CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF BIRNLEITNER v. AUSTRIA

(Application no. 45203/99)

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 Birnleitner 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 1 February 2005,

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

PROCEDURE

1. The case originated in an application (no. 45203/99) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Elisabeth Birnleitner ("the applicant"), on 18 August 1998.

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 Departement at the Federal Ministry for Foreign Affairs.

3. On 20 May 2003 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the lack of a public hearing before the Administrative Court 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

4. The applicant lives in Aistersheim.

5. The applicant owns a landholding of some 150 hectares, which is an approved hunting ground (*Eigenjagd*). According to the Upper Austria Hunting Act (*Oberösterreichisches Jagdgesetz*), every six years, the District Authority has to establish the boundaries of the Upper Austrian hunting grounds. In this respect, requests may be filed by landowners to have adjacent land allocated to their hunting grounds where, for proper

functioning of hunting, boundaries need readjustment (*Arrondierungsantrag*).

6. On 30 September 1992 the applicant filed such a request for readjustment in respect of the next six years' hunting period, i.e. from April 1993 to March 1999.

7. On 19 January 1993 the Grieskirchen District Authority (*Bezirkshauptmannschaft*) partly granted the applicant's request and assigned specified plots of third persons to the applicant's hunting grounds, but dismissed her request concerning some other parcels of land. On 30 January 1993 the applicant appealed against this decision.

8. The Upper Austria Regional Government (*Landesregierung*) quashed the decision on 9 July 1993 and referred the case back to the District Authority, instructing the latter to take a new decision after having supplemented its proceedings.

9. On 14 October and 2 November 1993, respectively, the District Authority issued new decisions establishing the boundaries of the applicant's hunting grounds. It dismissed the remainder of the applicant's request for adjustment of the boundaries. The applicant appealed against this decision.

10. A hearing together with an inspection of the location took place on 25 January 1994.

11. On 10 March 1994 the appointed official hunting expert (*jagdfachlicher Amtssachverständiger*) filed an expertise on the question whether supplementary community land had to be assigned to the applicant's hunting grounds.

12. On 22 March 1994 the Upper Austria Regional Hunting Committee (*Landesjagdbeirat*) commented on the applicant's request. On 28 April 1994 the applicant submitted the opinion of a private expert (*Privatsachverständiger*).

13. The Upper Austria Regional Government partly granted the applicant's appeal on 14 June 1994 and modified the impugned decision concerning some of the borders but confirmed the dismissal of parts of the applicant's request for additional adjustment. The applicant filed a complaint with the Constitutional Court.

14. On or about 27 September 1994 the Constitutional Court declined to deal with the applicant's complaint for lack of prospect of success and referred the case to the Administrative Court. This decision was served on the applicant's lawyer in December 1994.

15. On 14 November 1995 the Administrative Court ordered the applicant to supplement his complaint. On 8 February 1996 the applicant complied with this request.

16. The Regional Government filed its comments on the applicant's complaint on 15 May 1996.

17. On 3 July 1996 the Administrative Court, quashing the decision on formal grounds, referred the case to the Regional Government and ordered the latter to further supplement the proceedings. The court found in particular that the authority had failed to duly take into account the private expert's opinion submitted by the applicant. The court considered that the authority should have obtained the official expert's comment on the issues raised by the private expert. The decision was served on the applicant's lawyer on 21 August 1996.

18. Thereupon, the Regional Government informed the official expert of the private expert's submissions and ordered him to supplement his report accordingly.

19. On 8 October 1996 the official expert complied with this request. His additional remarks were served on the applicant, who was given a time limit to file her comments.

20. On 4 November 1996 and 31 December 1996 the applicant requested an extension of the time limit set. This was granted and on 20 January 1997 she filed her comments in the form of a revised version of her private expert's opinion.

21. The official expert, on 11 March 1997, commented on these further submissions, stating that they did not change his findings set out in the report of 8 October 1996.

22. On 16 July 1997 the Upper Austria Regional Government dismissed the applicant's appeal against the District Authority's decisions of 14 October and 2 November 1993. It found that the requested readjustments were not necessary for the purposes of the proper functioning of hunting. The private expert erred in his legal opinion that the mere fact, that the requested readjustments were useful for the applicant's hunting grounds and did not constitute a significant disadvantage to the adjacent hunting grounds, implied such a necessity.

23. The applicant lodged a complaint against this decision with the Administrative Court on 20 August 1997 and requested that an oral hearing be held. She complained that the Regional Government's had not given sufficient reasons for its decision. In particular, it had not balanced the arguments submitted by the private expert against those submitted by the official expert. Furthermore, its legal findings were not conclusive. The applicant further complained that the Regional Government had not obtained the official expert's opinion on the revised version of her private expert's opinion and had not held an oral hearing in which it heard both experts.

24. The applicant further contested that the private expert had erred in his legal opinion concerning the necessity of the readjustments. She complained that the Regional Government had failed to indicate that the requested parcels of land had in the past already been assigned to her. She

finally submitted that the granting of the requested readjustments guaranteed a better hunting efficiency.

25. On 4 November 1997 the Regional Government filed its comments on the applicant's appeal. In these submissions, reference was made to the statements of the official expert concerning the revised version of the private expert's opinion on 11 March 1997. The Regional Government noted that this comment had not been communicated to the applicant because the official expert had added nothing to his report of 8 October 1996. These comments were served on the applicant's lawyer on 17 November 1997.

26. On 21 January 1998 the Administrative Court dismissed the applicant's appeal as being unfounded. It found that the Regional Government had duly considered the private expert's arguments and gave conclusive arguments for its decision. It noted that the Regional Government had held a hearing on 25 January 1994. No further hearing had been necessary. The applicant's remaining submissions were irrelevant for the proceedings at issue.

27. The court dispensed with an oral hearing. This decision was served on the applicant's lawyer on 18 February 1998.

THE LAW

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

28. The applicant complained under Article 6 § 1 of the Convention about the lack of an oral hearing before the Administrative Court. Article 6 of the Convention, as far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations ...., everyone is entitled to a fair and public hearing within a reasonable time by a[.]...tribunal ..."

A. Admissibility

29. The Government argued that Article 6 was not applicable to the proceedings at issue as the applicant had no right to the requested readjustments. They submitted in this regard that the relevant provisions of the Hunting Act allowed for such a readjustment only in exceptional cases, where, for proper functioning of hunting, boundaries need readjustment. The applicant's request, however, primarily aimed at an extension of her hunting ground to the detriment of the adjacent hunting ground. Furthermore, the decision not to grant requested readjustments was

exclusively issued on the basis of considerations of hunting management, which were in the entire discretion of the hunting authorities. Finally, the applicant had still the possibility to acquire the requested adjustments by concluding an agreement under civil law with the owners of the adjacent hunting grounds.

30. The applicant contested this argument and submitted that the proceedings at issue concerned at least a “serious dispute” relating to her civil rights.

31. The Court reiterates that the applicability under the civil head of Article 6 of the Convention depends on whether there was a dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question which must be civil in nature (see for instance the *Zander v. Sweden* judgment of 25 November 1993, Series A no. 279-B, p. 38, § 22).

32. In the present case, the applicant filed a request for the allocation of specified plots of adjacent community land to her hunting grounds so that these be readjusted for the next hunting period. The request was filed in accordance with the relevant provisions of the Upper Austrian Hunting Act, which provides for readjustment of the boundaries of hunting grounds in the case this is necessary to ensure the proper functioning of hunting. The Court further observes that the competent authorities do not enjoy unfettered discretion when deciding upon such a request; but they are bound by generally recognised legal and administrative principles. Thus, they have to consider the objective and purpose of the applicable legislation in the field in question and give sufficient and relevant reasons for their decision taken after fair proceedings.

33. The Court, in conclusion, finds that the domestic authorities had to rule on a serious and genuine dispute about the existence and scope in domestic law of a right, asserted by the applicant, namely to have the boundaries of her hunting grounds realigned in order to make proper use of her property. Accordingly, Article 6 is applicable to the proceedings at issue.

34. The Court notes that 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

35. The applicant complained about the lack of an oral hearing before the Administrative Court.

36. The Government argued that the special features of the proceedings constituted "exceptional circumstances" which justified the absence of a public hearing. The Government noted in this regard that the case concerned a rather technical matter and the applicant, in her complaint with the Administrative Court, raised only points of law and questions concerning the formal aspects of the proceedings before the Regional Government. The Administrative Court could therefore adequately decide the case on the basis of the case file.

37. The applicant submitted that the cases concerned the practical assessment of facts and did not concern complex technical matters. The Administrative Court should have heard the opinion of the private expert and the official expert in a contradictory hearing.

38. The Court recalls at the outset that Austria's reservation to Article 6, which concerns a restriction of the right to public court hearings, is invalid as it does not satisfy the requirements of Article 57 § 2 of the Convention (*Eisenstecke v Austria*, no. 29477/95, 3.10.2000, §§ 29,30).

39. As regards the circumstances of the present case, the Court notes that the administrative authorities, the Grieskirchen District Administrative Authority and the Upper Austria Regional Government, are not "tribunals" within the meaning of Article 6. Thus, the Administrative Court was the first and only tribunal which examined the applicant's case.

40. The Court is not persuaded by the Government's arguments. The applicant was in principle entitled to an oral hearing. In her complaint with the Administrative Court she requested an oral hearing and there is nothing to show that the subject matter of the dispute was of such a nature that it was better dealt with in written proceedings (see *mutatis mutandis Schuler Zgraggen v. Switzerland*, judgment of 24 June 1993; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002; *Speil v. Austria* (dec.), no. 42057/98, 5 September 2002;).

41. The Court therefore finds that the lack of an oral hearing of the applicant before the Administrative Court constituted a breach of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. Under the head of pecuniary damage the applicant claimed 18,000 euros (EUR) resulting of loss of income because of reduced possibility to hunt on her grounds between 1 April 1993 and 31 March 1999. Still under the head of pecuniary damage, she further claimed a total of EUR 11,738.71 for costs and expenses incurred in the proceedings before the domestic courts and the Court.

44. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. It will, however, examine the applicant's claims, as far as relevant, under the head of costs and expenses.

B. Costs and expenses

45. The applicant claimed EUR 3,456.99, including VAT, for the costs and expenses incurred before the domestic courts and EUR 8,281.77, including VAT, for those incurred before the Court.

46. The Government asserted that the applicant's claims concerning the proceedings before the Court were excessive.

47. 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, it does not appear from the applicant's submissions that any specific costs were incurred in relation to the demand for an oral hearing. Therefore no award can be made under this head.

As regards the costs and expenses incurred before the Court, the Court notes that the applicant, 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 applicant EUR 3,000 under this head, plus any tax that may be chargeable on this amount.

C. Default interest

48. 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 lack of an oral hearing before the Administrative Court 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 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 this 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 24 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President