CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF ACHLEITNER v. AUSTRIA

(Application no. 53911/00)

JUDGMENT

STRASBOURG

23 October 2003

FINAL

23/01/2004

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 Achleitner v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 2 October 2003,

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

PROCEDURE

1. The case originated in an application (no. 53911/00) 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 two Austrian nationals, Mr Johann Achleitner and Mrs Christiana Achleitner ("the applicants"), on 27 September 1999.

2. The applicants were represented by Mr W. Hasibeder, a lawyer practising in Ried (Austria).

3. 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.

4. On 20 June 2002 the First Section declared the application partly inadmissible and 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

5. The applicants were born in 1932 and 1934, respectively, and live in Schalchen, Austria.

6. The applicants run a fishing farm in Schalchen since 1976. Before that date the parents of the first applicant had run the fishing farm.

7. Between 1956 and 1969 the Braunau River Engineering Directorate (*Flussbauleitung*) carried out regulation works on a small river in the

vicinity of the applicants' estate without permission under the Water Act (*Wasserrechtsgesetz 1959*).

8. In October 1969 the former owners of the estate requested the Braunau District Authority (*Bezirkshauptmannschaft*) to order the Municipalities of Mattighofen and Schalchen ("*the Municipalities*") to re-establish the former state of the river bed maintaining that the regulation works had damaged the well which supplied their fishing farm with water. They submitted that the original capacity of the well had been 800 litres of water per second. After the regulation of the river the capacity of the well had been reduced to 100 litres of water per second. This constituted an interference with their water-rights. In case that the regulation could not be reversed they requested that the Municipalities be ordered to take other steps to ensure the water supply of the fishing farm.

9. On 14 January 1970 the District Authority dismissed this request.

10. On 20 May 1970 the Upper Austria Regional Governor allowed the appeal and remitted the case to the District Authority to decide on the request.

11. On 13 January 1971 the applicants' predecessors filed a request for transfer of jurisdiction (*Devolutionsantrag*) as the District Authority failed to decide within the statutory six months time-limit. On 11 February 1971 the Regional Governor dismissed this request.

12. On 3 September 1971 they filed again a request for transfer of jurisdiction and the Regional Governor again dismissed this request. The applicants' predecessors filed an appeal against this decision.

13. On 10 February 1972 the Federal Minister for Agriculture and Forestry (*Bundesminister für Land- und Forstwirtschaft*) allowed the appeal as a consequence of which the Regional Governor had to take a decision on the merits.

14. On 8 August 1972 the Regional Governor ordered the Municipalities to ask for an ex post permission of the regulation works which had already been carried out or to re-establish the former state of the river.

15. On 23 August 1973 the Federal Minister dismissed the Municipalities' appeal.

16. Subsequently, on 28 November 1973 the Municipalities applied for an ex post permission. On 3 June 1975 the District Authority held a hearing. At this hearing the applicants' predecessors requested that the Municipalities be ordered to pay compensation as they had suffered prejudice caused by the regulation works.

17. On 3 September 1975 the District Authority granted the ex post permission and ordered the Municipalities to take specific steps to ensure the water supply of the fishing farm before 31 December 1976. The District Authority dismissed the request for compensation.

18. On 2 December 1975 Regional Governor dismissed the applicants' predecessors' appeal and found that their water rights were not violated by the granted permission.

19. On 27 January 1976 the Federal Minister rejected the applicants' predecessors' appeal as belated. Subsequently, they lodged a request for leave to appeal out of time (*Wiedereinsetzung in den vorigen Stand*).

20. On 2 April 1976 the Federal Minister granted this request and, consequently, had to take a decision on the merits on the appeal against the Regional Governor's decision of 2 December 1975.

21. On 25 November 1976 the ownership on the fishing farm was transferred to the applicants and thereby, they became parties to the proceedings at issue.

22. On 5 July 1977 the Federal Minister dismissed the appeal and confirmed the Regional Governor's decision of 2 December 1975.

23. On 30 November 1979 the Administrative Court, upon a complaint lodged by the applicants, quashed this decision and found that the administrative authorities had not properly decided whether the applicants' water rights had been prejudiced by the regulation works.

24. Subsequently, on 19 November 1980, the Federal Minister remitted the case to the Regional Governor and on 15 December 1980 the Regional Governor remitted the case to the District Authority.

25. On 28 May 1982 the District Authority granted once more the ex post permission for the regulation works and dismissed the applicants' request for compensation.

26. On 28 June 1982 the applicants filed an appeal against this decision. In the years to follow several technical experts were appointed in order to establish whether the regulation works had damaged the well.

27. On 11 November 1984, as the District Authority had not taken a decision, the Municipalities filed an application for transfer of jurisdiction (*Devolutionsantrag*) with the Regional Governor. On 21 January 1985, as also the Regional Governor had not taken a decision, the applicants filed an application for a transfer of jurisdiction with the Federal Minister.

28. On 5 December 1987, as the Federal Minister had not taken a decision, the applicants lodged an application against the administrative authorities' failure to decide (*Säumnisbeschwerde*) with the Administrative Court.

29. On 7 January 1988 the Administrative Court ordered the Federal Minister to issue a decision within three months.

30. On 22 January 1988 the Federal Minister rejected the applicants' application for transfer of jurisdiction. The applicants lodged a complaint with the Administrative Court against this decision.

31. On 3 October 1991 the Administrative Court quashed this decision as a consequence of which the Federal Minister had to take a decision on the merits.

32. On 14 October 1996, after having held hearings on 1 and 2 July 1996, the Federal Minister dismissed the applicants appeal. The Minister found that the regulation works had not damaged the applicants' well and dismissed the request for compensation.

33. The applicants lodged a complaint with the Constitutional Court as well as with the Administrative Court.

34. On 13 March 1997 the Constitutional Court declined to deal with the applicants' complaint.

35. On 6 August 1998 the Administrative Court quashed the Federal Minister's decision of 14 October 1996 on the ground that the Federal Minister had failed to take into account the expert reports submitted by the applicants.

36. Subsequently, the Federal Minister appointed new technical experts and on 16 July 1999 the Federal Minister served a new expert report on the applicants.

37. On 27 October 1999 the applicants filed their comments on the expert report and challenged the experts appointed by the Federal Minister for bias (*Ablehnungsantrag*).

38. On 27 April 2000 the applicants agreed with the Federal Minister on the further conduct of the proceedings. The Federal Minister would furnish a questionnaire to the expert in order that he supplemented his report. Thereafter the applicants would be given the opportunity to comment on the revised report and another hearing would be held.

39. The proceedings are still pending.

THE LAW

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

40. The applicants 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..."

41. The Government contested that argument.

42. As to the period to be taken into consideration, Court does not consider it necessary to determine the question whether Article 6 of the Convention applies to the proceedings at issue, in respect of the applicants from October 1969 or from November 1976, when they became owners of the fishing farm. The Court finds it sufficient in the present case to state that the applicants became parties to the proceedings at issue in November 1976

(see e.g. *D.S. and O.P. v. Italy,* no. 16300/90, Commission decision of 27 June 1995). The proceedings are still pending. Thus, in any event, the period to be taken in consideration have already as from November 1976 lasted twenty six years and nine months.

43. In order to assess the reasonableness of the length of time in question, the Court will, however, also take into consideration the stage reached in the proceedings in November 1976 (see, among other authorities, the *Podbielski v. Poland* judgment of 30 October 1998, Reports 1998-VIII, p. 3395, § 31).

A. Admissibility

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

B. Merits

45. The Government contended that the application was based on several interrelated domestic proceedings and pointed out that due to the necessary comprehensive taking of evidence by relying on several expert opinions, these proceedings had been for the most part highly complex. The Government submitted that in the parallel proceedings, the same documents were decisive but the great volume of the file made it impossible to copy them. Thus, the transfer of the file to the different authorities dealing with the applicants' cases in different proceedings caused inevitable delays. However, the main problem in the proceedings at issue was that the required data concerning the level of ground water in the region at issue prior to the first regulation works did not exist. Given that this essential information was lacking, it was necessary to obtain several, very time consuming and expensive expert opinions. As to the applicants' conduct the Government asserted that, by making use of all remedies available, they contributed considerably to the length of the proceedings. As regards the conduct of the authorities they submitted that the proceedings before the Administrative Court had been conducted expeditiously. In sum, the Government argued that, even if a duration of more of thirty years appears at a first sight to be too long, a closer look into the complex subject matter of the proceedings shows that the duration of the proceedings seems to be justified.

46. The applicants contested the Government's view and stressed that the other proceedings mentioned concerned the water permit for the new well facilities and were not interrelated with the proceedings concerning the regulation of the works and the subsequent proceedings at issue. The applicants admitted that the proceeding were of a certain complexity but

submitted that the required data concerning the level of groundwater did not exist as the regulation works on the brook were carried out by the Municipalities without prior surveys and without permission under the Water Rights Act. Thus, the authorities were liable for the difficulties resulting from the lack of the essential data and that, meanwhile there exist sufficient documents to decide on the case. Finally, they contended that they could not be blamed for having used almost all the legal remedies available to them.

47. The Court reiterates that its case-law is based on the fundamental principle that the reasonableness of the length of proceedings is to be determined by reference to the particular circumstances of the case. In this instance those circumstances call for a global assessment (see, among other authorities, the *Obermeier v. Austria* judgment of 28 June 1990, Series A no. 179, pp. 23-24, § 72; the *Ferraro v. Italy* judgment of 19 February 1991, Series A no. 197, pp. 9-10, § 17).

48. The Court considers that the subject matter of the case involved a certain degree of complexity which, however cannot in itself explain the exceptional length of the proceedings which have now lasted for almost twenty seven years and are still pending. The Court cannot find that the reasons invoked by the Government sufficiently explain the length of the proceedings at issue.

49. There has therefore been a violation of Article 6 § 1 of the Convention in the present case.

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 applicants submitted that they had to invest 5 116,020.48 euros (EUR) in order to ensure the water supply of the fishing farm and submitted in this regard detailed documents. They asked the Court, considering the above mentioned amount, to grant adequate just satisfaction for the violation of his Convention rights. Further, they asked the Court to award each of them EUR 200,000 in respect of non-pecuniary damage.

52. The Government did not comment.

53. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On

the other hand, in respect of non-pecuniary damage sustained on account of the duration of the proceedings, the Court, making an assessment on an equitable basis as required in Article 41 of the Convention, awards EUR 35,000.

B. Costs and expenses

54. The applicants also requested the Court to reimburse an appropriate part of their legal costs and submitted that the costs and expenses incurred before the domestic courts amounted to EUR 642,734.79 (out of which EUR 20,931.17 concerned measures to accelerate the proceedings) and those incurred before the Court amounted to EUR 9,704.72.

55. The Government did not comment.

56. The Court reiterates that, in order to be the subject of an award, costs and expenses must have been actually and necessarily incurred and must be reasonable as to quantum (*Wiesinger v. Austria*, cited above, p. 30, § 88).

57. As to the costs of the domestic proceedings, the Court notes that, insofar as the length of proceedings is concerned, only costs incurred in an attempt to accelerate the proceedings can be regarded as having been necessary to prevent the violation found. However, the Court does not consider it necessary to determine the question whether the applicants' requests for transfer of jurisdiction and the application against the administrative authorities' failure to decide with the Administrative Court fulfil this requirement as the applicants failed to specify their costs concerning the above mentioned remedies.

Nevertheless, the Court cannot exclude that the excessive duration of the proceedings increased the overall costs incurred therefore (see *Bouilly v. France*, no. 38952/97, § 33, 7 December 1999, unreported and *Wiesinger v. Austria*, cited above, p. 30, § 88). Thus, the Court awards the applicants EUR 3,000 under this head.

58. As to the costs of the Convention proceedings, the Court notes that the applicants, 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 applicants EUR 2,000 under this head.

59. In sum, the Court makes an award of EUR 5,000 for costs and expenses.

C. Default interest

60. 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 remainder of the application admissible;

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 applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 35,000 (thirty five thousand euros) in respect of non-pecuniary damage and EUR 5,000 (five thousand euros) in respect of costs and expenses as well as any tax that may be chargeable on the above amounts;
   (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;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 23 October 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President