CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF EL MASSRY v. AUSTRIA

(Application no. 61930/00)

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 El Massry 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. 61930/00) 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 Egyptian national, Mr Mohamed El Massry ("the applicant"), on 24 August 2000.

2. The applicant, who had been granted legal aid, was represented by Mr H. Buchmayr, a lawyer practising in Linz. 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 under Article 6 that the proceedings concerning his compensation claim lasted unreasonably long.

4. The application was allocated to the Third 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 20 November 2003 the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

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

THE FACTS

8. The applicant was born in 1949 and lives in Bad Mitterndorf, Austria.

9. On 16 September 1989 the applicant was the victim of an assault and was heavily injured. He was brought to the Bad Aussee Hospital (*Landeskrankenhaus*) where he received medical treatment as he suffered from pulmonary disease. The applicant underwent an operation and was transferred to the Graz Hospital where another operation was carried out. After this medical treatment the applicant's ability to work was considerably reduced. He became unemployed and was without income.

10. On 27 November 1992 he instituted civil proceedings against the Steiermärkische Krankenanstalten Gesellschaft mbH, the company which administers public hospitals in the region of Styria. He claimed damages for pain and suffering and loss of profit. He alleged that medical malpractice had caused his state of health and that the surgeons treating him had infringed their duty to provide explanations and advice concerning the treatment.

11. The Leoben Regional Court (*Landesgericht*) held eight hearings between 12 January, 1993 and 15 December 1994. It heard numerous witnesses and medical experts. On 30 September 1993 the applicant challenged one of the experts. However, his challenge was dismissed on 14 October 1993.

12. On 15 December 1994 the Regional Court gave a partial judgment (*Teilurteil*). It considered the claim for damages to be well-founded in principle (*dem Grunde nach*), while the exact amount of compensation had to be determined in further proceedings. It found that the surgeons treating the applicant had infringed their duty to provide explanations and advice concerning the treatment.

13. On 3 February 1995 the defendant filed an appeal against this judgment and on 5 March 1995 the applicant commented on this appeal.

14. On 22 June 1995 the Court of Appeal dismissed the defendant's appeal.

15. On 22 November 1995 the Supreme Court dismissed the defendant's appeal on points of law (*außerordentliche Revision*). Thus, the judgment finding the applicant's claim to be well-founded in principle became final.

16. Between 8 March 1996 and 10 January 1997 the Regional Court, presided by another judge, held five hearings, at which it heard further medical experts. The issue to be clarified at this stage of the proceedings was the level of the applicant's ability to work before the incident and the extent to which the medical treatment received at the hospitals influenced his ability to work. On the basis of these findings, the amount of compensation due had to be assessed.

17. On 23 October 1996 the applicant amended and extended his claim.

18. On 10 January 1997 the Regional Court ordered a medical expert to submit his opinion. On 28 May and on 17 June 1997 the Court urged the expert to deliver his opinion.

19. On 18 June 1997 the applicant filed a request under Section 91 (*Fristsetzungsantrag*) of the Courts Act (*Gerichtsorganisationsgesetz*) and asked the Court of Appeal to set a time-limit for the delivery of a medical expert report as the appointed expert had not submitted his report for more than five months.

20. On 2 July 1997 the Court of Appeal allowed the applicant's request and fixed a four weeks' time-limit for the delivery of the report.

21. On 7 July 1997 the expert submitted the opinion. Subsequently, the parties were invited to comment on it.

22. On 24 November 1997 the Regional Court held another hearing and appointed a further expert. On 25 March 1998 the new expert report was delivered. On 22 April 1998 the defendant challenged the new expert for bias (*Ablehnungsantrag*). On the same day the court dismissed this application.

23. On 12 June 1998 the applicant requested the court to hold a further hearing. On 22 July and 5 November 1998 the Regional Court held further hearings at which the applicant extended his claim.

24. On 9 February 1999 the Regional Court gave a partial judgment and determined the precise amounts of compensation to be paid by the defendant.

25. On 19 March 1999 both the applicant and the defendant filed an appeal.

26. On 7 October 1999 the Court of Appeal, after a hearing, dismissed the applicant's appeal and partly allowed the defendant's appeal. It reduced the amount of compensation and quashed parts of the Regional Court's judgment and, to this extent, remitted the case to the Regional Court. This decision was served on 27 February 2000. On 27 March 2000 the applicant filed an appeal on points of law.

27. On 30 Mai 2000 the Supreme Court rejected the applicant's appeal on points of law. This decision was served on 27 July 2000.

28. On 19 October 2000 the applicant filed new submissions concerning his remaining claim and on 14 November 2000 the Regional Court held a hearing.

29. On 9 February 2001 the Regional Court appointed a medical expert who submitted his opinion on 24 March 2001. On 3 April 2001 the Regional Court ordered the applicant to comment on this opinion, which he did on 24 April 2001.

30. On 12 July 2001 the Regional Court held a hearing.

31. On 25 January 2002 the Regional Court partly allowed the applicant's claim, granting the amount of EUR 204,139.99, *inter alia*, for medical and travelling costs and a monthly payment of EUR 472.37.

32. On 19 March 2002 both the applicant and the defendant filed appeals against this decision.

33. On 16 June 2002 the Court of Appeal partly allowed both appeals. It reduced the amount to EUR 184,619.40 and remitted the case concerning the travelling costs and the monthly payment to the Regional Court.

34. On 19 February 2003 the Regional Court held another hearing. It decided to repeat the taking of evidence as, meanwhile, the case had been taken over by another judge.

35. On 30 July 2003 the Regional Court partly allowed the applicant's claim granting the amount of EUR 125,782.47, *inter alia*, for medical and travelling costs and a monthly payment of EUR 472.37.

36. On 22 September 2003 the defendant filed an appeal and on 22 October 2003 the applicant filed his observations.

37. On 5 November 2003 the Court of Appeal allowed the defendant's appeal in part and awarded the applicant the amount of EUR 123,602.29. It confirmed the Regional Court's judgment for the remainder. The judgment was served on the applicant's counsel on 25 November 2003.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. 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 by [a] ... tribunal..."

39. The Government contested that argument.

40. As to the period to be taken into consideration, the Court observes that the proceedings started on 27 November 1992, when the applicant filed his civil action, and ended on 25 November 2003 with the service of the Court of Appeal's judgment. Therefore, they lasted for almost eleven years.

41. The Government contended that the length of the proceedings could still be regarded as reasonable as they were extraordinarily complex. Difficult medical questions had to be determined, such as the causal link between the alleged medical malpractice and the applicant's state of health. In this respect numerous and time-consuming expert opinions had to be obtained from various specialists. As to the applicant's conduct in the proceedings, the Government stressed that he twice extended his claim and that the parties to the proceedings made extensive use of remedies available; in particular, both the applicant and the defendant challenged experts.

Moreover, all the partial decisions of the civil courts were challenged by the parties and dealt with at three levels of jurisdiction. Also, the hearing scheduled for 22 July 1998 was postponed upon the parties' request in order to allow friendly settlement negotiations, and the proceedings were only resumed on 5 November 1998. As to the conduct of the courts, the Government asserted that there were no periods of inactivity and that the courts conducted the proceedings in an expeditious manner. In particular, the courts repeatedly urged the experts to deliver their opinions and very rarely allowed requests by the parties to postpone hearings.

42. The applicant, on his part, admitted that the proceedings concerning compensation for medical malpractice raised difficult questions of fact and law. However, in particular after the Regional Court's finding in November 1995 that the applicant's claim was well-founded in principle, the Regional Court in the ensuing proceedings again allowed motions of the defendant concerning the well-foundedness of the applicant's claim which considerably delayed the proceedings. Moreover, the Regional Court had appointed experts which were practising within the area of influence of the defendant, a company administering public hospitals in Styria. Only when the court appointed another expert practising outside this geographical area were reliable opinions delivered. As to his own conduct, the applicant submitted that he could not be blamed for having used all legal remedies available to him and that he had not contributed to the length of the proceedings. Finally, he pointed out that the outcome of the proceedings was of great importance for him, as he was no longer able to work after the medical malpractice and did not dispose of any income except for the amounts granted in the compensation proceedings.

43. 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).

44. As to the merits, the Court agrees that the proceedings were quite complex. As regards the applicant's conduct, it finds that the applicant did not substantially contribute to the length of the proceedings. As to the authorities' conduct, the Court observes that there were no substantial periods of inactivity. However, considering the applicant's state of health and the great importance of the outcome of the proceedings for him, the Court finds that a period of almost eleven years exceeds a reasonable time.

45. There has accordingly been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed 300,000 euros (EUR) in respect of non-pecuniary damage.

48. The Government contested the claim to be excessive and not in line with this Court's case-law regarding the award of such damages.

49. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards award him EUR 9,000 under that head.

B. Costs and expenses

50. As regards costs and expenses incurred in the Convention proceedings, the applicant claimed EUR 900.72 for travel expenses for nine meetings with his lawyer and EUR 8 for telephone costs.

51. The Government did not express an opinion on the matter.

52. 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. The Court notes that the applicant received legal aid in the amount of EUR 685. It is not convinced that the applicant's claims meet the above requirements since he has not submitted invoices. However, deciding on an equitable basis, it finds it reasonable to award EUR 900 for costs and expenses in respect of the Convention proceedings in addition to the amount already granted for legal aid.

C. Default interest

53. 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 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 9,000 (nine thousand euros) in respect of non-pecuniary damage, EUR 900 (nine hundred euros) for 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 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 24 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mark VILLIGER
Deputy Registrar

Boštjan M. ZUPANČIČ
President