of such a remedy may depend on whether it has a significant effect on the length of the proceedings as a whole (loc. cit., § 22).

21. In the present case the proceedings started on 8 July 1987 and ended at first instance on 20 July 1998. The decision on the applicant's appeal was given on 20 January 1999. While the first instance proceedings were pending, Section 91 of the Courts Act entered into force on 1 January 1990. It was from that moment on that the applicant could have made an application under this provision. On that date, however, the proceedings had already lasted for some two and a half years. This period during which the applicant had no remedy at his disposal against unreasonable delay was substantial. Even if the applicant would have filed an application under Section 91 of the Courts Act after 1 January 1990, any decision given under this provision which might have speeded up the proceedings could not have made up for delay which had already occurred. The present application must therefore be distinguished from the aforementioned Holzinger v. Austria case.

22. Accordingly, in the particular circumstances of the present case, a request under Section 91 of the Courts Act cannot be considered as an effective remedy. The Government's preliminary objection must therefore be dismissed.

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

23. The applicant complains that the civil proceedings he brought in the present case were not concluded within a reasonable time as required by Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

"In the determination ... of any criminal charge against him, everyone is entitled to a hearing within a reasonable time by [a] ... tribunal ... ."

24. The applicant submits that the proceedings lasted too long and were not conducted with the necessary diligence. In particular, the repeated change of the judges dealing with his case and the repeated adjournment of the proceedings caused considerable delays.

25. This is disputed by the Government. They submit that the case was rather complex as there were parallel sets of proceedings and the court had to wait for their results. The length of the proceedings at issue was essentially caused by the applicant's conduct, i.e the continuous filing of motions and extensive requests for the taking of evidence.

26. As regards the calculation of the relevant period under Article 6 § 1, the Court notes that the proceedings started on 8 July 1987 when the applicant brought proceedings in the Salzburg District Court. The proceedings lasted until 20 January 1999 when the Regional Court dismissed the applicant's appeal. Thus, they lasted for more than eleven and a half years.

27. The Court observes that after 1 January 1990 the applicant could have filed a request under Section 91 of the Courts Act for a time-limit to be fixed. However, this subsequent period cannot be disregarded in the assessment of the relevant time under Article 6 § 1, but the Court will take this element into account when assessing the reasonableness of the length of the proceedings. In this respect it recalls that the assessment must be made in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (*Pélissier and Sassi v. France* [GC], no. 25444/94, 25.3.99, § 67).

28. In the Court's view the proceedings at issue were not complex. As regards the conduct of the applicant, the Court reiterates that after 1 January 1990 the applicant did not file a request under Section 91 of the Courts Act. Moreover, the adjournments of the proceedings, one of which lasted almost four years, had the applicant's consent. Thus, the ensuing delays were the applicant's responsibility.

However, as regards the conduct of the competent authorities before 1 January 1990, when the applicant did not have the Section 91 remedy at his disposal, no adjournment of any significant duration had been decided by the District Court. During two and a half years, namely between 8 July 1987 and 1 January 1990, only two hearings took place. On two occasions (1 November 1988 and 4 November 1989) the judge dealing with the applicant's case was replaced and during the whole year of 1989 no significant steps were taken by the competent court. This delay cannot be attributed to the applicant and has not been sufficiently explained by the Government.

29. The Court finds therefore that the length of the proceedings exceeded a "reasonable time". It follows that there has been a breach of Article 6 § 1 of the Convention.

III.. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicant claims non-pecuniary damages on account of the unreasonable length of the proceedings but leaves it to the Court to fix an appropriate amount. As regards pecuniary damages, he claims 5,630 Austrian schillings (ATS). He submits that if the proceedings had been concluded earlier he would have obtained that additional amount from the defendant. The Government did not comment on the applicant's claim.

32. As regards the applicant's claim for pecuniary damage, the Court finds that there is no causal link between the breach of which complaint is made and the alleged pecuniary damage; it is not possible to speculate as to what would have been the outcome of the proceedings if they had satisfied the requirements of Article 6 § 1 (see e.g. the Werner v. Austria judgment of 24 November 1997, *Reports of judgments and decisions* 1997-VII, p. 2514, § 72). Thus, no award can be made under this head.

33. As regards the claim for non-pecuniary damage, the Court considers that the applicant may be taken to have suffered distress on account of the delays in the case. On an equitable basis, the Court awards non-pecuniary damages of 30,000 ATS.

B. Costs and expenses

34. The applicant, who has not been assisted by counsel in the Convention proceedings, claims 1,555 ATS for out of pocket expenses such as postage and photocopies. The Government does not comment on this claim.

35. The Court finds that the amount claimed by the applicant appears reasonable and awards it in full.

C. Default interest

36. 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. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 30,000 (thirty thousand) Austrian schillings in respect of non-pecuniary damage and 1,555 (one thousand five hundred and fifty five) Austrian schillings 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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