



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

FIRST SECTION

CASE OF HENNIG v. AUSTRIA

(Application no. 41444/98)

JUDGMENT

STRASBOURG

2 October 2003

FINAL

02/01/2004

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 Hennig v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr P. LORENZEN,

Mr G. BONELLO,

Mrs N. VAJIĆ,

Mrs S. BOTOCHAROVA,

Mr V. ZAGREBELSKY,

Mrs E. STEINER, *judges*,

and Mr S. NIELSEN, *Deputy Registrar*,

Having deliberated in private on 29 April and 11 September 2003,

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

PROCEDURE

1. The case originated in an application (no. 41444/98) 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 an Austrian national, Mr Otto Hennig (“the applicant”), on 20 March 1998.

2. The applicant was represented by Amhof, Damian & Partners, a law firm practising in Vienna. 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 that the criminal proceedings against him lasted unreasonably long in breach of Article 6 § 1 of the Convention.

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).

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). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. By a decision of 23 May 2002 the Court declared the application admissible.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1938 and lives in Oberwart/Austria. He is an auditor and tax consultant (*Wirtschaftstreuhandler*).

10. In December 1989, the Salzburg Tax Office (*Finanzamt*), in the course of investigations into a large scale fraud relating to the “WEB/IMMAG” group, instituted criminal proceedings against 97 persons, requesting them to submit in writing their comments as suspects.

11. On 14 December 1989 the applicant, who in his professional capacity assisted the “WEB/IMMAG” group, wrote a letter to the Oberwart Tax Office. Therein he asked that his income tax declarations for the years 1985 to 1987 be corrected, so that the losses declared be cancelled, in particular ATS 541,585 for the year 1985; ATS 1 million for 1986 and ATS 220,000 for 1987. He further asked that following a re-calculation of his income, new tax assessment orders be issued.

1. Investigations by the Tax Authorities against the applicant for tax evasion

12. On 27 and 28 December 1989 the Salzburg Tax Office informed the applicant that he was suspected of tax evasion in that he had acted as a sham holder of shares in three cases concerning the years 1985–87. It further invited him to submit his comments in writing.

13. After the applicant's request of 15 January 1990 for an extension of the time-limit had been granted, he submitted his comments on 31 January 1990.

14. Until 29 October 1992 the Salzburg Tax Office for the Audit of Large-scale Companies (*Großbetriebsprüfung*) examined the “WEB/IMMAG” group.

15. On 22 March 1993 the Salzburg Tax Office requested the Oberwart Tax Office to transmit the applicant's tax file in order to determine the amount of evaded taxes.

16. On 17 May 1993 the Oberwart Tax Office replied to the Salzburg Tax Office that the file could not be transferred because of pending investigations.

17. Following another request for transfer of the file by the Salzburg Tax Office on 23 July 1993, the Oberwart Tax Office, on 24 January 1994, replied that the file had been sent to the Vienna Tax Office for the Audit of Large-scale Companies and could only be transmitted after these investigations had been completed.

18. Upon the Salzburg Tax Office's request of 28 January 1994, the Vienna Tax Office for the Audit of Large-scale Companies transferred the applicant's file on 25 May 1994.

19. On 3 June 1994 the Salzburg Tax Office informed the Salzburg Public Prosecutor's Office of the result of its investigations and requested that the applicant be prosecuted for tax evasion. It noted that the losses declared by the applicant for the years 1985–1989 (ATS 541,585 for the year 1985, ATS 1 million for 1986 and ATS 220,000 for 1987) resulted in tax evasion of ATS 327,016 for the year 1985, ATS 603,552 for 1986 and ATS 148,821 for 1987. Thus, the total amount of evaded taxes was ATS 1,079,389.

20. On 8 August 1994, when interrogated by the Oberwart District Court, the applicant stated that he wished to submit his comments in writing directly to the Salzburg Regional Court by 31 August 1994. On that date and on 30 September 1994, he requested extensions of the time-limit as he had fallen ill. On 27 January 1995 he submitted his comments and observations in writing.

2. Court proceedings against the applicant

21. On 9 February 1995 the Public Prosecutor's Office preferred a bill of indictment against the applicant charging him with tax evasion of ATS 1,079,389 in that he had made false statements of losses in his income tax forms between 1985 and 1987 (ATS 541,585 for 1985; ATS 1 million for 1986 and ATS 220,000 for 1987). The bill of indictment comprised eleven pages.

22. On 31 March 1995, the presiding judge of the chamber dealing with the applicant's case informed the President of the Regional Court that he considered himself biased since he had been the deputy investigating judge in proceedings against other accused relating to the same case. On 21 June 1995, the President decided nevertheless that the presiding judge should not withdraw from the case.

23. On 4 September 1995 the applicant requested that the trial scheduled for 13 September 1995 be adjourned. This request was granted by the court.

24. On 22 November 1995 the Regional Court convicted the applicant of tax evasion, pursuant to Section 33 § 1 of the Code of Tax Offences (*Finanzstrafgesetz*). As regards the applicant's argument that he could not be punished because his letter of 14 December 1989 constituted “self-denunciation” of a tax offence resulting in exemption from punishment, the court observed that it had not been made in time because the tax authorities had already discovered the offence, and it had not been sufficiently detailed for the purposes of a “self-denunciation”.

25. On 29 October 1996 the written version of the judgment, comprising twelve pages, was served on the applicant's counsel. Thereupon, on 26 November 1996, the applicant filed a plea of nullity

(*Nichtigkeitsbeschwerde*) and requested that the transcripts of the trial be corrected. On 4 February 1997, after having obtained various statements, the Salzburg Regional Court corrected the transcripts.

26. On 28 May 1997 the Procurator General (*Generalprokurator*) submitted his observations on the applicant's plea of nullity.

27. On 25 June 1997 the Supreme Court scheduled the hearing on the plea of nullity for 29 July 1997. On that day the Supreme Court dismissed the applicant's plea of nullity. This decision was pronounced orally. On 2 October 1997 the written version of the judgment, consisting of twelve pages, was served on the applicant's counsel.

THE LAW

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

28. The applicant complained that the length of the criminal proceedings against him was in breach of Article 6 § 1, which as far as material, 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...”

29. He argued that his case was not complex since he himself had provided the information necessary for his tax assessments to be corrected, the amount thereof was undisputed. What was at stake in his case was, therefore, whether or not the information given by him on 14 December 1989 constituted a “self-denunciation” of a tax offence resulting in exemption from punishment. The lack of complexity of the proceedings could also be inferred from the length of the judgments given by the courts, comprising a maximum of twelve pages. Considerable delays had been caused by the tax authorities before the bill of indictment was drawn up by the Public Prosecutor. In particular, it took the Salzburg Tax Office more than three years, namely from 31 January 1990, when he submitted his comments on the suspicions of tax evasion, before it requested the Oberwart Tax Office to transfer the tax file on 22 March 1993. Subsequently, more than one year elapsed from that date until the file was transferred to the Salzburg Tax Office on 25 May 1994. In the applicant's view, there was no explanation why the authorities could not have made copies of the tax file while the Salzburg and Vienna Tax Offices for the Audit of Large-scale Companies were examining the “WEB/IMMAG” group. Compared to the delays caused by the authorities, his own motions did not contribute significantly to the overall duration.

30. The Government submitted that the proceedings were particularly complex as they concerned highly complicated and time consuming investigations into a sophisticated network of some 400 companies and the financial relations among them within the framework of the “WEB/IMMAG” group. During the preliminary investigations the disclosure of some 800 bank accounts was ordered in Austria and abroad, 410 letters rogatory were prepared and transferred to foreign judicial authorities, and some 8,000 volumes of documents were seized and examined. Moreover, several delays were caused by the applicant who repeatedly requested extensions of time-limits, adjournment of the proceedings and that the transcripts of the hearings be corrected.

31. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant in the litigation (see *Humen v. Poland* [GC], no. 26614/95, 15 October 1999, § 60).

32. As regards the period to be taken into account, the Court reiterates that in criminal matters, the “reasonable time” referred to in Article 6 § 1 begins to run as soon as a person is “charged” with an offence; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened. “Charge”, for the purposes of Article 6 § 1, may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” (see among other authorities; *Reinhardt and Slimane-Kaid v. France*, judgment of 31 March 1998, *Reports of Judgments and Decisions* 1998-II, § 93). Having regard to this, the Court finds that the proceedings commenced on 27 December 1989, when the Salzburg Tax Office informed the applicant that he was suspected of tax evasion, and ended on 2 October 1997, when the written version of the judgment was served on the applicant's lawyer (see *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, § 33). Thus, the proceedings lasted approximately seven years and nine months.

33. The Court is not persuaded by the Government's argument that the applicant's case was particularly complex. The present case can be distinguished from the undoubtedly more complex investigations into the whole “WEB/IMMAG” group and its financial network, as the applicant's case concerned merely three financial transactions, for which he had given information already in 1989 and the amount of which had been uncontested throughout the proceedings. It does not, therefore, appear that the applicant's

case was particularly complex. The Court reiterates in this context that even a certain complexity of the proceedings does not in itself suffice to justify a substantial duration (see *Schweighofer and others v. Austria*, nos. 35673/97, 35674/97, 36082/97 and 37579/97, § 32, 9 October 2001; *Rösslhuber v. Austria* (no. 32869/96, § 27, 28 November 2000).

34. As to the applicant's conduct, the Court notes that he caused some delays, but they must be viewed against the considerable delay which occurred before the bill of indictment was drawn up. The Court refers in this respect to the case of *Rösslhuber* (cited above, § 28).

35. In the applicant's case, the proceedings had already lasted for more than five years and one month when, on 9 February 1995, the bill of indictment was drawn up. As in the *Rösslhuber* case, the Court considers that the Government have not sufficiently explained the delays occurred in this period of time. In particular, there is no explanation why it took the Salzburg Tax Office more than three years, namely from 31 January 1990, when the applicant submitted his comments on the suspicions of tax evasion, before it requested the Oberwart Tax Office to transfer the tax file on 22 March 1993. From that date, more than one year elapsed until the applicant's tax file was ultimately transferred to the Salzburg Tax Office on 25 May 1994. No copies of the files were made, nor was it considered whether a severance of the applicant's case could have accelerated the proceedings. There is nothing to suggest that such measures would have been incompatible with the good administration of justice (see *mutatis mutandis*, *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, p. 42, § 21).

36. Unlike the preliminary investigations, the trial was conducted with reasonable diligence. However, the Court notes that approximately eleven months elapsed from 22 November 1995 when the Regional Court pronounced the oral judgment until its written version, comprising twelve pages, was served on 29 October 1996. In the Court's view, the speedy conduct of the trial was not sufficient to make up for the above considerable delays which had already occurred during the pre-trial phase.

37. The Court is aware of the difficulties States may encounter in conducting criminal proceedings relating to white-collar crime with reasonable diligence, as such cases often involve very complex facts and a large number of suspects (see *Rösslhuber*, cited above, § 30).

38. The Court reiterates, however, that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to decide cases within a reasonable time (see, among other authorities, *Vocaturo v. Italy*, judgment of 24 May 1991, Series A no. 206-C, p. 32, § 17; and *Spentzouris v. Greece*, no. 47891/99, § 27, 7 May 2002). The evidence adduced in the present case shows that there were excessive delays, which were mainly attributable to the national

authorities. Consequently, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. Under the head of pecuniary damage the applicant requested 10,000 euros (EUR) for loss of earnings as a result of the duration of the proceedings. He further claimed EUR 20,000 as compensation for non-pecuniary damage for anxiety suffered on account of their length.

41. The Government contended that there was no causal link between the length of the proceedings and the pecuniary damage claimed by the applicant. They further submitted that the finding of a violation would be sufficient to redress any non-pecuniary damage suffered by the applicant.

42. The Court agrees with the Government that there is no causal link between the pecuniary damage claimed and the violation found. In particular it is not for the Court to speculate what the outcome of the proceedings would be if they had been in conformity with 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).

43. As to non-pecuniary damage, the Court, having regard to its case-law, taking into account the importance of the proceedings at issue for the applicant and making an assessment on an equitable basis, awards the applicant EUR 4,000.

B. Costs and expenses

44. The applicant claimed reimbursement of costs and expenses incurred in the domestic proceedings in the amount of EUR 12,881.40 and EUR 16,791.72 for costs incurred in the Strasbourg proceedings.

45. As regards the claim relating to the domestic proceedings, the Government observed that the requested sum would be a reimbursement of the total costs incurred in the domestic proceedings, whereas only those costs which were incurred in an attempt to redress the violation of the Convention could be taken into account. Further, the Government

contended that the requested amount relating to the Convention proceedings was excessive.

46. The Court reiterates 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). The Court notes that the applicant made no attempt in this respect. On the other hand, unreasonable delays in proceedings may raise the applicant's costs (see *Bouilly v. France*, no. 38952/97, § 33, 7 December 1999). Thus, the Court awards the applicant EUR 1,000 on an equitable basis.

47. As to the costs of the Convention proceedings, the Court notes that the applicant, who was represented by counsel, did not have the benefit of legal aid. Making an assessment on an equitable basis and having regard to the sums awarded in similar cases, the Court awards the applicant EUR 2,000 under this head.

48. In sum, the Court therefore awards a total of EUR 3,000 for costs and expenses plus any tax that may be chargeable.

C. Default interest

49. 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

1. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* by six votes to one
 - (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 4,000 (four thousand euros) in respect of non-pecuniary damage, and EUR 3,000 (three thousand euros) in respect of costs and expenses plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

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

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:

- (a) dissenting opinion of Mrs Vajić.

C.R.
S.N.

DISSENTING OPINION OF JUDGE VAJIĆ

I do not agree with the opinion of the majority that there has been a violation of Article 6 § 1 of the Convention for the following reasons:

In my opinion the case was undoubtedly a very complex one. The four and a half years of the preliminary investigation (after the deduction of the delays caused by the applicant (§ 20), and not more than five years and one month as stated in § 35, do not seem to be too long a period having in mind that the case was part of the investigation relating to the "WEB/IMMAG" Group during which criminal proceedings against 97 persons were instituted (§ 10), the disclosure of 800 bank accounts was ordered in Austria and abroad, 410 letters rogatory were transferred to foreign judicial authorities, and some 8,000 volumes of documents were seized and examined (§ 30). I am also not convinced by the majority's argument as to the finding that the case should and indeed could have been distinguished from the remainder of the investigations into the "WEB-case" (§ 33).

There is, on the other hand, a very long period for which no explication was given by the Government, that being the period of more than eleven months needed for the preparation of the written version of the judgment of 12 pages. The Court has, however, not found a violation as to the trial part of the proceedings (§ 36).