



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

FIRST SECTION

CASE OF SYLVESTER v. AUSTRIA (no. 2)

(Application no. 54640/00)

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 Sylvester v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mrs S. BOTOUCHAROVA,

Mr A. KOVLER,

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. 54640/00) 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 a national of the United States of America, Mr Thomas R. Sylvester (“the applicant”), on 23 August 1999.

2. 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. The applicant complained about the length of proceedings relating to his request to have a divorce decree and custody decision issued by a United States court recognised in Austria.

4. 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.

5. By a decision of 9 October 2003 the Court declared the application admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

7. The applicant was born in 1953 and lives in Cincinnati, Ohio.

8. In April 1994 the applicant married an Austrian citizen. The marriage was concluded in the United States of America and the couple set up their common residence in Michigan. On 11 September 1994, their daughter was born.

9. On 31 October 1995, after his wife had left the United States with their daughter without obtaining the applicant's consent and had set up her residence in Austria, he brought a petition for divorce in the Oakland Circuit Court (Michigan). He also introduced court proceedings in Austria requesting the return of his daughter under the 1980 Hague Convention on the Civil Aspects of Child Abduction.

10. On 2 November 1995 the applicant's wife brought a petition for divorce in the Graz District Civil Court.

11. On 16 April 1996 the Oakland Circuit Court confirmed a default decree of divorce issued in January 1996, noting that Mrs Sylvester had failed to comply with the requirements for setting aside the default. Further, it awarded the applicant sole custody over the couple's daughter and ordered that she should reside with him in case of her return.

12. On 5 June 1996 the applicant filed a request for recognition of the divorce decree with the Austrian Federal Ministry of Justice.

13. On 26 September 1996 the Federal Ministry of Justice refused to grant this request. Referring to Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act (4. *Durchführungsverordnung zum Ehegesetz*), it considered that a recognition of the divorce decree would be contrary to Austrian *ordre public* as the applicant's wife, being the defendant in the proceedings before the Oakland Circuit Court, had not been heard as she was considered to be in default, despite the fact that the applicant's petition for divorce had not been duly served on her.

14. Thereupon, on 15 November 1996 the applicant filed a complaint with the Administrative Court. The latter instituted preliminary proceedings on 25 November 1996.

15. On 9 January 1997 the Administrative Court received the observations of the Federal Ministry of Justice and, on 20 January 1997, it received the observations of Mrs Sylvester as a third party.

16. On 18 December 1998 the Administrative Court referred the case to the Constitutional Court requesting it to review the constitutionality of Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act.

17. It argued that Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which has constitutional rank in Austrian law, applied to the proceedings concerning the recognition of foreign divorce decrees as their outcome had a direct effect on the civil law relationship of the persons concerned. However, it

was incompatible with that Article that the Federal Ministry of Justice, an administrative authority, decided upon the request for recognition. The subsequent control by the Administrative Court was not sufficient where the subject matter, such as family law relations, fell within the very core of the notion of “civil rights”.

18. The Constitutional Court received the Administrative Court’s request on 19 February 1999. The Administrative Court submitted three further requests raising the same issue, which were received by the Constitutional Court on 13 July, 21 October and 12 November 1999, respectively. The proceedings in these cases were joined to proceedings in the applicant’s case.

19. On 4 February 2000 the Administrative Court supplemented its request in the applicant’s case.

20. On 28 February 2001 it supplemented its requests in the three other cases.

21. On 16 June 2001 the Constitutional Court gave its judgment, finding that Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act was in conformity with the constitution.

22. The Constitutional Court noted firstly that the proceedings at issue were concerned with the questions whether recognition was compatible with Austrian *ordre public*. Thus, the recognition of foreign divorce decrees was closely linked to the question whether they could be enforced in Austria. Referring to a number of decisions, in which the European Commission of Human Rights had found that Article 6 did not apply to enforcement proceedings, the Constitutional Court expressed doubts as to the applicability of Article 6.

23. Even assuming that Article 6 applied, referring to the Court’s *Zumtobel v. Austria* judgment (of 21 September 1993, Series A no. 268-A), the Constitutional Court held that the Administrative Court’s scope of review was sufficient, since proceedings concerning the recognition of foreign divorce decrees involved mainly questions of law. Where an assessment of facts was required, as for instance where the question arose whether an action had been duly served, the Administrative Court was empowered to review whether the administrative authority’s assessment was correctly based on the contents of the file.

24. On 5 October 2001 having resumed its proceedings, the Administrative Court dismissed the applicant’s complaint. The decision was served on the applicant on 29 October 2001.

THE LAW

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

25. 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 his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time ...”

26. In the applicant’s assertion, the duration of the proceedings was excessive. He contested that the proceedings were complex and asserts that, while no delay was attributable to him, there were lengthy periods of inactivity in the proceedings before the Administrative Court and the Constitutional Court.

27. The Government asserted that the proceedings were complex in that they raised an issue of constitutional law. The Administrative Court thus, had to seize the Constitutional Court which joined the applicant’s case to three other cases raising the same issue. No major periods of delay were attributable to the authorities.

28. 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 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).

29. The proceedings at issue started on 26 September 1996, when the Federal Ministry of Justice refused the applicant’s request for recognition, and were terminated on 29 October 2001 when the Administrative Court’s decision was served. Thus, they lasted five years and one month.

30. The Court acknowledges that the case was of a certain legal complexity. Given that the case came before three levels of jurisdiction, an overall duration of five years and a month does not in itself appear unreasonable. However, three years out of these five elapsed without any procedural steps being taken: There was a period of inactivity of one year and eleven months before the Administrative Court between 20 January 1997, when the parties’ observations were ready, and 18 December 1998 when it referred the case to the Constitutional Court. The latter joined the applicant’s case to three others raising the same legal issue, which accounts for some delay. Nevertheless, there is no explanation as to why a year and almost one month elapsed between 4 February 2000, when the Administrative Court filed supplementary submissions with the

Constitutional Court in the applicant's case, and 28 February 2001, when it did so in the three other cases.

31. Where the duration of proceedings may not be excessive in itself but is marked by substantial periods of inactivity, the Court considers that the importance of what is at stake for the applicant plays a decisive role (see *Hadjikostova v. Bulgaria*, no. 36843/97, § 35, 4 December 2003).

32. As the Court already held in its admissibility decision in the present case (*Sylvester v. Austria* (dec.), no. 54640/00, 9 October 2003), the proceedings concerning the applicant's request for recognition of a divorce decree and custody decision issued by a United States court, were directly decisive for his marital status and parental rights. In this connection the Court reiterates that, in cases relating to civil status special diligence is required in view of the possible consequences which the excessive length of proceedings may have, notably on enjoyment of the right to respect for family life (*Laino v. Italy* [GC], no. 33158/96, § 22, ECHR 1999-I). Given the importance of what was at stake for the applicant in the present case, the courts were required to display special diligence.

33. In these circumstances, the Court concludes that the overall duration of five years and one months with two lengthy periods of delay, cannot be considered as "reasonable" within the meaning of Article 6 § 1 even taking into account that the case was of some complexity and came before three levels of jurisdiction.

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

II. 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 a total amount of 390,753.08 United States dollars (USD) in respect of pecuniary damage. This sum includes travel and subsistence costs relating to trips from the United States to Austria for the purpose of visiting his daughter, interpreter's costs relating to an interview with a court-appointed expert in the context of access proceedings, lost wages, payments made to his divorced wife and costs of psychological counselling and medical treatment.

37. As to non-pecuniary damage, the applicant requested an award of USD 1 million.

38. The Government contended that there was no causal link between the pecuniary damage claimed and the alleged violation of the Convention. The claim for non-pecuniary damage was excessive.

39. The Court observes that the violation found in the present case concerns the length of the proceedings. It agrees with the Government that there is no causal link between the said violation and the pecuniary damage claimed. In particular, it is not for the Court to speculate on what the outcome of the proceedings would be if they were 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). Consequently, no award is made under this head.

40. As to non-pecuniary damage, the Court takes into account the awards usually made in cases relating to the length of proceedings and the importance of what was at stake for the applicant. Making an assessment on an equitable basis, it awards the applicant EUR 3,500 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

41. The applicant claimed a total amount of USD 196,574.64, equivalent to EUR 160,955 for costs and expenses incurred in various proceedings before the Austrian courts and for costs and expenses incurred in the Convention proceedings.

42. The Government asserted that the applicant partly claimed costs for proceedings which were not the subject of the present application, such as the proceedings concerning the return order under the 1980 Hague Convention on the Civil Aspects of Child Abduction, which were the subject of a previous judgment (*Sylvester v. Austria*, no. 36812/97 and 40104/98, 24 April 2003), access, maintenance and custody proceedings. Moreover, the costs relating to the proceedings at issue in the present case, i.e. proceedings for the recognition of the divorce decree and custody decision issued by a United States court, were excessive.

43. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and which are reasonable as to quantum are recoverable under Article 41 of the Convention (*Sylvester*, cited above, § 88).

44. As to the costs of the domestic proceedings, the Court notes that part of the costs claimed by the applicant relates to proceedings which were not the subject of the present application. Moreover, none of the costs incurred in the present proceedings can be said to have served to prevent or redress

the violation found, namely the excessive length of the proceedings. Consequently, no award is made under this head.

45. In respect of the Convention proceedings, the Court, having regard to the sums usually awarded in comparable cases, grants the applicant EUR 2,500 plus any tax that may be chargeable on that amount.

C. Default interest

46. 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. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *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 3,500 (three thousand five hundred euros) in respect of non-pecuniary damage and EUR 2,500 (two thousand five hundred euros) for costs and expenses, plus any tax that may be chargeable on these 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;
3. *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