CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF SCHELLING v. AUSTRIA

(Application no. 55193/00)

JUDGMENT

STRASBOURG

10 November 2005

FINAL

10/02/2006

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 Schelling 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 20 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 55193/00) 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, Richard Schelling ("the applicant"), on 11 February 2000.

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 Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged that the administrative proceedings at issue were unfair, in particular, in that the Administrative Court failed to hold a public hearing and in that the expert heard in the proceedings was biased and the Administrative Court failed to appoint another expert.

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. By a decision of 29 April 2003 the Court declared the application partly inadmissible and adjourned the remainder.

6. 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). By a decision of 25 November 2004 the Court declared the remainder of the application admissible.

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

THE FACTS

THE CIRCUMSTANCES OF THE CASE

8. The applicant is a farmer and lives in Langenegg.

9. On 16 August 1988 the applicant requested permissions under the Water Act (*Wasserrechtsgesetz*) and the Landscape Protection Act (*Landschaftsschutzgesetz*) which were necessary for putting a culvert through a drain on agricultural land owned by him.

10. Thereupon, on 14 September 1988 the Bregenz District Administrative Authority (*Bezirkshauptmannschaft*) conducted an oral hearing on the applicant's requests and inspected his land.

11. On 21 June 1990 the District Administrative Authority refused the requested permissions. The applicant appealed.

12. On 12 December 1990 the Vorarlberg Regional Governor (*Landeshauptmann*) granted the requested permission under the Water Act.

13. The Vorarlberg Regional Government (*Landesregierung*), on 2 April 1991, dismissed the applicant's appeal insofar as it concerned the request for permission under the Landscape Protection Act.

14. On 28 May 1991 the applicant filed a complaint with the Administrative Court (*Verwaltungsgerichtshof*) against the Regional Government's decision.

15. The Administrative Court quashed the Regional Government's decision on the ground of procedural deficiencies on 6 May 1996 and remitted the case to the latter. It found that the authorities had failed to obtain detailed information concerning nature conservancy issues which were raised by the applicant's project.

16. On 16 January 1997 the Regional Government invited the applicant to comment on the additional expert opinion on nature conservancy issues of the expert A. On 31 January 1997 the applicant submitted his comments, following which A. amended the expert opinion on 5 May 1997.

17. Subsequently, on 26 May 1997, the applicant lodged an application with the Administrative Court against the administrative authorities' failure to decide (*Säumnisbeschwerde*).

18. On 10 July 1997 the Administrative Court ordered the Regional Government to issue a decision within three months. Subsequently, the Regional Government appointed an expert on agriculture and forestry issues, who, after inspecting the applicant's land on 19 August 1997, delivered his opinion on 22 August 1997.

19. On 4 November 1998 the Administrative Court requested the Regional Government to order expert A. to submit an additional expert opinion on nature conservancy issues, which A. delivered on 12 January 1999.

20. Subsequently, on 25 January 1999, the Regional Government invited the applicant to submit comments on the expert opinions on nature conservancy issues and on agriculture and forestry issues within two weeks.

21. On 24 February 1999 the applicant submitted comments on these opinions and requested an oral hearing. He also requested that the experts be summoned to the hearing and that the land be inspected by the court. He stressed that the project would improve the productivity of the agricultural land and that therefore public interest existed in the realisation of his project as required under the applicable law. He also challenged the expert A. for bias as he had already delivered an opinion upon a request by the Regional Government and that his independence was doubtful as he was a civil servant bound by instructions.

22. On 6 July 1999 the Administrative Court dismissed the applicant's appeal against the District Authority's decision of 21 June 1990 concerning the request for permission under the Landscape Protection Act. It found that the competence to decide on the merits had passed over to it as the Regional Government had failed to decide within the three-month time-limit set.

23. Further it found, in view of the expert opinions, that the applicant's project interfered with the objects of the Landscape Protection Act as it would spoil the character of the landscape and that there existed no public interest which would justify the measure. Moreover, the applicant had not disproved the expert's conclusion.

24. As regards the alleged bias of A., it found that the mere fact that the expert had already delivered an opinion at an earlier stage of the proceedings and that he was a civil servant was not in itself sufficient to raise doubts as to his independence and impartiality and that the applicant had failed to put forward any specific argument to cast doubt upon A.'s independence or impartiality.

25. Finally, the court held that it could abstain from an oral hearing and an inspection of the applicant's land since the proceedings had been carried out correctly and the facts, insofar as relevant in view of the applicable law, were undisputed. This decision was served on the applicant's counsel on 12 August 1999.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION CONCERNING THE LACK OF A PUBLIC ORAL HEARING

26. The applicant complained under Article 6 § 1 of the Convention that the administrative proceedings had been unfair in that the Administrative Court failed to hold a public oral hearing.

Article 6 § 1 of the Convention, as far a relevant, reads as follows:

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

27. The Government argued that, in the specific circumstances of the case, the Administrative Court could abstain from holding an oral hearing. After the Regional Government's Office had failed to decide, the Administrative Court had to decide on the applicant's appeal against the District Administrative Authority decision of 21 June 1990. The administrative authorities, having held oral hearings, having inspected the applicant's land and having obtained expert opinions, were "quasi-judicial" authorities. In particular, the Administrative Court was called upon to determine a question of law, namely whether the realisation of the requested project affected landscape protection interests and whether any such interference would be outweighed by other public interests. Referring to the case of *Döry v. Sweden* (no. 28394/95, §§ 42-43, 12 November 2002), the Government pointed out that the question of law at issue could be decided on the basis of the file, in particular in view of the amended expert opinions, which the Administrative Court considered to be conclusive and coherent. Moreover, the Administrative Court, on 6 May 1996, had already quashed the Regional Government's decision and remitted the case to the latter authority for obtaining a supplementary expert statement to determine the above-mentioned question of law. Subsequently, two experts delivered amended statements which were submitted to the applicant. In his comments of 24 February 1999 the applicant merely challenged the experts' findings without giving detailed reasons. In particular he made no concrete submission why the conduct of an adversarial hearing supported his view that the concurring expert opinions were incorrect nor had he submitted a counter-opinion.

28. The applicant contested the Government's view. He maintained that the special features of the case at issue required that an oral hearing be conducted by the Administrative Court, even more so because jurisdiction over his appeal against the District Administrative Authority's decision had passed on to the latter court. In particular, all questions of law had already been determined by that court's decision of 6 May 1996. In the subsequent

proceedings it only had to establish the relevant facts for the assessment whether or not the applicant's project met the preconditions for granting the requested permission under the Landscape Protection Act. In the applicant's view, theses were rather simple questions of fact.

29. The Court notes that the applicant's case was considered, in a first round, by the Bregenz District Administrative Authority, and the Regional Government, i.e. purely administrative authorities, and then by the Administrative Court, which quashed the latter authority's decision. In a second round, the Regional Government failed to decide within the statutory time-limit and jurisdiction passed on to the Administrative Court. The applicant did not contest that the Administrative Court qualifies as a tribunal, and there is no indication in the file that the Administrative Court's scope of review was insufficient in the circumstances of the case (see, for instance, *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, pp. 17-18, §§ 30-34 with further references). Thus, the Administrative Court was the first and only tribunal which examined the applicant's case.

30. As the Austrian 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), the applicant was in principle entitled to a public oral hearing before the first and only tribunal examining his case, unless there were exceptional circumstances which justified dispensing with such a hearing. The Court has accepted such exceptional circumstances in cases where proceedings concerned exclusively legal or highly technical questions (see *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, p. 19-20, § 58; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002; *Speil v. Austria* (dec.) no. 42057/98, 5 September 2002). In particular, the Court had regard to the rather technical nature of disputes over benefits under social-security schemes and has repeatedly held that in this sphere the national authorities, having regard to the demands of efficiency and economy, could abstain from holding a hearing if the case could be adequately resolved on the basis of the case-file and the parties' written observations (see, amongst others, *Döry v. Sweden,* cited above).

31. Turning to the circumstances of the present case, the Court notes that the applicant commented on the expert opinions submitted in the previous proceedings and requested, in particular, that the experts be summoned to an oral hearing and that the concerned land be inspected by the court. He stressed that the project would improve the productivity of the agricultural land and that therefore public interest existed in the realisation of his project as required under the applicable law. He also challenged the expert A. for bias as he had already delivered an opinion upon a request by the Regional Government and that his independence was doubtful as he was a civil servant bound by instructions.

32. The Court cannot find that in the present case the subject matter of the proceedings before the Administrative Court was of such a nature, namely a highly technical issue or of mere legal nature, as to dispense its obligation to hold a hearing.

33. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

34. The applicant further complained under Article 6 § 1 of the Convention that that the Administrative Court failed to inspect his property, that he had no possibility to question the experts in a hearing and that the Administrative Court's decision was only based on written evidence. He further complained that expert A. had been biased and that the Administrative Court failed to appoint a new expert as A. had been a civil servant bound by instructions who was working in a department at the Regional Government which had differing views with the competent Minister (*Landesrat*) of the Regional Government upon the applicant's request and A. already had delivered an opinion upon a request by the Regional Government.

35. In the view of its findings in paragraph 33 above the Court does not find it necessary to examine these complaints separately under Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant sought 8,000 euros (EUR) in respect of pecuniary damage, consisting of EUR 1,600 (for the impossibility to use his agricultural land appropriately during eight years) and EUR 6,400 (additional work expenses during eight years). He claimed EUR 1,600 in respect of non-pecuniary damage for distress suffered during the proceedings and as a result of the authorities' negative decision.

38. The Government asserted that there was no causal link between the violation complained of and the pecuniary damage requested. In respect of

the claim for non-pecuniary damage, the Government maintained that the finding of a violation would constitute sufficient just satisfaction.

39. The Court reiterates that it cannot speculate what the outcome of the proceedings would be if they had been in conformity with Article 6 of the Convention. Accordingly, it dismisses the claim for damages for pecuniary loss. 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 *mutatis mutandis Osinger v. Austria*, no. 54645/00, § 58, 24 March 2005, with further references).

B. Costs and expenses

40. The applicant requested EUR 663.86 (including VAT) for reimbursement of costs incurred in the domestic proceedings, namely for the lawyer's fees concerning the submissions of his comments with the Administrative Court on 24 February 1999, and EUR 7370.74 (including VAT) for costs of the Convention proceedings.

41. 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. As regards the costs claim for the Convention proceedings, the Government pointed out that it was excessive.

42. As to the costs claim concerning the domestic proceedings, the Court notes that in the submission of 24 February 1999 with the Administrative Court the applicant commented on the experts opinions and further requested an oral hearing before the Administrative Court. However, 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.

43. 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 3,500 under this head.

C. Default interest

44. 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 on account of the lack of a public oral hearing before the Administrative Court;

2. *Holds* that it is unnecessary to examine the applicant's further complaints under 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 in accordance with Article 44 § 2 of the Convention, EUR 3,500 (three thousand and five hundred 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 10 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President