



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

THIRD SECTION

CASE OF BRUNNTHALER v. AUSTRIA

(Application no. 45289/99)

JUDGMENT

STRASBOURG

29 June 2006

FINAL

29/09/2006

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 Brunnthaler v. Austria,

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

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr L. CAFLISCH,

Mr C. BÎRSAN,

Mr V. ZAGREBELSKY,

Mrs E. STEINER,

Mrs A. GYULUMYAN, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 16 June 2005 and 8 June 2006,

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

PROCEDURE

1. The case originated in an application (no. 45289/99) 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, Mr Martin Brunnthaler (“the applicant”), on 3 November 1998.

2. The applicant was represented by Mr H. Blum, a lawyer practising in Linz. The Austrian Government (“the Government”) were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged in particular that the proceedings relating to his request for an industrial licence for chimney sweeping 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. 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).

6. By a decision of 16 June 2005, the Court declared the application partly admissible.

7. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1949 and lives in Linz. He is a chimney sweeper by profession.

9. On 4 August 1988 the applicant filed a request for an industrial licence (*Konzession*) for chimney sweeping in Linz. On 31 March 1989 he filed an alternative request to start chimney sweeping in a specified administrative area (*Kehrgebiet*). Following a new regulation concerning the division of those administrative areas which entered into force in December 1991, the applicant, on 14 January 1992, modified his request into one for an industrial licence as a chimney sweeper in a different specified administrative area.

10. As the Upper Austria Regional Governor (*Landeshauptmann*) did not deal with his request, the applicant, on 20 July 1992, filed a request for the transfer of jurisdiction (*Devolutionsantrag*) with the Federal Minister of Economic Affairs (*Bundesminister für wirtschaftliche Angelegenheiten*).

11. On 3 June 1993 the Federal Minister allowed his request for transfer but dismissed his application for the industrial licence under the Trade Act (*Gewerbeordnung*). Referring to the submissions of the competent municipalities, he noted that there was no need for further chimney sweepers in the concerned area.

12. On 20 July 1993 the applicant filed a complaint with the Administrative Court. He complained in particular that the Federal Minister had not made sufficient investigations for his findings.

13. On 20 December 1994 the Administrative Court (*Verwaltungsgerichtshof*) quashed the decision on procedural grounds.

14. On 3 February 1995 the Federal Minister rejected the applicant's request for a transfer of jurisdiction, finding that, according to the amended Trade Act (*Gewerbeordnung*), the authority now competent for applications of the applicant's kind was the Administrative District Authority, namely the Linz Municipal Office (*Magistrat*). Therefore, the Regional Governor (*Landeshauptmann*) was competent to rule on any request for transfer of jurisdiction.

15. On 19 December 1995 the Administrative Court confirmed this decision.

16. As the Municipal Office did not decide on his request, the applicant, on 2 April 1996, filed a request for the transfer of jurisdiction with the Regional Governor.

17. On 10 May 1996 the Regional Governor dismissed the applicant's request.

18. Following the information in this decision as to further remedies (*Rechtsmittelbelehrung*), the applicant on 26 June 1996 filed against this decision a complaint with the Constitutional Court.

19. On 30 September 1997 the Constitutional Court (*Verfassungsgerichtshof*) declined to deal with the applicant's complaint and, upon the applicant's request, transferred the case to the Administrative Court.

20. On 17 April 1998 the Administrative Court rejected the applicant's complaint for non-exhaustion of administrative remedies as he had failed to file an appeal with the Federal Minister for Economic Affairs.

21. Referring to the erroneous information as to further remedies in the decision of the Regional Governor of 10 May 1996, the applicant requested reinstitution into the proceedings (*Wiedereinsetzungsantrag*) and at the same time filed an appeal against that decision with the Federal Minister for Economic Affairs.

22. On 1 July 1998 the Regional Governor allowed the reinstitution into proceedings. On 3 September 1999 the Federal Minister for Economic Affairs dismissed the applicant's appeal.

23. Meanwhile, however, the Linz Municipal Office, on 23 January 1997, again dismissed the applicant's request for an industrial licence.

24. On 21 July 1997 the Regional Governor confirmed this decision.

25. On 30 September 1997 the Constitutional Court declined to deal with the applicant's complaint and, upon the applicant's request of 29 December 1997, transferred the case to the Administrative Court.

26. On 13 March, 7 April, 28 April and on 15 May 1998 the applicant, in compliance with the Administrative Court's order to remedy certain procedural effects, filed further submissions.

27. On 9 September 1998 the Administrative Court dismissed the applicant's complaint as being unfounded. This decision was served on the applicant's counsel on 21 September 1998.

II. RELEVANT DOMESTIC LAW

28. Section 73 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) deals with the administrative authorities' duty to decide. Its relevant part reads as follows:

“(1) Subject to any contrary provision in the administrative regulations, the authorities must give a decision on applications by parties ... and appeals without unnecessary delay, and at the latest six months after the application or appeal has been lodged.

(2) If the decision is not served on the party within this time-limit, jurisdiction will be transferred to the competent superior authority upon the party's written request

(*Devolutionsantrag*). ...This request has to be refused by the competent superior authority if the delay was not caused by preponderant fault of the authority.

(3) The period for giving a decision by the superior authority runs from the date the request for transfer of jurisdiction was lodged with it.”

THE LAW

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

29. The applicant complained about the length of the above proceedings. He relied on Article 6 § 1 of the Convention which, as far as relevant, 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...”

1. *Applicability of Article 6 § 1*

30. In their supplementary observations of 19 September 2005 the Government again contested the applicability of Article 6 of the Convention to the proceedings at issue. The Government submitted that the proceedings related to the applicant’s request for a first licence for chimney sweeping to which the applicant, in the absence of any need for further chimney sweeping business in the area concerned, had no right. Furthermore, chimney sweepers may be required by regional legislation to carry out tasks falling in principle to public authorities and act as organs assisting the municipality. The Government referred in particular to the carrying out of flue gas measurements (*Abgasmessungen*) as preventive measures, the preparation of expert opinions, the sweeping, cleaning and controlling of chimneys, fireplaces and furnaces, flue gas appliances and joining pieces, the testing of the functioning and fire safety of technical installations, regular checks under the Clean Air Act (*Luftreinhaltegesetz*) and the report of any defects to the fire authorities. The Government alleged that on average 75 % of the activities carried out by chimney sweepers constituted sovereign tasks of the State. Referring to the findings of the *Pellegrin v. France* judgment ([GC], no. 28541/95, § 66, ECHR 1999-VIII) the Government therefore disputed that the applicant could rely on a “civil right” within the meaning of Article 6 of the Convention.

31. The applicant contested these arguments and submitted in particular that only few activities of a chimney sweeper concerned the public interest, while the majority of such work was commercial and stood under

considerable competition. There was no doubt that Article 6 was applicable to the present proceedings.

32. 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, as a recent authority, *Birnleitner v. Austria*, no. 45293/99, § 31, 24 February 2005).

33. In the present case, the applicant filed a request for an industrial licence for chimney sweeping in accordance with the relevant provisions of the Trade Act, which provides for the granting of such licence in case the legal requirements are met. 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 object and purpose of the applicable legislation in the field in question and give sufficient and relevant reasons for their decision taken after fair proceedings.

34. The Court, therefore, 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 (see, *mutatis mutandis*, *Birnleitner v. Austria*, cited above, § 33). The Court finally does not discern any fresh evidence capable of persuading it to reconsider the ruling it gave in its decision of 16 June 2005 that the duties and responsibilities of a chimney sweeper under Austrian law were not such as to exclude the dispute at issue from the scope of Article 6 § 1. In particular, in its admissibility decision the Court considered the duty of chimney sweepers to examine buildings as to their conformity with fire protection legislation, to inform operators of heating facilities about relevant legislation and, in case of imminent danger, to report the matter to the competent authority, did not "typify the specific activities of the public service ... as the depository of public authority responsible for protecting the general interests of the State or other public authorities" (see *Pellegrin v. France* [GC], no. 28541/95, § 66, ECHR 1999).

35. Accordingly, Article 6 is applicable to the proceedings at issue.

2. Merits of the complaint

36. The Government asserted that the length of the proceedings was reasonable. Certain delays were due to the applicant's conduct and the fact that proceedings were complex, namely because careful investigations had to be undertaken and at the same time the applicable law underwent modifications.

37. The applicant maintained that the length of the proceedings breached the “reasonable time” requirement laid down in Article 6 § 1.

38. The Court notes, as it has already found in its decision of 16 June 2005, that the period to be taken into consideration started with the applicant’s request for transfer of jurisdiction on 20 July 1992. It ended on 21 September 1998 when the Administrative Court’s final decision was served on the applicant’s counsel. The proceedings, thus, lasted for six years and two months during which the applicant’s case was considered before four instances and once remitted back.

39. 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).

40. 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. However, there were several periods of delay attributable to the authorities. The Court namely observes that there was a period of procedural inactivity of almost one year until the Federal Minister on 3 June 1993 took a decision after the applicant’s request for transfer of jurisdiction of 20 July 1992. Another year and five months elapsed until the Administrative Court on 20 December 1994 decided on the applicant’s complaint of 20 July 1993. Finally, the Court notes that after the Administrative Court’s finding of 19 December 1995 according to which the Municipal Office was competent to decide, it took another 13 months until the Municipal Office’s decision of 23 January 1997.

41. Having regard to these various delays and the overall length of the proceedings, the Court finds that the duration of the proceedings was excessive and failed to meet the “reasonable time” requirement.

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

II. 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 claimed 10,000 EUR in respect of non-pecuniary damage.

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

46. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 2,500 under that head.

B. Costs and expenses

47. The applicant claimed 15,540.13 EUR for costs and expenses of the domestic proceedings, and 6,414.14 EUR in respect of costs incurred in the proceedings before the Court.

48. The Government submitted that only the applicant's costs for the request for a transfer of jurisdiction in 1992 should be reimbursed as it was taken in order to prevent the alleged violation of the Convention. As to the costs of the Convention proceedings, the Government submitted that they were excessive.

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 in order to prevent the alleged violation 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 considers that these requirements are only met by the requests for transfer of jurisdiction of 20 February 1992 and of 2 April 1996 and the applicant's complaint of 26 June 1996 against the negative decision upon the latter request. The applicant put these costs at 2,686.88 EUR including turnover tax. Finally, as to the costs incurred in the Convention proceedings, the Court finds the applicant's claim excessive and notes in particular that the application was declared admissible only in part. It thus considers it reasonable to award the sum of EUR 3,000 for the proceedings before the Court.

50. In sum, the Court makes an award of EUR 5,686.88 for costs and expenses. This sum includes any taxes chargeable on this amount.

C. Default interest

51. 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*
 - (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, the following amounts:
 - (i) EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage;
 - (ii) EUR 5,686.88 (five thousand six hundred eighty six euros and eighty eight cents) in respect of costs and expenses;
 - (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 29 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President