



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

FIRST SECTION

CASE OF KERN v. AUSTRIA

(Application no. 14206/02)

JUDGMENT

STRASBOURG

24 February 2005

FINAL

24/05/2005

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 Kern 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 1 February 2005,

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

PROCEDURE

1. The case originated in an application (no. 14206/02) 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 Franz Kern (“the applicant”), on 2 April 2002.

2. The applicant was represented by Mr E. Proksch, a lawyer 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 for Foreign Affairs.

3. On 22 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 was born in 1960 and is a farmer living in Eichfeld.

1. Land consolidation proceedings

5. In 1987 agricultural land consolidation proceedings (*Zusammenlegungsverfahren*), involving the property of the applicant and of 190 other parties, were instituted by the Graz District Agricultural Authority

(*Agrarbezirksbehörde*). From September 1987 until August 1989 the state of possessions was determined, the soil evaluated and plans were made for joint facilities and measures.

6. On 11 August 1989 the Agricultural Authority issued land ownership certificates (*Besitzstandsausweis*), the evaluation plan and the plan regarding joint measures and facilities. This decision became final after it had been laid open to general inspection. On the same day, the parties were ordered to pay the costs of surveying and marking the boundaries.

7. In June 1990 the Water Rights Authority (*Wasserrechtsbehörde*) presented a draft, according to which the entire land consolidation area was situated in the water protection zone. On 21 November 1990 the Styria Regional Governor (*Landeshauptmann*) issued a decree (*Verordnung*) for groundwater protection which, unlike the draft of June 1990, only included one-third of the land consolidation area. It entered into force on 1 January 1991.

a. Provisional Transfer and Clearing decree

8. On 12 December 1990 the District Agricultural Authority ordered the provisional transfer (*vorläufige Übernahme*) of compensatory parcels (*Grundabfindung*). The applicant appealed on 28 December 1990.

9. The District Agricultural Authority issued a clearing decree (*Rodungsbescheid*) on 1 August 1991. The applicant appealed on 19 August 1991.

10. On 29 January 1992 the Steiermark Regional Land Reform Board (*Landesagarsenat* - “the Regional Board”) issued two decisions, dismissing the applicant’s appeals of 28 December 1990 and 19 August 1991, respectively.

11. The applicant lodged a complaint on 6 April 1992 with the Constitutional Court (*Verfassungsgerichtshof*) against the Regional Board’s decisions. The Regional Board submitted observations in reply on 3 June 1992.

12. On 15 June 1992 the Constitutional Court declined to deal with the complaint concerning the clearing decree and remitted the case to the Administrative Court (*Verwaltungsgerichtshof*).

13. The Administrative Court requested the applicant to supplement his complaint on 4 September 1992 and, on 10 November 1992, it discontinued the proceedings as the applicant had failed to comply with the latter request.

14. On 1 December 1992 the Constitutional Court declined to deal with the applicant’s complaint concerning the provisional transfer and remitted the case to the Administrative Court.

15. The Administrative Court requested the applicant to supplement his complaint on 22 March 1993. The applicant did so on 26 April 1993.

16. The Administrative Court dismissed the complaint on 25 May 1993. Thus, the order concerning the provisional transfer became final.

b. Contribution scale

17. On 28 September 1992 the District Agricultural Authority issued the final contribution scale (*Beitragsschlüssel*) for joint measures and facilities, determining the factor of compensation payments, the financial contributions to joint measures and facility and the compensation for clearances and substitute forestations. The applicant appealed to the Regional Board on 14 October 1992.

18. On 29 September 1993 the Regional Board partly granted the applicant's appeal.

c. Consolidation scheme and amendment of the area zoning plan

19. Subsequently, on 16 March 1994, the applicant filed a request for transfer of jurisdiction (*Devolutionsantrag*) for the issuing of a consolidation scheme (*Flurbereinigungsplan*) to the Regional Board, which the latter dismissed as being unfounded on 27 April 1994.

20. On 25 May 1994 the District Agricultural Authority, including further plots of land, issued new land ownership certificates. Thus, the consolidation proceedings involved 250 parties.

21. The District Agricultural Authority issued a consolidation scheme on 7 July 1994. The applicant appealed to the Regional Board on 23 August 1994.

22. In the meantime, on 11 July 1994, the Styria Regional Government (*Landesregierung*) issued a decree concerning the regional development scheme (*regionales Entwicklungsprogramm*) for the extraction of sand and gravel, under the 1974 Styrian Planning Act (*Raumordnungsgesetz*).

23. On 27 July 1995 the applicant requested that jurisdiction over his appeal of 23 August 1994 be transferred to the Supreme Land Reform Board (*Oberster Agrarsenat* - "the Supreme Board"). The Regional Board submitted observations in reply on 17 August 1995.

24. The Supreme Board decided on 6 December 1995 that it had jurisdiction over the applicant's appeal as the Regional Board had not decided within the statutory six-month time-limit.

25. On 5 June 1996 the Supreme Board set aside the consolidation scheme insofar as it concerned the applicant on the ground that the District Agricultural Authority had failed to carry out a proper valuation of the applicant's plots of land involved and referred the case back to that authority.

26. Between 12 December 1996 and 17 April 1997 the District Agricultural Authority held three hearings and, on 29 April 1997, it amended the consolidation scheme, allocating new parcels of land to the applicant. The applicant appealed to the Regional Board on 13 May 1997.

27. On 22 October 1997 the Regional Board, having held a hearing, dismissed the applicant's appeal of 13 May 1997. It noted, *inter alia*, that it was not bound by the findings of the Supreme Board's decision of

5 June 1996. It found that the applicant had received compensatory parcels which had the same operating value (*Betriebserfolg*) as the plots of land he had owned before the issuance of the consolidation scheme.

28. Meanwhile, on 12 August 1997 the Eichfeld Municipal Council (*Gemeinderat*) amended the area zoning plan (*Flächenwidmungsplan*), designating land for a gravel pit. The applicant filed objections on 13 October 1997 and, on 16 December 1997, the Eichfeld Municipal Council informed the applicant that it refused his objections.

29. On 29 December 1997 the applicant lodged a complaint with the Constitutional Court against the Regional Board's decision of 22 October 1997.

30. By a decision of 23 February 1998 the Constitutional Court declined to deal with the complaint for lack of prospects of success and remitted the case to the Administrative Court, which, on 27 March 1998, requested the applicant to supplement his complaint.

31. The applicant did so on 4 May 1998, in respect of which the Regional Board submitted observations in reply on 21 August 1998.

32. In October and December 1998 the applicant submitted further documents.

33. On 22 June 2001 the Administrative Court requested the applicant to submit observations. The applicant did so on 13 July 2001.

34. On 20 September 2001 the Administrative Court dismissed the applicant's complaint. It held that although the District Agricultural Authority and the Regional Board had wrongly considered that they had not been bound by the Supreme Board's findings, the grievance of applicant's complaint had ceased to exist owing to the amendment of the area zoning plan which had taken place in the meantime. In particular, having assessed the value of the property the applicant had acquired following the new consolidation scheme, the applicant was even better off after the amendment of the area zoning plan than he had been before the institution of the consolidation proceedings or in case the Supreme Board's findings would have been observed by the agricultural authorities, respectively. The decision was served on 5 October 2001.

2. The applicant's request to separate compensatory parcels

35. In the meantime, on 23 October 1997, the applicant requested the District Agricultural Authority to separate retroactively from the consolidation scheme certain compensatory parcels, which were situated in the ground water protection area and in the gravel extraction area, and that the situation of the original ownership be restored.

36. On 15 April 1998 the District Agricultural Authority dismissed this request. The applicant appealed to the Regional Board on 5 May 1998.

37. On 28 October 1998 the Regional Board, after having held a hearing and having obtained an opinion of an official expert (*Amtssachverständiger*) on agricultural issues, dismissed the applicant's appeal.

38. On 15 December 1998 the applicant filed a complaint against this decision with the Constitutional Court, which, on 22 February 1999, refused to deal with it and referred it to the Administrative Court.

39. The Administrative Court requested the applicant to supplement his complaint on 7 June 1999. The applicant did so on 22 July 1999.

40. On 3 September 1999 the Administrative Court requested the Regional Board and a second complainant to submit observations in reply. They did so on 20 and 25 October 1999, respectively.

41. The applicant submitted additional documents to the Administrative Court on 16 February 2000, in respect of which the Regional Board submitted observations in reply on 8 June 2000.

42. The applicant submitted further documents to the Administrative Court on 21 September 2000.

43. On 20 September 2001 the Administrative Court dismissed the applicant's complaint. The decision was served on 5 October 2001.

3. The applicant's request for re-instatement of the consolidation scheme

44. The applicant requested the District Agricultural Authority, on 27 November 2001, to re-instate the consolidation scheme in its version of 7 July 1994.

45. On 26 March 2002 the latter authority informed the applicant that that would only be possible if all the parties involved agreed. It appears that no such request was submitted so far.

THE LAW

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

46. The applicant complained that the length of the consolidation 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 fair... hearing within a reasonable time by [a] ... tribunal..."

A. Admissibility

1. *The Government's objection based on non-exhaustion of domestic remedies*

47. The Government firstly argued that the applicant had not exhausted domestic remedies as he had only once made a successful request for transfer of jurisdiction on 27 July 1995. He could have used this remedy already a few months earlier and also in other phases of the proceedings, e.g. in respect of his appeal against the District Authority's decision of 28 September 1992.

48. The applicant contested the Government's arguments.

49. As to the question whether the applicant has exhausted domestic remedies, the Court reiterates that a request for transfer of jurisdiction under Section 73 of the General Administrative Procedure Act (*Devolutionsantrag*) constitutes, in principle, an effective remedy which has to be used in respect of complaints about the length of administrative proceedings (see *Egger v. Austria* (dec.), no. 74159/01, 9 October 2003). In the Court's view, a detailed examination as to whether the applicant could have made more efficient use of the remedy by using it at other stages of the proceedings, would overstretch the duties incumbent on an applicant pursuant to Article 35 § 1 of the Convention (see *mutatis mutandis Wohlmeyer Bau GmbH v. Austria*, no. 20077/02, § 45, 8 July 2004). This is all the more so, as the applicant has used the remedy not only once but on two occasions, namely on 16 March 1994 and again on 27 July 1995. The Court further notes that the proceedings at issue were pending before the Administrative Court for about three and a half years, namely between 27 March 1998, when the latter court requested the applicant to supplement his complaint, and 20 September 2001, when it rendered its decision and that no remedy lies against delays caused by the Administrative Court. The Court concludes that the applicant complied with his obligation to exhaust domestic remedies. Thus, the Government's objection on non-exhaustion has to be dismissed.

2. *The period to be taken into consideration*

50. As to the period to be taken into consideration, the Government argued that the proceedings began on 28 December 1990 when the applicant filed an appeal against the provisional transfer of compensatory parcels and were terminated by the Administrative Court's rulings of 20 September 2001. This is contested by the applicant who, without specifying any dates, submitted that the proceedings had lasted for more than twelve years.

51. The Court agrees with the Government that the period to be taken into consideration began on 28 December 1990 with the applicant's appeal

against the District Agricultural Authority's decision of 12 December 1990 since it was at that moment that the "dispute" within the meaning of Article 6 arose (see *Wiesinger v. Austria*, judgment of 30 October 1991, Series A no. 213, p. 20, § 51; and *Kolb and Others v. Austria*, nos. 35021/97 and 45774/99, § 49, 17 April 2003). The proceedings ended on 5 October 2001 with the service of the Administrative Court's decisions. They, thus, lasted more than ten years and nine months.

52. The Court notes that 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

53. The Government submitted that land consolidation proceedings were complex by nature and involved a large number of parties in the instant case. The issuance of decrees on groundwater protection and of a regional development scheme concerning the extradition of sand and gravel of 21 November 1990 and 11 July 1994, respectively, increased its complexity. Nevertheless, the Austrian authorities conducted them expeditiously, whereas the applicant made use of all remedies available.

54. The applicant contested these arguments.

55. 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).

56. As to the complexity of the proceedings, the Court reiterates that land consolidation is by its nature a complex process, affecting the interests of both individuals and the community as a whole (see *Walder v. Austria*, no. 33915/96, § 30, 30 January 2001; and *Kolb and Others v. Austria*, cited above, § 52). The applicant did not cause significant delays. However, considerable delays are attributable to the authorities. More than eleven months elapsed from 23 August 1994, when the applicant appealed against the consolidation scheme, until 27 July 1995, when he requested that jurisdiction be transferred to the higher authority, namely the Supreme Board. Another eleven months passed by before that authority, on 5 June 1996, decided in the matter. Furthermore, the case was pending before the Administrative Court for some three years and seven months as regards his complaint concerning the amended consolidation scheme, and for more than two years and seven months as concerns the applicant's request that compensatory parcels be separated retroactively, namely from 23 February 1998 and 22 February 1999, respectively, when the

Constitutional Court remitted the case to the Administrative Court, until that court served its decisions on 5 October 2001.

57. 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 in the present case. 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 also *Kolb and Others v. Austria*, cited above, § 56).

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

II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

58. The applicant also complained under Article 6 of unfairness of the consolidation proceedings, in particular that the District Agricultural Authority’s decision of 29 April 1997 had arbitrarily disregarded the findings of the Supreme Board’s decision of 5 June 1996.

59. On 17 March 2004 the applicant submitted that the Regional Board did not qualify as a “tribunal” under Article 6 since one of its members had decided on an opinion drafted by him as an official expert.

Admissibility

60. Referring to the Administrative Court’s decision of 10 November 1992 to discontinue the proceedings because the applicant had not supplemented his complaint, the Government submitted that the applicant had failed to exhaust domestic remedies. The applicant did not comment.

61. The Court notes at the outset that the Government’s objection relates to the stage of the proceedings, in which the applicant complained about the clearing decree, while the applicant’s complaint about the alleged unfairness of the proceedings concerns in particular the District Agricultural Authority’s decision of 29 April 1997 that it had arbitrarily disregarded the findings of the Supreme Board’s decision of 5 June 1996. In the present case, the Court considers it unnecessary to examine the Government’s objection because the applicant’s complaint is inadmissible for the following reason. The Court reiterates that it is not a court of appeal from the decisions of domestic courts and that, as a general rule, it is for those courts to assess the evidence before them. The Court’s task under the Convention is to ascertain whether the proceedings as a whole were fair (see *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I; and *mutatis mutandis*, *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, p. 470, § 67).

62. Turning to the circumstances of the present case, the Court notes that the Administrative Court found that the agricultural authorities had wrongly considered that they had not been bound by the Supreme Board's findings, however that the applicant's grievance had ceased to exist owing to the amendment of the area zoning plan. In particular, the value of the property he had acquired following the new consolidation scheme was even higher than it had been before the institution of the consolidation proceedings or in case the agricultural authorities had observed the Supreme Board's findings. There is no appearance of arbitrariness or that the proceedings had otherwise been unfair either.

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

64. As to the complaint concerning the alleged lack of a "tribunal", the Court observes that the proceedings ended on 5 October 2001 and that the applicant raised this complaint for the first time on 17 March 2004.

65. It follows that this complaint has been introduced outside the six-month time-limit prescribed by Article 35 § 1 and must be rejected pursuant to Article 35 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

66. The applicant further complained under Article 1 of Protocol No. 1 that the compensatory parcels he had received were less valuable than the plots of land of special value he had brought into the consolidation proceedings. Article 1 of Protocol No. 1 provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Admissibility

67. The Court notes that Article 1 of Protocol No. 1 applies. It considers that the domestic authorities examined the issue thoroughly and, giving detailed reasons, found that the applicant had been duly compensated and was even in a better situation than before the institution of the consolidation proceedings. There is no indication that an excessive burden was placed on the applicant. Thus, there is no appearance of a violation of Article 1 of Protocol No. 1 in this respect.

68. 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

69. 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

70. The applicant claimed a total of 598,025 euros (EUR) in respect of pecuniary damage, consisting EUR 74,000 for “lost opportunities to use the property” and EUR 524,025 for loss in value of his land. He requested EUR 5,000 for non-pecuniary damage.

71. The Government contested these claims.

72. 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, it considers that the applicant has sustained distress owing to the duration of the consolidation proceedings and finds the claim to be reasonable. Thus, it awards the full sum claimed in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

73. The applicant also claimed a total amount of EUR 20,302.97 including turnover tax for the costs and expenses incurred before the domestic courts and the Court.

74. The Government contested these claims.

75. 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 considers that these requirements are only met by the request for transfer of jurisdiction of 27 July 1995, which the applicant put at EUR 135.70 including turnover tax. Furthermore, it cannot be excluded that the excessive duration of the proceedings increased the overall costs incurred therefor (see *Bouilly v. France*, no. 38952/97, § 33, 7 December 1999) and awards EUR 1,000.

76. Finally, as to the costs incurred in the Convention proceedings, the Court finds the applicant's claim excessive. Firstly, the claims are calculated on the basis of three co-parties, namely the applicant and his parents, whereas only the applicant complained before this Court. Secondly, the application was only declared admissible in part. It thus considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

77. In sum, the Court makes an award of EUR 3,135.70 for costs and expenses, plus any tax that may be chargeable on that amount.

C. Default interest

78. 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 excessive 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,
 - (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage,
 - (ii) EUR 3,135.70 (three thousand one hundred and thirty-five euros and seventy cents) in respect of costs and expenses,
 - (iii) plus 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President