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

FIRST SECTION

CASE OF THALER v. AUSTRIA

(Application no. 58141/00)

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 Thaler v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV, *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. 58141/00) 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 Michael Thaler ("the applicant"), on 14 April 2000.

2. The applicant was represented by Mr B. Oberhofer, a lawyer practising in Innsbruck. 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 alleged that the Regional Appeals Commission which decided on his claims for doctor's fees lacked independence and impartiality.

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 15 September 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

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1944 and lives in Innsbruck.

8. The applicant is a medical practitioner whose contract with the Tyrol Regional Health Insurance Board (*Gebietskrankenkasse*) was terminated by the latter on 31 December 1996. Subsequently the applicant was practising without a contract with the Health Insurance Board and is meanwhile retired. He complains about two sets of proceedings.

A. The first set of proceedings

9. On 29 October 1996 the applicant instituted proceedings against the Tyrol Regional Health Insurance Board. He claimed that the defendant had to pay an additional amount of 120 Austrian schillings (ATS) for doctor's fees.

10. On 2 April 1997 the Joint Arbitration Committee (*Paritätische Schiedskommission*) dismissed the applicant's claim. The applicant appealed against this decision.

11. On 2 July 1998 the Regional Appeals Commission (*Landesberufungskommission*) dismissed the appeal.

12. On 25 September 1998 the applicant lodged a complaint with the Constitutional Court. He alleged, *inter alia*, that the general agreement between the Association of Social Insurance Boards (*Hauptverband der Sozialversicherungsträger*) and the Tyrol Medical Association (*Ärztekammer*) on which his doctor's fees were based violated his constitutional right to non-discrimination (*Recht auf Gleichheit*).

13. On 15 April 1999 he amended his complaint and alleged that the Regional Appeals Commission was no independent and impartial tribunal within the meaning of Article 6 of the Convention by virtue of its composition.

14. On 17 December 1999 the Constitutional Court dismissed the complaint. It did not accept that the Regional Appeals Commission's decision had violated the applicant's constitutional rights. As regards the composition of the Regional Appeals Commission, the Constitutional Court noted that the applicant's complaint had been lodged out of the statutory six months time-limit. However, referring to its constant case-law, it found that the applicant's constitutional rights were not violated.

B. The second set of proceedings

15. On 11 February 1997 the applicant instituted proceedings against the Tyrol Regional Health Insurance Board. He claimed that it had to pay some ATS 18 million (about 1,3 million euros) as the doctor's fees provided for in the general agreement between the Association of Social Insurance Boards and the Tyrol Medical Association were far too low and, therefore, his contract with the Regional Health Insurance Board was null and void.

16. On 11 August 1997 the applicant made a request for transfer of jurisdiction (*Devolutionsantrag*) as the Joint Arbitration Committee failed to decide within the statutory six months-period.

17. On 28 October 1997 the Regional Appeals Commission, after having held a hearing, dismissed the applicant's claim.

18. On 15 December 1997 the applicant lodged a complaint with the Constitutional Court. He alleged that the contract between the Association of Social Insurance Boards and the Tyrol Medical Association on which his doctor's fees were based violated his constitutional right to non-discrimination. Further, he complained that the Regional Appeals Commission was no independent and impartial tribunal within the meaning of Article 6 of the Convention by virtue of its composition and submitted that the Association of Social Insurance Boards had provided two deputy directors of the Tyrol Regional Health Insurance Board as assessors.

19. On 16 December 1999 the Constitutional Court dismissed the complaint. Referring to its constant case law, the Constitutional Court found that the Regional Appeals Commission in general may be considered as an independent and impartial tribunal because of the term of office of the members and because members were not bound by any instructions. Further it found that ...

> "It is true that the assessors of the Regional Appeals Commission are representatives of two conflicting spheres of interest. However, these members are not bound by instructions from the sending organisation ... and they are by no means spokespersons of these organisations. Their task is rather to bring their experience to bear in the proceedings. ... A violation of the required impartiality could, thus, ... be due to specific circumstances in the individual case resulting, for example from an official or organisational dependence of the appointed member of the Regional Appeals Commission. ...
>
> Such official or organisational dependence does, however, in the Constiutional Court's view, not arise from the mere fact that the parties of the general agreement provide the assessors of the Regional Appeals Commission. ... In view of the legally guaranteed freedom from instructions of the members of the Regional Appeals Commission, a constellation affecting the appearance of independence and impartiality could - also in the light of the case *Hortolomei v. Austria* (cited above) - only exist if the appointed assessors had been involved in the preparation of the general agreement or if there were other specific reasons raising legitimate doubts about their independence and impartiality in determining certain legal matters. ..."

20. In conclusion, the Constitutional Court found no indication that the members of the Regional Appeals Commission lacked independence or impartiality.

II. RELEVANT DOMESTIC LAW

A. General provisions

21. Pursuant to Sections 341 ff. of the Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*) the Association of Social Insurance Boards (*Hauptverband der Sozialversicherungsträger)* on behalf of the Regional Health Insurance Board (*Gebietskrankenkasse*) concludes with the respective Regional Medical Association a general agreement (*Gesamtvertrag*). The Regional Health Insurance Board concerned has to consent to the general agreement which is the basis of individual contracts (*Einzelvertrag*) between the respective Regional Health Insurance Board and medical practitioners. It regulates, *inter alia*, the doctor's fees for medical treatments effected by practitioners under contract.

B. The composition of the Regional Appeals Commission

22. The Social Insurance Act, in the version in force at the material time, provided as follows:

> "344 (1) In order to arbitrate and give a decision on disputes of a legal or factual nature arising in connection with an individual contract, a Joint Arbitration Committee shall be established in each Land ...
>
> (2) The Joint Arbitration Committee shall consist of four members, two of whom shall be appointed by the Regional Medical Association and two by the Regional Health Insurance Board, which is party to the individual contract. ...
>
> (4) An appeal can be lodged with the Regional Appeals Commission against a decision given by the Joint Arbitration Committee. ....
>
> 345 (1) For each Land, a permanent Regional Appeals Commission shall be established. It shall consist of a professional judge as Chairman and of four assessors. The Chairman shall be appointed by the Federal Minister of Justice. The Chairman must be a judge who, at the time of his appointment, is working at a court trying cases under labour and social insurance legislation. The Regional Medical Association and the Association of Social Insurance Boards each provide two assessors."

23. The non-judicial members of the Regional Appeals Commission are appointed for a renewable period of five years and not subject to the

hierarchical authority of the bodies which sent them (Article 21 of the Federal Constitution). They may only be recalled, if they do not anymore fulfil the professional requirements to be appointed or if they violate or neglect their official duties. Moreover, they may be recalled upon request of the sending organisation for important personal reasons by the Federal Minister of Justice.

24. Decisions of the Regional Appeals Commissions are excluded from the competence of the Administrative Court (*Verwaltungsgerichtshof*) by Article 133 § 4 of the Federal Constitutional Law.

25. On 1 September 2002 an amendment of the Social Insurance Act, modifying the manner of appointment of the assessors, entered into force. The amended version of Section 345, in so far as relevant, provides as follows:

> "... The Federal Minister of Justice shall appoint two assessors upon proposal of the Austrian Medical Association respectively and two upon proposal of the Association of Social Insurance Boards. Representatives and employees of the Regional Health Insurance Board and members and employees of the Regional Medical Association who are parties to the general agreement on which the individual contract subject to the dispute is based, must not be assessors in the respective proceedings."

THE LAW

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

26. The applicant complained that the Regional Appeals Commission could not be regarded as an independent and impartial tribunal as required by Article 6 § 1 of the Convention which, so far as material, reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law. ..."

27. Referring to the case of *Hortolomei v. Austria* (no. 17291/90, Commission's report of 16 April 1998, § 46), the applicant submitted in particular that he was challenging a contract concluded by the two bodies, namely the Association of Social Insurance Boards and the Tyrol Medical Association, which had sent the assessors sitting in the Regional Appeals Commission. Moreover, in the second set of the proceedings, the Association of Social Insurance Boards provided as assessors two deputy directors of the Tyrol Regional Health Insurance Board, which was both party to the general agreement and to the individual contract.

28. The Government contended that there was no appearance of a lack of independence and impartiality of the Regional Appeals Commission and

relied in the first place on the Constitutional Court's decision of 16 December 1999 (see paragraph 19 above). They pointed out that the Constitutional Court had quashed several decisions of the Regional Appeals Commission, if one of the assessors had been directly involved in the negotiations of the contracts to be examined in subsequent proceedings.

29. However no member of the Regional Appeals Commission had been involved in the negotiation or conclusion of the general agreement to be considered in the proceedings at issue. The present case, therefore, had to be distinguished from *McGonnell v. the United Kingdom* (no. 28488/95, §§ 53-58, ECHR 2000-II), where the Court found a violation of Article 6 § 1 on account of the direct involvement of a judge in the adoption of the development plan at issue in the proceedings. The present case was rather comparable to *Siglfirðingur ehf v. Iceland* (dec.) (no. 34142/96, 7 September 1999) in which the Court found that the presence of assessors appointed by the Employers' Federation and the Federation of Labour in Icelandic labour courts did not in itself justify doubts as to their independence and impartiality. Finally, they submitted that the Social Insurance Act had been amended in 2002 (see above, paragraph 25).

30. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

As to the question of "impartiality", there are two aspects to this requirement. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 281, § 73).

The concepts of independence and objective impartiality are closely linked (ibid.) and the Court will consider them together.

31. The Regional Appeals Commission is composed of a professional judge as chairman who is appointed by the Federal Minister of Justice and of four assessors, two of which are appointed by the Regional Medical Association, two by the Association of Social Insurance Boards.

32. What is at issue in the present case is the independence and objective impartiality of the four assessors. The Government argued in essence that only situations in which a member of the Regional Appeals Commission has been directly involved in the negotiation of the contract at issue give rise to objectively justified fears about a lack of independence and objective impartiality of the Regional Appeals Commission.

33. The Court is not convinced by this argument. It considers that situations falling short of the direct involvement of a member of a tribunal

in the subject matter to be decided may give rise to legitimate doubts as regards that tribunal's independence and impartiality. It considers that the present case is comparable to the case of *Hortolomei* (cited above, § 46) in which the European Commission of Human Rights held that the Regional Appeals Commission set up under the Austrian Social Insurance Act did not present the necessary appearance of independence and impartiality as the assessors were nominated by and had close links with the bodies which had concluded the guidelines challenged in that case. It found that the applicant "could legitimately fear that the assessors – notwithstanding their five year terms of office and formal independence of the executive – had a common interest contrary to his own and therefore that the balance of interests, inherent in the sending of representatives of the medical profession and the Health Insurance Boards in other cases, was liable to be upset in his case."

34. The Court finds no reason to reach a different conclusion in the present case. It notes that, in both sets of proceedings against the Tyrol Regional Health Insurance Board the applicant challenged the general agreement between the Association of Social Insurance Boards and the Tyrol Medical Association on which his doctor's fees were based.

35. As regards the first set of proceedings the Court considers that, for the reasons set out in *Hortolomei*, the mere fact that the two bodies which had concluded the impugned general agreement appointed the assessors to the Regional Appeals Commission is sufficient to justify the applicant's fears as regards the Commission's lack of independence and impartiality. The case relied on by the Government (*Siglfirđingur ehf*, cited above) cannot lead to another finding, since the assessors in the labour courts at issue in that case were representatives of conflicting spheres of interest but, unlike the present case, there were no circumstances liable to upset the balance inherent in such a system.

36. As to the second set of proceedings the Court notes that, in addition, the two assessors appointed by the Association of Social Insurance Boards were senior officials of the Tyrol Regional Health Insurance Board, i.e. the applicant's opponent in the proceedings. This must have aggravated the applicant's legitimate fears that the Regional Appeals Commission might not approach his case with the necessary independence and impartiality.

37. Finally, the Court notes that the lack of independence and impartiality of the Regional Appeals Commission was not remedied on appeal, as its decision was not subject to control by a judicial body that has full jurisdiction and provides the guarantees of Article 6 § 1. In the present case an appeal to the Administrative Court was excluded by law, and the Constitutional Court does not have full jurisdiction, the scope of the case before it being limited to issues of constitutional law (see *Hortolomei*, cited above, §§ 49-50, with further references).

38. The Court therefore concludes that there has been a violation of Article 6 § 1 in both sets of proceedings.

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. The applicant requested an overall amount of EUR 1,331,934 for pecuniary and non-pecuniary damage. In respect of pecuniary damage he claimed that he would have succeeded in the domestic proceedings had the Regional Appeals Commission been impartial.

41. The Government commented that there was no causal link between the alleged violation and the pecuniary damage claimed. As to non-pecuniary damage the finding of a violation was sufficient.

42. The Court reiterates that it is not called upon to speculate 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* 1997-VII, p. 2514, § 72). Consequently, no award under this head is made.

43. The Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered (see *McGonnell*, cited above, § 61).

B. Costs and expenses

44. The applicant claimed EUR 2,979.58, including VAT, in respect of costs and expenses incurred in the proceedings before the Constitutional Court and EUR 44,128.22, including VAT, for costs and expenses incurred in the Convention proceedings.

45. The Government submitted that EUR 4,000 appeared appropriate in respect of the Convention proceedings.

46. The Court observes that, in both sets of proceedings, the applicant's complaint to the Constitutional Court did not only concern the issue of impartiality but also involved a number of other questions. Making an assessment on an equitable basis, it awards the applicant EUR 1,000 in respect of the domestic proceedings.

47. Moreover, the Court observes that the applicant's claim in respect of the Convention proceedings is excessive. It finds the sum accepted by the Government reasonable and therefore awards the applicant EUR 4,000 under this head.

48. In sum, a total amount of EUR 5,000 is awarded in respect of costs and expenses plus any tax that may be chargeable on that amount.

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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for non-pecuniary damage;

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 5,000 (five thousand euros) for 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 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* unanimously 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