



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

THIRD SECTION

CASE OF OSINGER v. AUSTRIA

(Application no. 54645/00)

JUDGMENT

STRASBOURG

24 March 2005

FINAL

24/06/2005

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 Osinger v. Austria,

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

Mr B.M. ZUPANČIČ, *President*,

Mr L. CAFLISCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr V. ZAGREBELSKY,

Mrs E. STEINER,

Mrs A. GYULUMYAN,

Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr M. VILLIGER, *Deputy Section Registrar*

Having deliberated in private on 3 March 2005,

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

PROCEDURE

1. The case originated in an application (no. 54645/00) 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, Franz Osinger (“the applicant”), on 30 November 1999.

2. The applicant was represented by Mr J. Kattner, a lawyer practising in Amstetten. 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 that there was no public hearing in the succession proceedings, in breach of Article 6 § 1 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 26 June 2003, the Court declared the application partly admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1937 and lives in Mank/Austria.

9. A., the applicant's brother, died on 1 December 1988. He had been a farmer and the owner of a farm. On 23 December 1998 the competent court was informed about A.'s death and, subsequently, appointed a notary public as court commissioner (*Gerichtskommissär*).

10. On 22 and 23 February 1989 the applicant and eight other persons entitled to the estate of A. appeared before the notary public in Ybbs and made conditional declarations of acceptance of succession (*bedingte Erbserklärung*).

11. On 23 February, 28 March and in April 1989 three experts submitted opinions on the value of the farm.

12. On 28 July 1989 the applicant's sister M. argued that the farm was a hereditary one (*Erbhof*) within the meaning of the Agricultural Succession Act 1958 (*Anerbengesetz*) and filed an application to be appointed as its principal heir (*Anerbin*).

13. On 22 September 1989 an expert submitted his opinion and concluded that the farm should not be considered hereditary.

14. On 2 October 1989 the applicant requested to be appointed as principal heir.

15. On 28 December 1989 the Ybbs District Court (*Bezirksgericht*) found that the farm did not qualify as a hereditary one because it could not provide a living for five adults as required under the applicable law. Further, it found the declarations of acceptance to be valid and appointed all nine statutory heirs as heirs to A.'s estate (*Einantwortungsurkunde*) but dismissed the requests by the applicant and M. to be appointed principal heirs. On 9 January 1990 the applicant appealed.

16. On 21 February 1990 the St. Pölten Regional Court (*Landesgericht*) quashed the District Court's decision and remitted the case to it. It found that the issue whether the farm qualified as hereditary within the meaning of the Agricultural Succession Act 1958 had not been sufficiently determined. The other heirs appealed.

17. On 18 October 1990 the Supreme Court dismissed the appeals and upheld the Regional Court's finding.

18. On 31 December 1990 the District Court transmitted the file to the public notary for supplementary investigations. On 28 February 1991 an expert submitted an additional opinion.

19. On 8 April 1991 the District Court decided to request an additional expert opinion, which it obtained on 12 September 1991.

20. On 17 October 1991 the District Court, having heard an agricultural expert, found that the farm qualified as a hereditary one under the Agricultural Succession Act 1958. Five parties appealed.

21. On 4 March 1992 the Regional Court dismissed the appeals and, on 27 Mai 1992, the Supreme Court dismissed an appeal on points of law and confirmed that the Agricultural Succession Act 1958 was applicable.

22. Subsequently the District Court held hearings on 7 September and 9 November 1992. It heard several agricultural experts in order to clarify whether M. or the applicant qualified as principal heir. On 13 January and 11 March 1993 the court obtained further expert opinions.

23. From April to June 1993 forest pest control measures were carried out in the forest belonging to the farm. As the parties of the hereditary proceedings did not reach an agreement, an estate curator (*Verlassenschaftskurator*) was appointed and the succession proceedings were suspended.

24. On 8 September 1993 the District Court dismissed the applicant's request to be appointed as principal heir. It found that he did not qualify as such because he already owned part of another hereditary farm, and appointed M. as principal heir. The applicant appealed and submitted a new private expert opinion.

25. On 29 December 1993 the Regional Court allowed his appeal and remitted the case to the District Court. It found that there was not sufficient evidence to conclude that the applicant did not meet the requirements as principal heir.

26. On 7 March 1994 the District Court transferred the file to the public notary for supplementary investigations. On 27 April 1994 additional expert opinions were submitted. On 13 May 1994 the applicant commented thereupon.

27. From September to November 1994 new forest pest control measures were carried out in the forest belonging to the farm. Again an estate curator was appointed and the succession proceedings were suspended. On 17 November 1994 the District Court ordered the public notary to submit his final submissions.

28. On 2 February 1995 the District Court, having heard additional experts, again dismissed the applicant's request and appointed M. as principal heir. The applicant appealed.

29. On 12 July 1995 the Regional Court quashed the decision and remitted the case to the District Court. On 10 August 1995 the file was transmitted to the notary public.

30. On 5 February 1996 the District Court held a further hearing. Thereafter, it obtained further expert reports and the applicant commented repeatedly on these reports and repeatedly requested further opinions.

31. On 12 August 1997 the applicant submitted a private expert opinion and requested to discuss it at an oral hearing. The court-appointed expert commented on the private expert opinion.

32. On 13 July 1998 the court held another hearing in which the applicant asked to hear further experts.

33. On 21 October 1998 the District Court dismissed the applicant's request to be appointed as principal heir and appointed M. instead. It refused to hear further experts.

34. On 19 March 1999 the Regional Court dismissed the applicant's appeal. It confirmed the District Court's refusal to hear further experts finding that the court-appointed expert had commented in detail on the private expert opinion submitted by the applicant and that the latter could not impugn the plausibility of the opinion of the court-appointed expert.

35. On 10 June 1999 the Supreme Court dismissed the applicant's appeal on points of law. This decision was served on the applicant's lawyer on 14 July 1999.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. The Non-Contentious Proceedings Act 1854 (*Außerstreitgesetz*) does not contain any specific provision on hearings in succession proceedings. Case-law and opinion of writers consider that hearings under this act are not public (see *Fasching, Lehrbuch des österreichischen Zivilprozessrechts, Wien, 1984*, marginal number 682; *Gögl, Der Beweis im Verfahren außer Streitsachen, ÖJZ 1956, 344 (347)*).

37. On 1 January 2005 a new draft of the Non-Contentious Proceedings Act entered into force and repealed the 1854 Act. As general rules, Sections 18 and 19 of the 2005 Act now provide for oral and public hearings in non-contentious proceedings, and their conduct lies within the discretion of the court. Section 162 provides for oral hearings in succession proceedings on the determination of an heir (*Verfahren über das Erbrecht*), in particular. Section 185 stipulates that, with the exception of proceedings on the determination of an heir (Section 162), there are no public hearings in succession proceedings (*Verlassenschaftsverfahren*).

THE LAW

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

38. The applicant complained that in the succession proceedings there had been no public hearing as required under Article 6 § 1 of the Convention. Article 6 § 1, as far as material, reads as follows:

“1. In the determination of his civil rights and obligations ..., everyone is entitled to a ... public hearing ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

39. The Government maintained that the right to a public hearing was not absolute and that an exclusion of the general public was admissible, *inter alia*, for the protection of the private lives of the parties or when required on grounds of private and family life within the meaning of Article 8 of the Convention. They pointed out that succession proceedings were not open to the general public in order to protect the private sphere of the parties. The legislator, thus, took into account that family relations and the pecuniary situation of the parties belonged to a person's private sphere which deserved protection from the disclosure of details. They concluded that the parties' right to protection of their private lives guaranteed by Article 8, and also by Article 6 § 1, justified an exclusion of the public for such proceedings were not of public interest. Moreover, the Government submitted that in the present case there had been a number of hearings at which the parties could duly put forward their arguments and that the applicant's submissions that there had been no fair hearing were unfounded. Finally they argued, referring to this Court's decision in the case of *Varela Assalino v. Portugal* (no. 643369/01, 25 April 2002), that the primarily “technical nature” of the issues to be determined in the present proceedings, namely the question of whether or not the farm qualified as hereditary, had justified the absence of a hearing altogether and that this, therefore, was true all the more for the lack of publicity at the hearings.

40. The Government further contended that it was the Austrian courts' practice in succession proceedings to conduct oral and public hearings only at the request of a party. The applicant, assisted by counsel, must have been familiar with this practice. Thus, in the light of this Court's case-law, having failed to request a hearing throughout the proceedings, he had waived his right to a hearing.

41. The applicant contested the Government's view. He argued that the proceedings at issue involved a dispute about civil rights which did not

differ from other claims dealt with in civil proceedings. There was no reason to distinguish succession proceedings from other civil suits; in particular, the determination of the heir of an agricultural estate did not, normally, involve the consideration of facts falling within the parties' private sphere. Further, the question of whether or not a farm qualified as hereditary could not be regarded as being of a "technical nature". This issue amounted to an estimate based on valuations rather than to an empirically measurable question of fact.

42. He also disputed that the Austrian courts would conduct hearings on a party's request in succession proceedings and maintained that there was no right to an oral and public hearing under the applicable law. Therefore, the Government's argument that he had waived his right to a hearing was a contradiction in terms. Moreover, on 12 August 1997 he had in fact requested a hearing to discuss the private expert opinion. Thus, he never waived his right to a hearing.

43. The Court notes at the outset that Austria's reservation in respect of Article 6 § 1 concerning the requirement that hearings be public has been found to be invalid (see *Eisenstecken v. Austria*, no. 29477/95, § 29, ECHR 2000-X).

44. Article 6 § 1 of the Convention provides that, in the determination of civil rights and obligations, "everyone is entitled to a fair and public hearing". The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, a fair hearing, the guarantee of which is one of the foundations of a democratic society (see *Sutter v. Switzerland*, judgment of 22 February 1984, Series A no. 74, § 26).

45. However, the requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the provision that "the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Moreover, it is established in the Court's case-law that, even in a criminal law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice (see *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, § 70; *Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000; *Z. v. Finland*, judgment of 25 February 1997, *Reports* 1997-I, § 99; and

T. v. the United Kingdom [GC], no. 24724/94, §§ 83-89, 16 December 1999).

46. The Court has already considered that in the course of proceedings where exclusively legal or highly technical questions are at stake, the requirements of Article 6 may be fulfilled even in the absence of a hearing. Moreover, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public (see *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, p. 19, § 58; and *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002).

47. Further, the Court has not, in this context, found it inappropriate for a State to designate an entire class of cases as an exception to the general rule that civil proceedings, *inter alia*, should take place in public, where considered necessary in the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of the parties (see *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, §§ 87-88), although the need for such a measure must always remain subject to the Court's control (see *Riepan v. Austria*, no. 35115/97, § 34, ECHR 2000-XII).

48. In the present case the Court notes that the parties had contradictory positions on the Austrian courts' practice concerning the conduct of public hearings. It observes that the Government's own submissions on this issue appear contradictory as they first pointed out that the general public was excluded from succession proceedings for the protection of the private sphere of the parties, whereas they submitted later on that it would be the Austrian courts' practice to conduct hearings on a party's request (see above, §§ 39 and 40, respectively). Furthermore, the Government have not submitted any example of domestic case-law which would confirm this practice in succession proceedings under the Non-Contentious Proceedings Act.

49. Accordingly, the Court shares the view of the applicant that hearings under that Act were not public (see *II. Relevant domestic law and practice*). This was not stated explicitly in the Act itself, which only mentioned oral hearings in respect of custody or guardianship proceedings (Section 185 of the Non-Contentious Proceedings Act), but was the common practice of the Austrian courts and the understanding of academic writers on that subject. It is therefore irrelevant for the purposes of Article 6 § 1 whether or not the applicant asked for a public hearing, because no such possibility was provided for by the applicable domestic law (see *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, p 14, § 31; and *Eisenstecken*, cited above, § 33).

50. In the present case the courts had to determine the heir entitled to take over the farm after the death of the applicant's brother. The applicant and eight other persons filed declarations of acceptance of succession and

both the applicant and his sister filed applications to be appointed as principal heirs under the Agricultural Succession Act 1958. The decisive question in these proceedings was whether the farm qualified as hereditary one, which was the precondition for the applicability of the Agricultural Succession Act 1958.

51. The Court considers that the applicant was in principle entitled to a public hearing. It finds unconvincing the Government's argument that the qualification of a farm as hereditary under the applicable law was an issue of a primarily "technical nature" in the sense of the case of *Schuler Zgraggen v. Switzerland* (cited above), because this question only arose after several matters of fact had been established, for example the situation created by concurring declarations of acceptance of succession. There is no other reason that could justify the absence of an oral hearing.

52. Furthermore, the Court observes that the domestic courts did not consider whether the exclusion of the public was justified in the proceedings at issue. The Government equally did not put forward specific arguments which could justify the view that that exclusion was required for the protection of the private life of the parties in the present proceedings, but only referred to the legislator's general consideration that succession proceedings might disclose details of the parties' personal sphere. The Court notes that, on 1 January 2005, a new draft of the Non-Contentious Proceedings Act entered into force which provides for public hearings in succession proceedings on the determination of an heir.

53. In conclusion, the Court finds that the lack of a public hearing in the present proceedings was in breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant sought 704,120.39 euros (EUR) in respect of pecuniary damage, consisting of EUR 475,286.08 (value of the farm for which he was not instituted as principal heir) and EUR 229,720.12 (loss of fourteen years' income from the farm), minus EUR 885.81 (his share of the heritage). He claimed EUR 25,000 in respect of non-pecuniary damage for distress suffered.

56. The Government submitted that there was no causal link between the absence of a public hearing and the alleged pecuniary damage and that the claim for non-pecuniary damage was excessive.

57. The Court agrees with the Government that there is no causal link between the violation of the Convention found and the alleged claim for pecuniary damage. In particular, it is not for the Court to speculate what the outcome of the proceedings would be if they were in conformity with the requirements of Article 6 § 1 of the Convention. Accordingly it dismisses the claim under this head (see *Demir and Others v. Turkey*, judgment of 23 September 1998, Reports 1998-VI, p. 2660, § 63).

58. Further, the Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage the applicant may have sustained in the present case (see *Bakker v. Austria*, no. 43454/98, § 36, 10 April 2003, with further references).

B. Costs and expenses

59. The applicant requested EUR 23,426.92 for reimbursement of costs incurred in the domestic proceedings and EUR 8,199.13 for costs of the Convention proceedings.

60. The Government submitted in respect of the costs claim for the domestic proceedings that only those costs could be possibly reimbursed which were incurred in an attempt to prevent the violation found. No such procedural activities were discernible or invoked by the applicant. As regards the costs claim for the Convention proceedings, the Government pointed out that the only one complaint was declared admissible.

61. As to the costs claim concerning the domestic proceedings, the Court agrees with the Government that none of the costs listed by the applicant can be considered as having been incurred in an attempt to prevent or redress the violation found. It accordingly dismisses this claim.

62. In respect of the costs incurred in the Strasbourg proceedings, the Court observes that the applicant, who was represented by counsel, did not have the benefit of legal aid and that he was only partly successful with his application. It considers it reasonable to award him EUR 4,000 under this head.

C. Default interest

63. 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 the non-pecuniary damage sustained by the applicant;
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 4,000 (four thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
 - (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 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mark VILLIGER
Deputy Registrar

Boštjan M. ZUPANČIČ
President