



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

FIRST SECTION

CASE OF JANKIKOVA v. AUSTRIA

(Application no. 56483/00)

JUDGMENT

STRASBOURG

7 April 2005

FINAL

07/07/2005

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 Jancikova 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. QUESADA, *Deputy Section Registrar*,

Having deliberated in private on 17 March 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 56483/00) 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, Mrs Helena Jancikova (“the applicant”), on 28 March 1999.

2. The applicant was represented by Mr G. Hahmann, 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. The applicant alleged that the administrative criminal proceedings against her lasted unreasonably long and that no effective remedy lay against it.

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. On 4 July 2002 the Court declared the application partly inadmissible and adjourned the remainder. By a decision of 6 November 2003 the Court declared the remainder of 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 First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1961 and lives in Vienna. She is the owner of a plot of land in Vienna. At the time of the events she was building a house on her land.

9. On 16 October 1992 officers of the Regional Vienna Labour Office (*Landesarbeitsamt*) inspected the construction site and found that four persons of Czech nationality, who were carrying out plaster works, had no permit to work in Austria.

10. On 21 October 1992 the Labour Office submitted a report to the Vienna Municipal Office (*Magistrat*) alleging that the applicant had illegally employed four foreigners. Thereupon, the Municipal Office opened administrative criminal proceedings against the applicant under the Aliens' Employment Act (*Ausländerbeschäftigungsgesetz*) and invited her, by letter of 29 December 1992, to comment on the charge against her. As the applicant was out of town, this letter did not reach her prior to 20 January 1993, when the Municipal Office ordered the applicant to pay a fine in the amount of ATS 66,000 (EUR 4,796.41) for having illegally employed four foreigners contrary to the provisions of the Aliens' Employment Act. This order was served on the applicant on 4 February 1993. According to the applicant, this was the first time that she became aware that proceedings had been instituted against her.

11. On 11 February 1993 the applicant, assisted by counsel, filed a request for reinstatement into the first instance proceedings (*Wiedereinsetzungsantrag*) and lodged an appeal with the Independent Administrative Panel (*Unabhängiger Verwaltungssenat*, hereafter referred to as "IAP") against the order of 20 January 1993.

12. On 19 February 1993 the Municipal Office rejected the request for reinstatement into the proceedings. The applicant appealed on 25 March 1993 to the IAP.

13. On 14 February 1995 the IAP summoned the parties to a hearing scheduled for 21 March 1995 and invited the applicant to comment on the charge. The applicant did so on 3 March 1995.

14. On 21 March 1995 the IAP dismissed her appeal concerning reinstatement. It found that the invitation to comment on the charge of 29 December 1992 had been served in accordance with the provisions of the Official Notifications Act (*Zustellgesetz*) and that therefore the Municipal Office's decision of 19 February 1993 to refuse reinstatement into the proceedings had been lawful. This decision was served on the applicant on 17 May 1995. The applicant's complaint of 21 June 1995 against the IAP's

decision was rejected by the Administrative Court (*Verwaltungsgerichtshof*) on 7 September 1995.

15. On 21 March 1995 the IAP also examined the applicant's appeal of 11 February 1993 against the order of 20 January 1993 to pay the fine in the amount of ATS 66,000. Having deliberated, the IAP rejected the applicant's appeal the same day.

16. On 23 August 1996 the IAP finalised the written version of its decision on the applicant's appeal of 11 February 1993. It found that the applicant had concluded work contracts with foreigners which required a valid work permit under the Aliens' Employment Act. The decision was served on 29 November 1996.

17. On 19 December 1996 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*).

18. By a decision of 30 September 1997 the Constitutional Court refused to deal with the complaint for lack of prospects of success and transferred the case to the Administrative Court. This decision was served on 9 December 1997.

19. On 9 April 1998 the IAP commented on the applicant's complaint and, on 20 May 1998, the applicant submitted observations in reply.

20. On 13 September 1999 the Administrative Court dismissed the applicant's complaint. This decision was served on 30 September 1999.

II. RELEVANT DOMESTIC LAW

21. Pursuant to Article 132 of the Federal Constitution, the Austrian law no application may be lodged with the Administrative Court against the administrative authorities' failure to decide (*Säumnisbeschwerde*) in administrative criminal proceedings. This provision was adopted in 1984 (*BGBI.* 296/1984). The legislative committee stated in its respective report (*AB 345, XVI. GP*), referring to the Code of Administrative Offences (*Verwaltungsstrafgesetz*), that the exclusion of this remedy was justified as the administrative authorities had to decide on appeals within a short time-limit. The provisions to which the legislative committee referred provide as follows:

22. Pursuant to Section 51 § 7 of the Code of Administrative Offences, administrative authorities have to decide on appeals within fifteen months and if they do not comply with this time-limit the proceedings have to be discontinued. This time-limit does not apply to proceedings, in which more than one party has a right to appeal. Periods during which proceedings before the Constitutional Court and the European Court of Justice are pending shall not be counted for the purpose of the fifteen months time-limit.

23. Pursuant to Section 31 §§ 1 and 2 of the Code of Administrative Offences, the prosecuting authority has to institute administrative criminal

proceedings against a person suspected of having committed an administrative offence within six months or as regards specific offences - as the offence at issue - within one year after the perpetration of the offence.

24. Pursuant to Section 31 § 3 of the Code of Administrative Offences, the authorities may only sentence a person suspected of an administrative offence within a period of three years after the perpetration of the offence. Periods during which proceedings before the Constitutional Court, the Administrative Court and the European Court of Justice are pending shall not be counted for the purpose of the period of prescription.

25. In administrative criminal proceedings in which more than one party has the right to appeal, e.g. in proceedings where also the Labour Office has *locus standi*, legal protection against the authorities' failure to decide is only safeguarded by the limitation of the period of three years within which a penal order has to be issued. The public pronouncement of the decision is considered to be sufficient for complying with this time-limit.

26. Pursuant to Section 19 § 2 of the Code of Administrative Offences in connection with Sections 32 to 35 of the Code of Criminal Procedure (*Strafprozessordnung*), the administrative authorities have to consider an unreasonable length of the proceedings as mitigating circumstance.

THE LAW

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

27. The applicant complained under Article 6 of the Convention about the length of the criminal proceedings against her. Article 6 § 1, so far as relevant, provides as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal...”

28. As to the period to be taken into consideration, the Court considers that the proceedings started on 4 February 1993, when, according to the applicant, she became aware for the first time that proceedings had been instituted against her. The proceedings ended on 30 September 1999, when the final decision of the Administrative Court was served on the applicant's counsel. They therefore lasted six years and almost eight months.

29. The Government submitted that the Austrian authorities dealt expeditiously with the case. As to the period of time between 17 May 1995, when the IAP pronounced its decision, and 29 November 1996, when its written version was served, the Government argued that the applicant could have filed a complaint with the Constitutional Court and the Administrative Court prior to the delivery of the written decision. The authorities could not

therefore be held responsible for this delay. Further, the proceedings were of a certain complexity as foreign nationals were involved in the proceedings, as the IAP had also to consider the applicant's request for reinstatement and as the Labour Office had also to be heard as a party.

30. The applicant contested the Government's arguments. She submitted that it had taken the IAP two years to decide on her appeal and another year and eight months before the written decision was served. The proceedings before the Constitutional Court, which refused to deal with her case, lasted for approximately nine months and the subsequent proceedings before the Administrative Court lasted for another fifteen months. She stressed that the duration was not justified and that the periods of prescription in administrative criminal proceedings was not sufficient to safeguard expeditious proceedings. In particular, she contended that the proceedings before the IAP lasted for approximately two years and one month before a decision on her appeal was taken. Due to the hearing scheduled at short notice, she and her counsel could not attend the pronouncement and, thus, did not learn the content of the IAP's decision before the delivery of the written decision, which happened one year and eight months later. Moreover, the authorities fixing the sentence had not considered the length of the proceedings as mitigating circumstance.

31. The Court finds that the proceedings were not particularly complex and there is no indication that the applicant contributed to the length of the proceedings. There was a period of inactivity of some two years while the case was pending before the IAP, i.e. from 25 March 1993 when the applicant filed her appeal and 14 February 1995 when the IAP summoned the parties to a hearing. The Court does not overlook that the IAP had to decide on the applicant's request for reinstatement into the first-instance proceedings before deciding on her appeal. However, this does not sufficiently explain the duration of the appeal proceedings. Moreover, after the IAP had publicly pronounced its decision on 21 March 1995, more than one year and eight months elapsed before the written version was served on 29 November 1996. The Court is not convinced by the Government's argument that the authorities were not to be blamed for that period as the applicant could have complained to the Constitutional Court and the Administrative Court against the IAP's decision before the delivery of the written decision. Rather, it finds that in order to enable the applicant to effectively exercise her defence, it was necessary to know the reasons on which the IAP had based its decision before a complaint with the Constitutional Court and Administrative Court could be lodged. Thus, the Court considers that the authorities were responsible for this delay. Finally, one year and almost four months elapsed before the Administrative Court took its decision, namely from 20 May 1998, when the case was ready for a decision as the applicant had submitted observations in reply, and

13 September 1999, when the Administrative Court decided on the applicant's complaint.

32. Having regard to these periods of inactivity which were exclusively attributable to the Austrian authorities, the Court finds that the duration of the proceedings was excessive and failed to meet the “reasonable time” requirement.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

34. The applicant also complained under Article 13 about the lack of a remedy against her complaint about the length of the proceedings. Article 13 provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

35. The Government stressed that, as regards administrative criminal proceedings, Austrian law provided for very short periods of prescription within which the authorities have to act (see §§ 21-26 above). This regulation ensured that a decision is taken within a reasonable time. Moreover, the Government asserted that the authorities determining the sentence had to take into account the duration of the proceedings.

36. The applicant contested the Government's view and pointed out that the fifteen months' period referred to in Section 51 § 7 of the Code of Administrative Offences had not applied to the present proceedings and that the IAP's decision had only been served on her four years after the perpetration of the offence. Thus, even the three years' period provided for by Section 31 § 3 of the Code of Administrative Offences had not prevented an unreasonable delay. Finally, she submitted that the authorities had not applied the rule that an unreasonable delay should be considered as a mitigating circumstance.

37. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief (see, among many other authorities, *Kudla v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

38. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law (see, for example, *Ilhan v. Turkey* [GC], no. 22277/93, § 97,

ECHR 2000-VII). The term “effective” is also considered to mean that the remedy must be adequate and accessible (see *Paulino Tomás v. Portugal* (dec.), no. 58698/00, ECHR 2003-XIII). In addition, particular attention should be paid, *inter alia*, to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (see *Tomé Mota v. Portugal* (dec.), no. 32082/96, ECHR 1999-IX; and *Paulino Tomás*, cited above).

39. The Court is not called upon to examine *in abstracto* the compatibility with the Convention of the provisions of the Code of Administrative Offences concerning the prescription periods. Its task is to determine whether, in the light of the *Kudla* judgment (cited above), there had been a remedy available to grant the applicant appropriate relief as regards her complaint about the length, compatible with Article 13 of the Convention.

40. Having regard to the above finding that the proceedings exceeded the reasonable time requirement under Article 6, the Court observes further that the period of fifteen months within which authorities have to decide on appeals (Section 51 § 7 Code of Administrative Offences) did not apply to the present case and that Section 31 § 3 Code of Administrative Offences did not ensure that the written version of the IAP's decision was served on the applicant within the period of three years.

41. Since there was no other remedy against delays caused by the domestic authorities, the Court finds that the means referred to by the Government did not meet the standard of “effectiveness” for the purposes of Article 13 in the present case.

42. Accordingly, the Court finds that Article 13 has been violated.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant requested a total of 6,000.23 euros (EUR) in compensation for pecuniary damage, i.e. for the fine and costs imposed by the Austrian administrative authorities.

45. The Government contested that there was a causal link between the applicant's claim and the violation found.

46. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. In the absence of a claim for compensation in respect of non-pecuniary damage, the Court makes no award under this head either.

B. Costs and expenses

47. The applicant sought a total of EUR 12,242.13 including VAT as reimbursement for costs and expenses. This amount included EUR 2,528.89 including VAT for costs and expenses incurred before the Court.

48. The Government contested the claim as it comprised the costs and expenses incurred in the entire proceedings. In particular, the applicant had not taken any procedural step in order to accelerate the proceedings at domestic level. As regards the claim in respect of the Convention proceedings, the Government pointed out that the application had only been declared partly admissible.

49. 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 notes that no costs incurred in an attempt to accelerate the domestic proceedings. However, it cannot be excluded that the excessive duration of the proceedings increased the overall costs incurred (see *Bouilly v. France*, no. 38952/97, § 33, 7 December 1999). It therefore awards EUR 1,000 in this respect.

50. As to the costs in the Convention proceedings, the Court notes that the applicant, who was represented by counsel, did not have the benefit of legal aid. It considers it reasonable to grant the applicant EUR 2,000.

51. Therefore a total amount of EUR 3,000 is awarded under this head, plus any tax that may be chargeable on this amount.

C. Default interest

52. 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 there has been a violation of Article 13 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;
 - (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 7 April 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President