



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

FIRST SECTION

CASE OF MALEK v. AUSTRIA

(Application no. 60553/00)

JUDGMENT

STRASBOURG

12 June 2003

FINAL

12/09/2003

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 Malek v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr G. BONELLO,

Mrs F. TULKENS,

Mr E. LEVITS,

Mrs S. BOTOUCHAROVA,

Mr A. KOVLER,

Mrs E. STEINER, *judges*,

and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 22 May 2003,

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

PROCEDURE

1. The case originated in an application (no. 60553/00) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Helmut Malek (“the applicant”), on 30 June 2000.

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. On 21 March 2002 the First Section decided to communicate the complaint concerning the length of the proceedings to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**A. The circumstances of the case**

4. The applicant was born in 1963 and lives in Krems (Austria). He is a practising lawyer by profession.

5. On 18 June 1993 a colleague, Mr P., laid a disciplinary information against the applicant alleging that he had infringed the profession’s honour and reputation in the context of administrative criminal proceedings relating to traffic offences. He was suspected of having misbehaved towards intervening police officers during a traffic control by threatening them with

job-related troubles in case they charged him with traffic offences. Subsequently, on 10 September 1993 the Disciplinary Council of the Lower Austrian Bar Chamber (*Disziplinarrat der Niederösterreichischen Rechtsanwaltskammer*), upon request of the Bar Chamber's Prosecutor (*Kammeranwalt*), appointed an Investigating Commissioner (*Untersuchungskommissär*).

6. On 16 September 1993 the Investigating Commissioner informed the applicant that disciplinary proceedings against him were opened and requested him to file observations as regards the charges against him.

7. On 4 October 1993 the applicant complied with this request.

8. On 13 June 1994 the Investigating Commissioner submitted a report to the Disciplinary Council.

9. On 7 October 1994 the Disciplinary Council discontinued the proceedings against the applicant. The Bar Chamber's Prosecutor filed an appeal against this decision.

10. On 15 December 1994 the applicant submitted his observations on the appeal.

11. On 20 February 1995 the Appeals Board (*Oberste Berufungs- und Disziplinarkommission*) allowed the Bar Chamber's Prosecutor's appeal and remitted the case to the Disciplinary Council.

12. In August 1995, after the case had been taken over by another Investigating Commissioner, the latter agreed with the Vienna Federal Police Directorate (*Bundespolizeidirektion*) to question the police officers involved in the traffic control at issue by way of letters rogatory. On 3 November 1995 he filed letters rogatory with the Donaustadt District Court (*Bezirksgericht*) which were subsequently transferred to the Josefstadt District Court.

13. On 13 December 1995 the two police officers were questioned by the Josefstadt District Court.

14. On 8 February 1996 the Investigating Commissioner submitted his report to the Disciplinary Council.

15. On 3 June 1996 the Disciplinary Council, upon the Investigating Commissioner's report, decided to open the main proceedings. This decision was served on the applicant on 31 July 1996.

16. On 30 August 1996 the applicant filed his observations.

17. On 20 September 1996 the Disciplinary Council fixed a hearing for 14 October 1996 and summoned the applicant, his spouse and the two police officers. As the applicant's spouse and one police officers submitted that they could not appear at that date, the hearing was cancelled.

18. On 24 February 1997 the Constitutional Court, in proceedings unrelated to the present one's, issued a decision concerning the composition of the Disciplinary Council. On 15 May 1997, after an internal discussion of the consequences of the Constitutional Court's decision for the proceedings at issue, Mr F was appointed as new chairman of the Disciplinary Council.

19. On 17 September 1997 the Disciplinary Council fixed a hearing for 6 October 1997. The applicant's spouse and the two police officers submitted that they could not appear at that date.

20. On 19 September 1997 the applicant filed observations and challenged the chairman and another member of the Disciplinary Council for bias.

21. On 23 September 1997 a new chairman was appointed.

22. On 6 October 1997 the Disciplinary Council held a hearing. The applicant requested to summon his spouse for the next hearing. The Disciplinary Council adjourned the case and decided to obtain the file concerning the administrative criminal proceedings against the applicant.

23. On 9 February 1998 the Disciplinary Council requested the Vienna Federal Police Directorate to submit the file concerning the administrative criminal proceedings against the applicant.

24. On 5 August 1998, since the file at issue had meanwhile been transmitted to an other administrative authority, the Disciplinary Council filed a new request to submit the file.

25. On 6 August 1998 the Disciplinary Council fixed a hearing for 14 September 1998. The applicant again challenged a member of the Disciplinary Council for bias.

26. On 14 September 1998 the Disciplinary Council held a hearing. The only witness heard was one of the two police officers, the other witnesses and the applicant submitted that they were not able to appear.

27. On 14 October 1998 the Disciplinary Council fixed another hearing for 9 November 1998. The applicant again challenged two members of the Disciplinary Council for bias and submitted that he was prevented from appearing.

28. On 9 November 1998 the Disciplinary Council held a hearing and convicted the applicant under section 10 § 2 of the Lawyers Act. It found that he had misbehaved towards intervening police officers during a traffic control by threatening them with job-related troubles in case they charged him with traffic offences. The applicant had thereby infringed the profession's honour and reputation. The Disciplinary Council ordered him to pay an additional fine of ATS 10,000 as he had already been ordered to pay ATS 25,000 in four other sets of disciplinary proceedings.

29. On 15 December 1998 the applicant filed an appeal against this decision and on 11 January 1999 the Bar Chamber's Prosecutor submitted his observations in reply.

30. On 14 June 1999 the Appeals Board dismissed the applicant's appeal.

31. On 30 September 1999 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He complained, *inter alia*, about the length of the proceedings and claimed that the disciplinary authorities had failed to take the excessive length of the proceedings into account as a mitigating circumstance.

32. On 29 February 2000 the Constitutional Court dismissed the applicant's complaint. This decision was served on the applicant on 6 April 2000.

B. Relevant domestic law

33. Section 10 § 2 of the Lawyers Act (*Rechtsanwaltsordnung*) provides that a practising lawyer is obliged to preserve the honour and reputation of the profession by his honest and sincere conduct.

34. Section 16 § 1 of the Disciplinary Act (*Disziplinarstatut*), in the version applicable at the material time, provided for the following disciplinary penalties: a written reprimand, a fine of up to ATS 500,000, a prohibition on practising as a lawyer for a period not exceeding one year and being struck off the bar roll.

THE LAW

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

35. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" principle, provided in Article 6 § 1 of the Convention, which reads as follows:

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

36. The Government contested that argument.

37. The period to be taken into consideration began on 16 September 1993, when the Investigating Commissioner informed the applicant that disciplinary proceedings against him were opened and ended on 6 April 2000, when the Constitutional Court's decision was served on the applicant. Thus, it lasted six years and about seven months for three levels of jurisdiction whereby the case was once referred back to the first instance.

38. In his letters of 15 November and 2 December 2002 the applicant raised additional complaints. He alleged that the Appeals Board violated the principle of equality of arms in that the Bar Chamber's prosecutor's observations were not served on him and that the authorities violated his rights under Article 6 § 1 as they failed to consider in mitigation the length of the proceedings.

A. Admissibility

39. The Court reiterates that disciplinary proceedings in which the right to continue to exercise a profession is at stake give rise to a dispute over civil rights (see *Philis v. Greece* (no.2) judgment of 27 June 1997, Reports of judgments and decisions 1997-IV, p. 1085, § 45 with further references, and *W. R. v. Austria*, no. 26602/95, §§ 25 - 31, 21 December 1999, unreported).

40. The Government requested the Court to declare the application inadmissible as being manifestly ill-founded.

41. The Court finds that the complaint concerning the length of the proceedings is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

42. The applicant further complains about the unfairness of the proceedings. The Court observes that the proceedings were terminated on 6 April 2000 while these complaints were only lodged on 15 November and 2 December 2002. The Court reiterates that it "may only deal with the matter ... within a period of six months from the date on which the final decision was taken".

43. It follows that this part of the application was introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

B. Merits

44. The Government contended that the length of the proceedings may still be regarded as reasonable and argued that they were of some complexity as during the proceedings a decision of the Constitutional Court had been issued, the impact of which on the composition of the Disciplinary Council in the present proceedings had to be considered. As regards the conduct of the authorities they submitted that there was no period of inactivity and they pointed out that, upon appeal of the Bar Chamber's Prosecutor, the case was once remitted to the Disciplinary Council. As regards the conduct of the applicant the Government contended that he considerably contributed to the length of the proceedings as he repeatedly

challenged members of the Disciplinary Council for bias and that therefore the appointment of the respective chairmen had been extremely complicated. Further, they stressed that the witnesses, in particular the applicant and his spouse, repeatedly failed to obey the summons, that the disciplinary authorities have no capacity to oblige witnesses to obey their summons under the applicable law and that, due to the fact that the disciplinary authorities are no full-time panels, the fixing of a date for new hearings was a rather difficult issue. Finally, the Government contended that the appeal proceedings before the Appeals Board and the Constitutional Court were dealt with expeditiously.

45. The applicant contested the Government's view and stressed that the Disciplinary Council did not deal with the case expeditiously and that the proceedings were not at all complex. He further argued that, even assuming, that he contributed to the length of the proceedings, the organisation of the disciplinary authorities as part-time panels could not be blamed on him.

46. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria established by its case-law, particularly the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

47. The Court considers that the case was not particularly complex. As regards the appeal proceedings in the second set of the proceedings the Court finds that there were no particular periods of inactivity. However, the period before this stage requires detailed examination.

48. As regards the conduct of the applicant the Court finds that, since he and his spouse failed to obey the authorities' summons for several times, some of the delays are attributable to him. However, as regards the conduct of the authorities, the Court observes that the proceedings, before the Disciplinary Council took its decision of 9 November 1998, lasted a very long time. In particular, after the case had been remitted to the Disciplinary Council on 20 February 1995, it lasted until 6 October 1997 before the Disciplinary Council held the first hearing. The Court has not overlooked that during this period some procedural steps were taken. However, the Court is not persuaded by the Government's explanation for this delay that the disciplinary authorities are no full-time panels and that they have no capacity to oblige witnesses to obey their summons. It reiterates that it is for Contracting States to organise their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time (see, for instance, *Vocaturo v. Italy* judgment of 24 May 1991, Series A no. 206-C, p. 32, § 17 and *G.S. v. Austria*, no. 26297/95, § 35, 21.12.99).

49. Thus, having regard also to the overall duration of the proceedings, the Court finds 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.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant did not seek compensation for pecuniary damage. Under the head of non-pecuniary damage, the applicant claimed a sum of 2,180 euros (EUR).

52. The Government did not comment on the applicant’s claim.

53. The Court accepts that the applicant has suffered non-pecuniary damage, such as distress and frustration relating to the length of the proceedings, which is not sufficiently compensated by the finding of violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,500 (one thousand five hundred) under this head.

B. Costs and expenses

54. The applicant also claimed EUR 2,769.50 for the costs incurred before the Court.

55. The Court finds that no award can be made with respect to this claim, as the applicant chose to present his own case to the Court (see *Philis v. Greece*, judgment of 27 August 1991, Series A no. 209, pp. 26-27, §§ 77-78; and *Brincat v. Italy*, judgment of 26 November 1992, Series A no. 249-A, p. 13, § 29).

C. Default interest

56. 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.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the length of the proceedings admissible and the remainder of the application inadmissible;
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, EUR 1,500 (one thousand five hundred) in respect of non-pecuniary damage;
 - (b) 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 June 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President