



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

THIRD SECTION

CASE OF SCHWEIGHOFER and OTHERS v. AUSTRIA

(Applications nos. 35673/97, 35674/97, 36082/97 and 37579/97)

JUDGMENT

STRASBOURG

9 October 2001

FINAL

09/01/2002

This judgment will become final in the circumstances set out in Article 44
§ 2.

In the case of Schweighofer and Others 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,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 24 August 1999, 29 August 2000, 20 March and 18 September 2001,

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

PROCEDURE

1. The case originated in four applications (nos. 35673/97, 35674/97, 36082/97 and 37579/97) 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 four Austrian nationals, Walter Schweighofer, Hans-Dieter Rauch, Peter Heinemann and Josef Mach ("the applicants"), on 12 February 1997, 11 February 1997, 9 April 1997 and 12 May 1997, respectively.

2. The first and fourth applicants were represented before the Court by Mr W. Weidinger, a lawyer practising in Vienna. The second and third applicants were represented by Mr Eckert & Fries, lawyers practising in Baden. 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 applicants alleged, in particular, that the criminal proceedings against them were unreasonably long.

4. The applications were 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 applications were 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 24 August 1999 the Chamber joined the applications and declared them partly inadmissible. By a decision of the 29 August 2000 the Chamber declared the remainder of the applications admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

8. On 12 December 1985 the second applicant was arrested at Vienna airport on suspicion of smuggling gold coins. 3200 gold coins and two gold bars were found hidden under his clothes. He was questioned as a suspect. On 15 December 1985 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) opened preliminary investigations against him and he was released. In 1986 he was repeatedly questioned either by the investigating judge or, upon the judge's request, by the Vienna Customs Office on suspicion of having organised large scale smuggling by which gold coins were exported to a Swiss company, M., and smuggled back to Austria where they were, via a number of firms owned by the applicant and other suspects, sold to banks, mostly the K. bank, and re-exported to Switzerland. Thereby the participants evaded large amounts of turnover tax and gained refunds for turnover tax which is due upon the import of goods but not upon their export.

9. On 27 July 1986 the fourth applicant was detained on remand on suspicion of participating in the smuggling of gold coins and tax evasion. Subsequently, he was questioned by the Customs Office upon the investigating judge's request. The proceedings against him were severed from the proceedings against the other suspects.

10. On 30 October 1986 the third applicant, who was the deputy director of the K. bank, was detained on remand. On 31 October 1986 preliminary investigations were opened against him and the investigating judge at the Vienna Regional Criminal Court questioned him as a suspect for tax evasion and smuggling, as well as for offences under the Foreign Exchange Act (*Devisengesetz*). The proceedings against him were severed from the proceedings against the other suspects.

11. On 28 July 1987 the Vienna Public Prosecutor's Office (*Staatsanwaltschaft*) preferred an indictment against the third applicant. He was charged under section 33 § 2 (a) of the Tax Offences Act (*Finanzstrafgesetz*) with having aided and abetted tax evasion, in that he bought smuggled gold coins from the firms belonging to the other suspects and exported them to the M. company in Switzerland, whilst carrying out the necessary banking transactions to falsify a flow of money from the M. company to the K. bank.

12. On 2 November 1987 the third applicant was released. Subsequently, the proceedings against him were rejoined to the proceedings against the other suspects. On 30 November 1987 the fourth applicant was released.

13. On 30 June 1988 the Vienna Regional Criminal Court convicted the fourth applicant, *inter alia*, of tax evasion under section 33 § 2 (a) of the Tax Offences Act and of forging documents. It sentenced him to one year and ten months' imprisonment and to a fine of twice the amount of the taxes evaded, namely Austrian schillings (ATS) 500 million, or one year's imprisonment in default. The judgment became final in April 1989, following unsuccessful appeal proceedings. Subsequently, the proceedings against the fourth applicant, as far as they related to facts which had not been the subject of the above judgment, were joined to the proceedings against the other suspects.

14. On 21 December 1988 the Vienna Regional Criminal Court questioned the first applicant as a suspect and opened preliminary investigations on suspicion of tax evasion against him. Subsequently, he was questioned by the Vienna Customs Office upon the Regional Court's request.

15. On 16 October 1991 the Vienna Public Prosecutor's Office filed the indictment, comprising some 250 pages. During the ten months required for its preparation, the Public Prosecutor responsible for the case had been relieved of all other business. The indictment was preferred against thirteen co-accused including the four applicants. In these and the subsequent proceedings, all four applicants were represented by counsel.

16. On 1 June 1994 the trial before the Vienna Regional Criminal Court started. It lasted a total of twenty-nine days during June, September, October, November and December 1994, in the presence of the applicants and their counsel. The court heard dozens of witnesses and took extensive documentary evidence. It refused a number of requests for the taking of evidence filed by the second and third applicants.

17. On 22 December 1994 the Vienna Regional Criminal Court gave its judgment comprising some 500 pages. It convicted all four applicants of having partly committed and partly aided and abetted tax evasion under section 33 § 2 (a) of the Tax Offences Act, smuggling under section 35 § 1 of the Tax Offences Act and a breach of foreign exchange regulations under section 24 of the Foreign Exchange Act. In addition it convicted the first and the fourth applicants of forging documents under section 223 § 2 of the Criminal Code. The court sentenced the applicants under both the Tax Offences Act and the Foreign Exchange Act to terms of imprisonment, fines (with terms of imprisonment in default) and fines in lieu of confiscation.

18. The Regional Court found that the applicants had, together with their co-accused, between 1980 and 1986 run a sophisticated network involving the large scale exportation of gold coins and other precious metals to Switzerland, mostly to the M. company but also to several banks, declaring

these exports and claiming refunds for turnover tax, which is not due upon export, and then bringing the coins back to Austria without declaring them, thus avoiding the turnover tax due upon import. Consequently, they breached foreign exchange regulations by exporting Austrian schillings to Switzerland without the permission of the Austrian National Bank, or by manipulating bank accounts by falsifying a flow of money from Switzerland. The amount of taxes evaded were between ATS 205 million and ATS 916 million per applicant. The relevant amounts under the Foreign Exchange Act were between ATS 570 million and ATS 2200 million per applicant.

19. Subsequently, the applicants each filed a plea of nullity and an appeal (*Nichtigkeitsbeschwerde und Berufung*). In their pleas of nullity the applicants raised a number of complex issues of law, concerning *inter alia* the relationship between section 33 § 2 (a) of the Tax Offences Act to a related provision and the question whether the offence under section 24 of the Foreign Exchange Act had not already been invalidated at the time of the first instance judgment by the liberalisation of the foreign exchange market in 1991.

20. On 14 November 1996 the Supreme Court (*Oberster Gerichtshof*) dismissed the applicants' pleas of nullity and their appeals in a 139-page judgment.

21. The judgment was served on the second and third applicants on 17 January and on the first and fourth applicants on 21 January 1997.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

22. The Government contended that the applicants failed to exhaust domestic remedies as they did not make an application under Section 91 of the Courts Act (*Gerichtsorganisationsgesetz*) following its entry into force on 1 January 1990. It provides for interlocutory applications whereby a court is required to request a higher instance to impose an adequate time-limit for taking a procedural measure which the lower court has failed to take to date. The Government relied on two recent judgments, in which the Court found that Section 91 of the Courts Act was an effective remedy as regards complaints about the length of proceedings (*Holzinger v. Austria*, no. 23459/94, 30.01.01, §§ 24-25, to be published in ECHR-2001), except where there has already been a substantial delay before the entry into force of this provision (*Holzinger (no. 2) v. Austria*, no. 28898/95, 30.01.01, §§ 21-22, also to be published in ECHR-2001).

23. The Government further submitted that they did not raise this plea earlier in their observations on admissibility, as it did not have any prospects of success in the light of the case-law as it stood at that time.

24. The second and third applicants contested the Government's view, while the first and fourth applicants did not make submissions.

25. The Court recalls that any plea of inadmissibility must be made by the respondent party in its observations on the admissibility of the application, insofar as its character and the circumstances permit (Rule 55 of the Rules of Court).

26. The Court notes that the Government submitted their observations on admissibility and merits in November 1999. Shortly before then, the Court had given a decision in which it had found, in general terms, that Section 91 of the Courts Act was not an effective remedy as regards length of proceedings (*Holzinger (no. 2) v. Austria* [decision], no. 28898/95, 12.10.1999, unreported). However, at that time this was the Court's only decision on the issue and it had not yet been confirmed by a judgment. This is all the more important, as it cannot be said that there was any constant case-law of the Commission with regard to Section 91 of the Courts Act. Moreover, on 2 December 1999, the Court 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* [decision], no. 32082/96, ECHR 1999-IX). This remedy is comparable to an application under Section 91 of the Austrian Courts Act, as it provides for an interlocutory application which allows a superior authority *inter alia* to fix a time-limit for taking a procedural measure which the competent court has failed to take. In these circumstances, the Court finds that the Government could have been expected to raise the issue of non-exhaustion either in their observations on admissibility, or at least following the *Tomé Mota* decision, which was given well before the Court's admissibility decision on 29 August 2000 in the present case. As there are no particular reasons which would have absolved the Government from raising the preliminary objection in the proceedings on admissibility, they are estopped from doing so now.

27. Accordingly, the Government's preliminary objection must be dismissed.

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

28. The applicants alleged that the criminal proceedings against them were not terminated within a reasonable time as required by Article 6 § 1 of the Convention which, so far 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..."

The applicants conceded that the proceedings were complex, but maintained that there were considerable delays attributable to the authorities. In particular there was no reason why, following the first indictment against the third applicant of 28 July 1987 and the partial judgment of 30 June 1988 against the fourth applicant, that it took until 16 October 1991 to file the indictment against all the co-accused. Moreover, there was no explanation for the lapse of time between the latter date and the start of the trial on 1 June 1994. As regards the latter delay, the second and third applicants submit that a request pursuant to Section 91 of the Courts Act would not have offered any prospect of success as the post of the competent trial judge was vacant until 1 January 1994 and thereafter a certain time had to be granted to the newly appointed judge for studying the case-file.

29. The Government asserted that the proceedings were highly complex and rank amongst the biggest criminal cases ever dealt with by the Austrian courts. The investigations involved numerous suspects. The Public Prosecutor had to be relieved from all other business to prepare the 250-page indictment. At the trial, dozens of witnesses had to be heard. The Regional Court's judgment comprised some 500 pages and even the Supreme Court's judgment comprised 139 pages as the case raised difficult legal issues. Moreover, the applicants contributed to the length of the proceedings.

30. The Court notes that the proceedings started, as regards the first applicant on 21 December 1988, when preliminary investigations were opened against him; as regards the second applicant on 12 December 1985, when he was arrested and questioned as a suspect; as regards the third applicant on 30 October 1986, when he was detained on remand and, as regards the fourth applicant on 27 July 1986 when he was detained on remand. They were terminated as regards the second and third applicants on 17 January 1997 and, as regards the first and fourth applicants, on 21 January 1997, when the Supreme Court's judgment was served.

The proceedings therefore lasted eight years and one month as regards the first applicant; eleven years and one month as regards the second applicant; ten years and two and a half months as regards the third applicant and ten and a half years as regards the fourth applicant.

31. The Court recalls that the reasonableness of the length of proceedings is to be assessed 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 applicants' conduct and the conduct of the competent authorities (see among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

32. The proceedings at issue in the present case were very complex. They concerned thirteen co-accused including the four applicants. The offences - the smuggling of gold coins and related tax and foreign exchange

offences - were committed on an extraordinary scale over a period of six years. During the twenty-nine days of trial hearings, dozens of witnesses had to be heard and the judgments given by the Vienna Regional Criminal Court as well as by the Supreme Court are of an extraordinary volume, as the case raised a number of complicated legal issues. However, the complexity of the proceedings does not in itself suffice to justify their substantial duration.

33. As to the conduct of the applicants, the Court recalls that in a case like the present one the fact that the applicants could have filed a request under Section 91 of the Court's Act after 1 January 1990 has to be taken into account (see the above-cited *Holzinger (no. 2)* judgment, §§ 27-28). This appears to be particularly relevant as regards the period between 16 October 1991, when the indictment was preferred, and 1 June 1994 when the trial was opened. The Court is not convinced by the applicants' argument that Section 91 of the Courts Act would not have offered prospects of success given the judicial vacancy, as this provision does seek to remedy the procedural dilatoriness of a particular judge, but of a court. Thus, the applicants could and should have made an application under Section 91 of the Courts Act and thereby reduced the period of delay. However, the Court notes that Section 91 of the Courts Act does not apply to delays caused by the Public Prosecutor. Thus, the applicants cannot be held responsible for any delays by the Public Prosecutor before the indictment was preferred on 16 October 1991.

34. As regards the conduct of the competent authorities before 1 January 1990, when the applicants did not have the remedy of Section 91 of the Courts Act at their disposal, the Court notes that the preliminary investigations had, until that date, lasted one year as regards the first applicant, four years as regards the second applicant, three years as regards the third applicant and three and a half years as regards the fourth applicant. Delays which occurred during this period cannot be attributed to the applicants and the Government have not provided any detailed explanation for the substantial duration of the preliminary investigations.

35. In sum, the Court finds that the overall duration of the proceedings cannot be regarded as reasonable within the meaning of Article 6 § 1.

There has thus been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The first applicant claimed ATS 8,5 million for loss of past and future income allegedly suffered as a result of the duration of the proceedings. In addition he claimed ATS 2 million in respect of non-pecuniary damage.

The second applicant requested the Court to award him an appropriate amount for non-pecuniary damage.

The third applicant claimed one symbolic schilling in respect of pecuniary and non-pecuniary damage.

The fourth applicant requested ATS 7,5 million for loss of past and future income allegedly suffered as a result of the duration of the proceedings. Further, he claimed ATS 3 million in respect of non-pecuniary damage, submitting that he is almost blind and that, had the proceedings been conducted speedily, he would have been able to serve his prison sentence when his state of health had been better.

38. The Government submitted that there was no causal link between the length of the proceedings and the pecuniary damage claimed by the first and fourth applicants. Moreover, the first and fourth applicants' claims for non-pecuniary damage were excessive.

39. The Court agrees with the Government that there is no causal link between the violation found and the first and fourth applicants' claims for pecuniary damage (see *Holzinger (no. 2) v. Austria*, cited above, § 32). Thus, no award can be made under this head.

40. As to non-pecuniary damage, the Court considers that the applicants must be taken to have suffered distress on account of the duration of the criminal proceedings against them. Making an assessment on an equitable basis and taking into account that the duration of the proceedings varied from applicant to applicant, the Court awards the first applicant ATS 60,000, the second applicant ATS 90,000 and the fourth applicant ATS 85,000. As to the third applicant, who requested one symbolic schilling, the Court awards ATS 1.

B. Costs and expenses

41. The first applicant claimed ATS 1,6 million for the costs in the domestic proceedings and ATS 400,000 for the costs in the Convention proceedings.

The second applicant requested ATS 120,000 for the costs in the Convention proceedings.

The third applicant requested ATS 97,564 for the costs in the Convention proceedings.

The fourth applicant claimed ATS 1,2 million for the costs in the domestic proceedings and ATS 480,000 for the costs in the Convention proceedings.

42. The Government commented that all four applicants' claims for costs were excessive. They accepted ATS 42,650 as an appropriate amount in respect of the costs of each applicant in the Convention proceedings.

43. The Court notes that the second and third applicants have not claimed any costs in respect of the domestic proceedings. As to the costs claimed by the first and fourth applicants for the domestic proceedings, the Court observes that they cannot be considered as having been incurred in an attempt to prevent or redress the violation found. However, considering that unreasonable delays in proceedings necessarily involve an increase in an applicant's costs (see, *Bouilly v. France*, no. 38952/97, 7.12.99, § 33), the Court awards the first and fourth applicants ATS 10,000 under this head.

44. As to the costs of the Convention proceedings, the Court notes that the applicants were represented by counsel and did not have the benefit of legal aid. Concurring with the Government's position, it awards each applicant ATS 42,650.

45. In sum, the Court awards the first and fourth applicants ATS 52,650 each, and the second and third applicants ATS 42,650 each, for costs and expenses.

C. Default interest

46. 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, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) to the first applicant 60,000 (sixty-thousand) Austrian schillings in respect of non-pecuniary damage and 52,650 (fifty-two-thousand six-hundred and fifty) Austrian schillings for costs and expenses;
 - (ii) to the second applicant 90,000 (ninety-thousand) Austrian schillings in respect of non-pecuniary damage and 42,650 (forty-two-thousand six-hundred and fifty) Austrian schillings for costs and expenses;
 - (iii) to the third applicant 1 (one) Austrian schilling in respect of non-pecuniary damage and 42,650 (forty-two-thousand six-hundred and fifty) Austrian schillings for costs and expenses;
 - (iv) to the fourth applicant 85,000 (eighty-five-thousand) Austrian schillings in respect of non-pecuniary damage and 52,650 (fifty-two-thousand six-hundred and fifty) 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 applicants' claims for just satisfaction.

Done in English, and notified in writing on 9 October 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President