



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

FIRST SECTION

CASE OF FEHR v. AUSTRIA

(Application no. 19247/02)

JUDGMENT

STRASBOURG

3 February 2005

FINAL

03/05/2005

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 Fehr v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 13 January 2005,

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

PROCEDURE

1. The case originated in an application (no. 19247/02) 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 Manfred Fehr (“the applicant”), on 8 May 2002.

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 for Foreign Affairs.

3. On 21 October 2003 the Court decided to communicate the application. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant lives in Feldkirch-Tosters (Austria).

5. In February 1996 the Feldkirch District Administrative Authority (*Bezirkshauptmannschaft*) instituted administrative criminal proceedings against the applicant under the Aliens’ Employment Act (*Ausländerbeschäftigungsgesetz*). He was suspected of having illegally employed a foreigner (Ö.) without the required permit to work.

6. On an unspecified date the District Administrative Authority invited the applicant to comment on the charge against him (*Aufforderung zur Stellungnahme*). On an unspecified date the applicant filed his comments.

7. On 3 July 1996 the District Authority issued a penal order and imposed a fine of ATS 25,000 (EUR 1,816.82). It found that the applicant had illegally employed a foreigner.

8. On 6 August 1996 the applicant, assisted by counsel, filed an appeal. On 12 August 1996 the applicant amended his appeal. He submitted that the Regional Vorarlberg Labour Office's (*Landesarbeitsamt*) decision of 21 September 1994, by which it refused to grant a work permit for Ö, did not fulfil the formal requirements of a decision (*Bescheid*) and was therefore null and void. Thus, Ö's preliminary work permit was still valid and, consequently, the penal order had no legal basis.

9. On 4 November 1998 the Independent Administrative Panel (*Unabhängiger Verwaltungssenat*, "the IAP") submitted that the applicant had filed his appeal out of time and ordered the applicant to comment on this submission within two weeks.

10. The applicant complied with this order on 19 November 1998. He submitted that the District Administrative Authorities' decision of 3 July 1996 was only served on him on 23 July 1996 due to his absence at the material time and that therefore the appeal was lodged in time.

11. On 23 November 1998 the IAP ordered the applicant to prove his absence at the material time within two weeks. On 9 December 1998 the applicant complied with this order.

12. By a decision of 15 December 1998 the IAP partly allowed the applicant's appeal and decreased the fine to ATS 20,000 (EUR 1,453.44) and ordered him to pay ATS 2,000 (EUR 145.35) as his contribution to the procedural costs at first instance. It found that Ö's preliminary work permit had expired on 24 October 1994 and that therefore the offence of illegal employment of a foreigner was met. The IAP further held that the applicant could not enjoy impunity for having committed an error of law, as he should have been aware that the District Administrative Authority would consider the employment illegal when the Labour Office's refusal to grant a work permit for Ö. was served.

13. On 1 March 1999 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He submitted that the IAP was no "tribunal" within the meaning of Article 6 of the Convention as its member acted as both judge and prosecutor. Further, he submitted that his rights under Article 6 § 2 of the Convention were violated. He relied on a precedent in which the administrative authorities had considered a decision with a similar deficiency as invalid and, thus, he considered Ö's preliminary work permit still valid. However, pursuant to the applicable law he had to show that no fault lay with him for the contravention of the provisions of administrative law.

14. On 14 June 1999 the Constitutional Court declined to deal with the complaint for lack of prospects of success and transmitted the complaint to the Administrative Court (*Verwaltungsgerichtshof*). The case file arrived at the latter court on 1 September 1999.

15. On 27 October 1999 the applicant amended his complaint with the Administrative Court and on 30 November 1999 the IAP submitted its observations.

16. On 16 October 2001 the Administrative Court dismissed the complaint. It referred to a previous decision in a similar case of the applicant in which it had to consider the employment of Ö. concerning another period of time. It found, that the Labour Office's decision refusing to grant a work permit was beyond doubt valid and, thus, there existed no work permit for the foreigner for the material time. Therefore, the applicant should have been aware that he violated the prohibition to employ foreigners without work permit. Thus, the IAP's penal order was lawful. Referring to its constant case law, the Administrative Court found that there was no doubt about the IAP's qualification as a tribunal within the meaning of Article 6 of the Convention. This decision was served on 12 November 2001.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION CONCERNING THE LENGTH OF THE PROCEEDINGS

17. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, provided in Article 6 § 1 of the Convention, which 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..."

18. The Government contested that argument.

19. The period to be taken into consideration began in February 1996 when the applicant was informed of the suspicion against him that he had illegally employed Ö. and ended on 12 November 2001 with the service of the Administrative Court's decision. It thus lasted approximately five years and nine months.

A. Admissibility

20. The Court finds that this complaint 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.

B. Merits

21. The Government submitted that the overall duration of the proceedings was reasonable. In particular, the first-instance proceedings before the District Authority only lasted some five months. The period of time that elapsed while the case was pending before the IAP was due to the fact that the latter authority waited for the outcome of the applicant's first complaint with the Administrative Court relating to a similar question. In the Government's view, this delay was justified for ensuring certainty of the law (see *Pretto and Others v. Italy*, judgment of 8 December 1983, Series A no. 71, p. 14, § 32). The proceedings before the Administrative Court lasted for two years and one month until the dispatching of the decision, which was not excessive either since the applicant did not have to fear a higher fine as the prohibition against passing a more severe (*reformatio in peius*) applied.

22. The applicant maintained that the proceedings were neither complex, nor had he caused any delays. The duration of the proceedings was excessive due to the conduct of the Austrian authorities. In particular the Government had not explained the period of two years and one month when the case had been pending before the Administrative Court.

23. 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 following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

24. The Court finds that the proceedings were not particularly complex. The applicant did not cause any significant delay. As regards the conduct of the authorities, there were two periods of inactivity, namely of some two years and three months while the case was pending before the IAP between August 1996 and November 1998, and of one year and ten and a half months before the Administrative Court, i.e. between 30 November 1999 when the case was ready for decision, following the IAP's submission of its observations, and 12 October 2001 when the Administrative Court decided on the complaint.

25. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of

persuading it to reach the conclusion that the reasonable time requirement was complied with. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement (see *Yavuz v. Austria*, no. 46549/99, §§ 38 and 40, 27 May 2004).

26. There has accordingly been a breach of Article 6 § 1.

II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

27. The applicant complained that no prosecuting authority participated in the criminal proceedings and, in particular, at the hearing before the Independent Administrative Panel. Thus, the member of the Panel acted as both judge and prosecutor. He also submitted that the member of the IAP was biased as he had already decided on a previous appeal of the applicant in a similar case. Finally, he complained that the decision violated his rights under Article 6 § 2. He submitted that he had relied on the administrative authorities’ case law, which, however, had changed during the proceedings.

A. Admissibility

28. As regards the complaint concerning the alleged lack of a prosecuting authority, the Court reiterates that, if an appeal is filed with the IAP against a penal order, the authority which issued the impugned decision assumes the function of the prosecuting authority in appeal proceedings before the IAP and that the absence of a representative of that authority from the hearing does not give rise to objectively justified fears as regards the IAP’s impartiality and that in this respect there is no appearance of a violation of Article 6 (see *Weh v. Austria*, (dec.) no. 38544/97, 4 July 2002).

29. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention

30. As regards the complaint about the bias of the member of the IAP the Court reiterates that, under the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Bulut v. Austria* judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II, p. 356, § 32; and *Padovani v. Italy* judgment of 26 February 1993, Series A no. 257-B, p. 20, § 26). The applicant has not submitted any argument calling the personal impartiality of the IAP’s member in question. Further, the mere fact that the same judge had already decided on the applicant’s appeals in other proceedings, does not objectively justify any fears as to a lack of impartiality on part of the latter (see *mutatis mutandis*, *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, p. 16, § 38; *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 40, § 97; *Thomann v. Switzerland*,

judgment of 10 June 1996, *Reports* 1996-III, p. 819, § 63, and *Faugel v. Austria* (dec.), no. 58647/00 and 58649/00, 24 October 2002).

31. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

32. As regards the complaint under Article 6 § 2, the Court reiterates that it is not for the Court to act as a court of appeal in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law. Furthermore, the domestic courts are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in the case (see, amongst many authorities, *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 32; *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, § 34).

33. The Austrian authorities found that the Labour Office's decision of 21 September 1994 to refuse a permanent work permit was valid and that therefore the preliminary work permit at issue had expired. Thus, the employment of Ö. was illegal at the material time. The IAP found that the applicant could not enjoy impunity for having committed an error of law, as he ought to have been aware that the authorities would consider the employment to be illegal when the Labour Office's decision refusing to grant a work permit for Ö. was served. The Court considers that this finding was neither arbitrary nor does it raise an issue under Article 6 § 2.

34. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. The applicant claimed 1,598.79 euros (EUR) in respect of pecuniary damage for reimbursement of the fine and the procedural costs imposed on him.

37. The Government contested this claim.

38. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. In the absence of a claim for non-pecuniary damage, the Court cannot make an award under this head either.

B. Costs and expenses

39. The applicant claimed a total of EUR 11,050.72 including VAT for costs and expenses incurred in the domestic proceedings and before the Court.

40. The Government contested these claims as being excessive.

41. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court notes that no costs incurred in an attempt to accelerate the domestic proceedings. However, it cannot be excluded that the excessive duration of the proceedings increased the overall costs incurred (see *Bouilly v. France*, no. 38952/97, § 33, 7 December 1999). It therefore awards EUR 1,000 in this respect.

42. As to the costs in the Convention proceedings, the Court notes that the applicant, who was represented by counsel, did not have the benefit of legal aid. It considers it reasonable to grant the applicant EUR 2,000.

43. Therefore a total amount of EUR 3,000 is awarded under this head, plus any tax that may be chargeable on this amount.

C. Default interest

44. 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 3,000 (three thousand euros) in respect of costs and expenses, plus any tax that may be chargeable on that amount;

(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 3 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President