



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

FIRST SECTION

CASE OF BAISCHER v. AUSTRIA

(Application no. 32381/96)

JUDGMENT

STRASBOURG

20 December 2001

FINAL

20/03/2002

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

In the case of Baischer v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS,

Mr G. BONELLO,

Mr E. LEVITS,

Mrs S. BOTOUCHAROVA,

Mr A. KOVLER,

Mrs E. STEINER, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 6 December 2001,

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

PROCEDURE

1. The case originated in an application (no. 32381/96) 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, Erwin Baischer (“the applicant”), on 29 May 1996.

2. The applicant was represented before the Court by Mr Estermann, a lawyer practising in Mattighofen (Austria). The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs

3. The applicant alleged that in criminal proceedings against him relating to an administrative offence no oral hearing has been held.

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 January 2001 the Court declared the application admissible.

7. As from 1 November 2001 the application was reallocated to the First Section of the 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.

8. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. On 9 November 1994 the Braunau District Administrative Authority (*Bezirkshauptmannschaft*) convicted the applicant twice under the Motor Vehicles Act (*Kraftfahrgesetz*) for failure to comply with the instructions of the Authority to inform them who had used his car on specific days (*Lenkerauskunft*), and sentenced him, on each offence, to a fine of 4,000 ATS or six days' imprisonment in default. The Authority noted that the applicant had given information but found it to be incorrect.

10. On 29 November 1994 the applicant filed an appeal against this decision with the Upper Austrian Independent Administrative Panel (*Unabhängiger Verwaltungssenat*). He complained that the District Administrative Authority had incorrectly applied the law and failed to sufficiently assess the evidence before it or clarify why the information he had given was untrue. The applicant did not request a hearing, nor did he expressly waive this right. No oral hearing was held.

11. On 2 January 1995 the Independent Administrative Panel dismissed the appeal on the merits but reduced the sentence.

12. On 28 February 1995 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He complained under Article 6 § 1 of the Convention that the Independent Administrative Panel had failed to hold a hearing. Such a hearing would have been necessary because his appeal was not limited to points of law. He had also criticised the District Administrative Authority's assessment of evidence. Therefore an oral hearing would have been necessary. In such a hearing the Independent Administrative Panel could have properly assessed this evidence, which had already been obtained at first instance, as well as fresh evidence.

13. On 13 July 1995 the Constitutional Court declined to deal with the applicant's complaint on the ground that it did not have sufficient prospects of success. Upon a request filed by the applicant on 10 August 1995, the Constitutional Court transferred the case to the Administrative Court (*Verwaltungsgerichtshof*).

14. On 23 February 1996 the Administrative Court, relying on Section 33a of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), declined to deal with the applicant's case, finding that it did not raise important legal issues. On 10 May 1996 this decision was served on the applicant's lawyer.

II. RELEVANT DOMESTIC LAW

15. The relevant provisions of the Austrian Federal Constitution (*Bundes-Verfassungs Gesetz*) concerning the establishment of Independent Administrative Panels which entered into force on 1 January 1991 read as follows:

Article 129

"It is the task of the Independent Administrative Panels in the regions and the Administrative Court in Vienna to ensure the lawfulness of the entire public administration."

Article 129b

"(1) Independent Administrative Panels are composed of a president, a deputy president and a sufficient number of further members. Its members are appointed by the Regional Government for a period of at least six years. ...

(2) In fulfilling their tasks under Articles 129a and 129b the members of the Independent Administrative Panel are not bound by any instructions. The court business shall be distributed among the members in advance for the period provided for in the regional legislation. A matter which according to such a schedule is the business of one member may only be withdrawn from him or her in case of impediment by a decision of the president.

(3) Before the end of their term of office members of Independent Administrative Panels may only be removed from office in the cases specified by the law and upon a decision of the Independent Administrative Panel itself.

..."

16. The Upper Austria Regional Act on the Independent Administrative Panel, Regional Gazette no. 90/1990 (*Gesetz über den Unabhängigen Verwaltungssenat des Landes Oberösterreich, LGBL. 90/1990*), repeats to a large extent the provisions of the Federal Constitution, although the term of office of the members of the Upper Austria Independent Administrative Panel is indefinite (Section 3 § 3).

17. Section 33a of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) reads as follows:

"The Administrative Court may decline to deal with a complaint against a decision of an Independent Administrative Panel in an administrative criminal case if no prison sentence or a fine exceeding AS 10,000 has been imposed and the Administrative Court's decision would not involve the determination of a legal question of fundamental importance. A legal question of fundamental importance is involved in particular if the challenged decision of the Independent Administrative Panel is at variance with the Administrative Court's case-law, if no such case-law exists or if the legal questions at issue have not been answered uniformly in the Administrative Court's case-law."

18. Section 51e of the Code of Administrative Offences (*Verwaltungsstrafgesetz*), as far as relevant, reads as follows:

"2. In case the appeal is expressly limited to points of law or concerns exclusively the severity of the sentence imposed, a hearing must only be scheduled if this is expressly requested in the appeal.

3. A hearing need not be held if the parties expressly waive their right to a hearing. The parties may express such a waiver up to the beginning of the hearing. ..."

THE LAW

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

19. The applicant complains about the absence of an oral hearing in criminal proceedings against him relating to administrative offences. He relies on 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 fair ... hearing ... by [a] ... tribunal..."

20. The applicant submits that, under Section 51e of the Code of Administrative Offences, the Independent Administrative Panel has to hold a hearing *ex officio*, unless the appeal only relates to issues of law or the penalty imposed. In his appeal the applicant had raised issues of law and attacked the assessment of evidence made by the District Administrative

Authority. The Independent Administrative Panel should therefore have held a hearing. It has failed to do so and merely decreased the fine. Article 6 § 1 has therefore been violated.

21. The Government concede that the authorities and courts dealing with the applicant's case had to determine a criminal charge within the meaning of Article 6 § 1 of the Convention and that no oral hearing was held. However, in the Government's view, the applicant should have requested an oral hearing before the Administrative Court as that court was competent to determine the matter by way of a review satisfying the requirements of both Article 6 § 1 and Article 2 of Protocol No. 7. Since the applicant made no such request, he implicitly waived his right to a hearing.

22. The Court recalls that according to its established case-law, Article 6 § 1 of the Convention applies to the administrative offences and the corresponding administrative criminal procedure under Austrian law (e.g. *Gradinger v Austria* judgment of 23 October 1995, Series A n 328-C, p. 61, § 36).

23. Article 6 § 1 of the Convention guarantees a right to a public hearing by an independent and impartial tribunal established by law. According to the Court's case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure - several of which appear in the text of Article 6 § 1 itself (*Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132, p. 29, § 64). Where a penalty is criminal in nature there must be the possibility of review by a court which satisfies the requirements of Article 6 § 1, even though it is not inconsistent with the Convention for the prosecution and punishment of minor offences to be primarily a matter for the administrative authorities (*Malige v. France* judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2937, § 45).

24. In the present case the applicant has been fined for an offence under the Road Traffic Act by the Braunau District Administrative Authority, a body, which according to the Court's case-law, does not satisfy the above requirements of Article 6 § 1 (*Gradinger v. Austria* judgment, *op.cit.*, § 42). Thus, the Court has to examine whether in the administrative criminal proceedings against the applicant his conviction was reviewed by any other authority or court which satisfies the requirements under Article 6 § 1 as regards the tribunal element and, if so, whether this body has held a public hearing.

25. The Court observes that the applicant's appeal against the fine order of the Braunau District Administrative Authority was dealt with by the Upper Austria Independent Administrative Panel. The Court, having regard

to the regulations on the establishment of this body and its case-law on that matter (*Hubner v. Austria* (dec.), no. 34311/96, 31.8.99) finds that the Independent Administrative Panel has to be regarded as a tribunal within the meaning of Article 6 § 1 of the Convention. The contrary has not been suggested by the parties.

26. The Court observes further that under section 51e of the Austrian Code of Administrative Offences, Independent Administrative Panels shall hold a hearing. They may refrain from doing so when the parties concerned expressly waive their right to a hearing or when the parties' appeal only concerns points of law, or the sentence imposed, and there is no express request for a hearing to be held. In the present case the applicant had not expressly waived his right to a hearing, nor does it appear that he limited his appeal to points of law or to the sentence. Thus, it appears that according to section 51e, the Independent Administrative Panel should have held a hearing *ex officio*. However, it did not do so. The Court further notes that the applicant specifically complained to the Constitutional Court (and the Administrative Court) that the Independent Panel had failed to hold a hearing, but to no avail.

27. The Government argue that the applicant should have asked for a hearing before the Administrative Court, as, in their view, review by that court satisfied the requirements of Article 6 § 1. Since the applicant made no such request, he implicitly waived his right to a hearing.

28. However, in the case of *Gradinger v. Austria* (op. cit., p. 63, § 44) the Court has held as follows:

“The powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention. It follows that when the compatibility of those powers with Article 6 § 1 is being gauged, regard must be had to the complaints raised in that court by the applicant as well as to the defining characteristics of a "judicial body that has full jurisdiction". These include the power to quash in all respects, on questions of fact and law, the decision of the body below. As the Administrative Court lacks that power, it cannot be regarded as a "tribunal" within the meaning of the Convention. ...”

29. The Court finds no reasons to come to a different conclusion as regards the scope of review exercised by the Administrative Court in the present case. It follows that a hearing before the Administrative Court would not have served any useful purpose, as that body does not fulfil the criteria of Article 6 § 1.

30. In sum, in the proceedings at issue the applicant was entitled to a public hearing before a tribunal within the meaning of Article 6 § 1 and the only body satisfying the criteria of this provision, the Upper Austria Independent Administrative Panel, has not held a public hearing. No convincing explanation for its refusal to do so has been advanced. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicant claimed 30,000 Austrian schillings (ATS) as non-pecuniary damages. The Government objected to this claim.

33. Having regard to its case-law in comparable cases the Court considers that, in the circumstances of the case, the present judgment affords the applicant sufficient reparation (*Schmautzer v. Austria* judgment of 23 October 1995, Series A no. 328-A, p. 16, § 44; *Mauer v. Austria* judgment of 18 February 1997, Reports 1997-I, p. 84, § 36).

B. Costs and expenses

34. For costs incurred in the domestic proceedings the applicant claimed 49,831.7 ATS. For costs incurred in the proceedings before the Convention organs the applicant, without specifying his claim, requested the court to grant a lump-sum of 50,000 ATS. The Government did not comment on the applicant's claim for costs incurred in the domestic proceedings. As regards the claim for costs incurred in the proceedings before the Convention organs, they submitted that without any break-down of these costs they could not properly comment the claim although, in any event, the amount appeared excessive.

35. The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 80, 20.5.99). The Court considers that these conditions are only met as regards the costs incurred in the proceedings before the Constitutional Court and the Administrative Court, which the applicant puts at 32,688.50 ATS. The Court considers the amount claimed to be reasonable and therefore awards this sum.

36. As regards the claim for costs incurred in the Strasbourg proceedings the Court observes that the applicant has not specified the amount or submitted any documents in support of his claim. Accordingly, no award can be made under this head.

C. Default interest

37. 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. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
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, for costs and expenses, 32,688 (thirty-two thousand six-hundred and eighty-eight) Austrian schillings, 50 (fifty) groschen;
 - (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 6 December 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President