



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

FIRST SECTION

CASE OF BAKKER v. AUSTRIA

(Application no. 43454/98)

JUDGMENT

STRASBOURG

10 April 2003

FINAL

10/07/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bakker v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mr G. BONELLO,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,
Having deliberated in private on 20 March 2003,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 43454/98) 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 a Dutch national, Mr Lambert Bakker (“the applicant”), on 21 August 1998.

2. The applicant was represented by Mr W.L. Weh, a lawyer practising in Bregenz. 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, in administrative proceedings on the refusal to exercise his profession as a self-employed physiotherapist, he was denied an oral hearing before the Constitutional Court and the Administrative Court.

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 First 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.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

7. By a decision of 13 June 2002 the Court declared the application partly admissible.

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

THE FACTS

9. The applicant is a Dutch national, born in 1957 and living in Bregenz (Austria).

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant is a physiotherapist who completed his professional training in Belgium and received his diploma in 1986. From 1987 to 1993 he worked as a physiotherapist in Austria during which time he was employed by an association working in that field.

11. On 19 February 1992 the Vorarlberg Regional Governor (*Landeshauptmann*) recognised his diploma with suspensive effect until he accomplished two additional exams. On 11 January 1995 the Regional Governor completed the decree of recognition upon the applicant's submission of the required certificates.

12. On 4 April 1995 the applicant filed a request with the Vorarlberg Regional Governor for the authorisation to work as a self-employed physiotherapist. He further submitted an employment certificate dated 4 January 1994, which had been issued by the association he had worked for.

13. On 26 July 1995 the Regional Governor refused to grant the applicant's request. It found that the applicant did not comply with the requirements set out in section 7 § 3 of the Act on Medico-Technical Services (*Bundesgesetz über die Regelung der gehobenen medizinisch-technischen Dienste, MTD-Gesetz*). According to this provision the right to work as a self-employed physiotherapist may only be granted after three years of authorised professional practice within the last ten years.

14. On 31 January 1996 the Ministry for Health and Consumer Protection (*Ministerium für Gesundheit und Konsumentenschutz*) partly granted the applicant's appeal. It found that the Regional Governor should have based its decision on section 68 § 6 of the Nursing Act (*Krankenpflegegesetz*) according to which the right to work as a self-employed physiotherapist may already be granted after two years of authorised professional practice within the last ten years. It held that, as regards the content, the Regional Government had decided correctly, however, it had based its decision on the wrong legal provision.

15. On 11 April 1996 the applicant filed a complaint with the Administrative Court. He requested an oral hearing and asked the court to seek a preliminary ruling from the European Court of Justice under Article 177 of the EC Treaty.

16. On 23 August 1996 the applicant filed another request with the Regional Governor in order to be granted the right to work as a self-employed physiotherapist.

17. On 28 November 1996 the Regional Governor also rejected this request. He held that the applicant was authorised to work as physiotherapist in Austria since 11 January 1995 following recognition of his foreign diploma. His employment at the association had been before that time and could not be considered as “authorised” professional practice within the meaning of section 68 § 6 of the Nursing Act.

18. On 28 February 1997 the Ministry for Health and Consumer Protection rejected the applicant’s appeal on formal grounds, applying the principle of *res iudicata*.

19. On 22 May 1997 the applicant filed a complaint with the Constitutional Court, requested an oral hearing and asked the court to seek a preliminary ruling from the European Court of Justice under Article 177 of the EC Treaty.

20. On 10 June 1997 the Constitutional Court refused to deal with the applicant’s complaint for lack of prospects of success. It found that his case did not raise serious questions of constitutional law or of the application of Community law and that the matter was not excluded from the competence of the Administrative Court.

21. On 22 June 1997 the applicant filed a complaint with the Administrative Court against the Ministry’s decision of 28 February 1997, requesting, *inter alia*, an oral hearing. He further asked the court to seek a preliminary ruling from the European Court of Justice under Article 177 of the EC Treaty on the question whether the refusal to exercise his profession as a self-employed physiotherapist in Austria was in accordance with Community law.

22. On 4 December 1997 the Feldkirch Regional Court, in the course of official liability proceedings instituted by the applicant, also requested the Administrative Court to decide upon the lawfulness of the decision by the Ministry for Health and Consumer Protection of 31 January 1996.

23. On 20 January 1998 the Administrative Court, in a joint decision, dismissed the applicant’s complaints of 11 April 1996 and 22 June 1997 and the request by the Regional Court without holding an oral hearing, relying on section 39 § 2 (6) of the Administrative Court Act. It confirmed the decisions by the Ministry for Health and Consumer Protection as being lawful. It further held that there was no issue that would require a preliminary ruling by the European Court of Justice, since the applicant’s requests did not concern the interpretation of a specific provision of Community law but rather challenged the implementation of national law exercised by Austrian authorities. The decision was served on the applicant’s counsel on 23 February 1998.

24. On 4 June 1998 the Feldkirch Regional Court, dismissed the applicant's claim relating to official liability proceedings. It found that there was no legal basis in national or Community law, which could support the applicant's claim.

II. RELEVANT DOMESTIC LAW

A. Hearings before the Administrative Court

Section 39 § 1 of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) provides that the Administrative Court is to hold a hearing after its preliminary investigation of the case where a complainant has requested a hearing within the time-limit. Section 39 § 2 (6) provides however:

"Notwithstanding a party's application, the Administrative Court may decide not to hold a hearing when (...)

6. It is apparent to the Court from the written pleadings of the parties to the proceedings before the Administrative Court and from the files relating to the prior proceedings that an oral hearing is not likely to contribute to clarifying the case, and if this is not against Article 6 § 1 of the European Convention on Human Rights."

B. Hearings before the Constitutional Court

Article 144 § 2 of the Federal Constitution reads as follows:

"The Constitutional Court may ... decline to accept a case for adjudication if it does not have sufficient prospects of success or if it cannot be expected that the judgment will clarify an issue of constitutional law. The Court may not decline to accept for adjudication a case excluded from the jurisdiction of the Administrative Court by Article 133."

THE LAW

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

25. The applicant complained under Article 6 § 1 of the Convention about the lack of a public hearing before a tribunal in the proceedings on his request for a permit to exercise the profession of a self-employed physiotherapist. Article 6 § 1, as far as material, reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. Applicability of Article 6

26. It is not in dispute that Article 6 is applicable to the present case, as proceedings on the admission to exercise a profession involve the determination of a civil right (see *De Moor v. Belgium*, judgment of 23 June 1994, Series A no. 292-A, §§ 42-47).

B. Compliance with Article 6

27. The applicant maintained that the proceedings contained no special features which could have exempted the courts from holding a hearing. Moreover, what was at stake in the proceedings were complex questions of fact and law, in particular, of compliance with European Community law, which should have been dealt with in an oral hearing.

28. The Government, relying on the case of *Fredin (no. 2) v. Sweden* (judgment of 23 February 1994, Series A no. 283-1, § 22), argued that special features of the proceedings constituted “exceptional circumstances” which justified the courts’ decisions not to hold a hearing. As regards the proceedings before the Administrative Court, the Government pointed out that that court had only to deal with questions of law which made a hearing unnecessary. Moreover, in the proceedings instituted by the Feldkirch Regional Court, the applicant had not requested a hearing. As regards the Constitutional Court, the Government submitted that also that court had not been obliged to hold a hearing since the complaint only concerned a formal *res iudicata* decision by the lower authority, which did not raise a serious question of constitutional law.

29. The Court observes at the outset that the administrative authorities, the Regional Governor and the Ministry for Health and Consumer Protection, are not “tribunals” within the meaning of Article 6. Only the Administrative Court and the Constitutional Court could qualify as “tribunals” (see *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, pp. 20-21, § 44; *Pauger v. Austria*, judgment of 28 May 1997, Reports 1997-III).

30. Moreover, the Court is not persuaded by the Government’s arguments. The applicant was in principle entitled to an oral hearing in the course of the proceedings on his request for authorisation to exercise his profession (see *Håkansson and Stureson v. Sweden*, judgment of 21 February 1990, Series A no. 171, p. 20, § 64). He had in his complaints to the Administrative Court requested an oral hearing and there is nothing to show that the subject matter of the dispute was of such a nature, for instance a highly technical issue, that it was better dealt with in written proceedings (see *Schuler-Zraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, p. 20, § 58; *mutatis mutandis Göç v. Turkey* [GC], no. 36590/97, §§ 51-52, ECHR 2002-).

31. The Court therefore finds that the lack of an oral hearing before the Administrative Court constituted a breach of Article 6 § 1. In view of this conclusion the Court finds that there is no separate issue as regards the lack of an oral hearing before the Constitutional Court.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicant claimed 300,000 euros [EUR] as compensation for pecuniary damage for alleged loss of earnings and EUR 70,000 for non-pecuniary damage.

34. The Government contended in respect of the claim for pecuniary damage that there was no causal link between the absence of an oral hearing and the alleged loss of earnings.

35. The Court reiterates that it cannot speculate as to what would have been the outcome of the proceedings if they had satisfied the requirements of Article 6 § 1 (see *Werner v. Austria*, judgment of 24 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2514, § 72). It therefore makes no award under the head of pecuniary damage.

36. Further, the Court considers that the finding of a violation constitutes sufficient reparation in respect of any non-pecuniary damage suffered (see *Baischer v. Austria*, no. 32381/96, § 33, 20 December 2001, unreported; *Rushiti v. Austria*, no. 28389/95, § 36, 21 March 2000, unreported; *Riepan v. Austria*, no. 35115/97, § 46, 14 November 2000, unreported).

B. Costs and expenses

37. For costs incurred in the domestic proceedings the applicant claimed EUR 12,484.11. For costs incurred in the proceedings before the Convention organs the applicant requested EUR 5,832.32.

38. The Government asserted that the applicant requested reimbursement of the costs for the whole domestic proceedings, whereas only those costs incurred in an attempt to prevent or redress the violation of the Convention could be examined. In respect of costs and expenses claimed for the Convention proceedings, the Government pointed out that, since the

application had been declared inadmissible for the most part, only an amount on an equitable basis could be awarded.

39. 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, ECHR 1999-III). In the present case, it does not appear from the applicant's submissions that any specific costs were incurred in relation to the demands for an oral hearing. Therefore no award can be made under this head. As regards the costs for the proceedings before the Convention organs, the Court observes that the applicant was only partly successful with his application. Making an assessment on an equitable basis, the Court awards the applicant EUR 4,500 for costs and expenses.

C. Default interest

40. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/97, § 124, ECHR 2002-).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds*
 - (a) that the finding of a violation constitutes sufficient reparation in respect of non-pecuniary damage;
 - (b) 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, EUR 4,500 (four thousand five hundred euros) in respect of costs and expenses;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 April 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President