



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

FIRST SECTION

CASE OF MÜLLER v. AUSTRIA

(Application no. 12555/03)

JUDGMENT

STRASBOURG

5 October 2006

FINAL

05/01/2007

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 Müller v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mrs N. VAJIĆ,

Mr A. KOVLER,

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 14 September 2006,

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

PROCEDURE

1. The case originated in an application (no. 12555/03) 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 Pierre Müller (“the applicant”), on 3 April 2003.

2. The applicant was represented by Mr Herbert Pochieser, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Mr Ferdinand Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. On 15 September 2005 the Court decided to communicate the complaint concerning the length of the proceedings to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1968 and lives in Vienna. He is the managing director (*Geschäftsführer*) of the M company.

5. On 24 January 1994 an officer of the Vienna Employment Office (*Landesarbeitsamt*) found Mr S, a Polish national, working on the construction site of the M company without employment or work permit.

6. Having obtained the applicant's submissions on 11 August 1994, the Vienna municipality (*Magistrat*), on 10 August 1995, issued a penal order (*Straferkenntnis*) against the applicant in which it convicted him under ss. 28 and 3 of the Employment of Aliens Act (*Ausländerbeschäftigungsgesetz*) of illegal employment of a foreigner and sentenced him to a fine of 10,000 ATS (approximately 700 EUR).

7. On 28 May 1996 the Vienna Independent Administrative Panel (*Unabhängiger Verwaltungssenat*, IAP), having held two public hearings, confirmed this decision. It did not follow the applicant's argument that he was not guilty as he had not known about the illegal employment of Mr S and had ordered a subordinate to observe the legality of the M company's employment policy. The IAP noted that the applicant had failed to set up an effective supervising system and had not shown how and when he had exercised control whether his orders were respected. It concluded that the applicant had not convincingly shown that no fault lay with him within the meaning of section 5 § 1 of the Code of Administrative Offences (*Verwaltungsstrafgesetz*).

8. The applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*) on 22 July 1996. On the same day he lodged a further complaint against another penal order of the IAP concerning also illegal employment of foreigners. The Constitutional Court joined these proceedings and, on 24 September 1996, granted the applicant's requests for suspensive effect.

9. At the same time, proceedings concerning complaints lodged by another managing director of the M company and the M company itself were pending before the Constitutional Court which involved the review of the constitutionality of a specific provision of the Employment of Aliens Act.

10. On 15 October 1998 the Constitutional Court declined to deal with the applicant's complaint for lack of prospect of success. It referred to its decision of 2 October 1997 in which it had found that the Independent Administrative Panels in principle qualified as “tribunals” but that the IAP in this case lacked “independence” as the deciding judge was a former civil servant of the federal authority which had issued the impugned decision and was likely to return after his term of office to the federal authority which had issued the impugned decision. The Constitutional Court noted that in the present case there was no concrete indication of lack of independence of the deciding member of the Vienna IAP. Upon the applicant's request, it transferred the case to the Administrative Court (*Verwaltungsgerichtshof*).

11. On 26 March 1999 the applicant submitted his amended complaint and submitted that the IAP's decision was unlawful on account of its content and the breach of procedural rules. The Administrative Court instituted preliminary proceedings on 6 April 1999. On the same date it granted suspensive effect to the applicant's complaint. On 17 May 1999 the

Administrative Court obtained the IAP's submissions. On 3 September 2002 it dismissed the applicant's complaint. On the same day it also confirmed the applicant's conviction concerning illegal employment of three other Polish nationals. These decisions were served on the applicant's counsel on 3 October 2002.

II. RELEVANT DOMESTIC LAW

12. The relevant provisions of the Austrian Federal Constitution (*Bundes-Verfassungsgesetz*) concerning the establishment of Independent Administrative Panels which entered into force on 1 January 1991 read as follows:

Article 129

“It is the task of the Independent Administrative Panels in the regions and the Administrative Court in Vienna to ensure the lawfulness of the entire public administration.”

Article 129b

“(1) Independent Administrative Panels are composed of a president, a deputy president and a sufficient number of further members. Its members are appointed by the Regional Government for a period of at least six years. ...

(2) In fulfilling their tasks under Articles 129a and 129b the members of the Independent Administrative Panel are not bound by any instructions. The court business shall be distributed among the members in advance for the period provided for in the regional legislation. A matter which according to such a schedule is the business of one member may only be withdrawn from him or her in case of impediment by a decision of the president.

(3) Before the end of their term of office members of Independent Administrative Panels may only be removed from office in the cases specified by the law and upon a decision of the Independent Administrative Panel itself.

13. The Vienna Act on the Independent Administrative Panel, Regional Gazette no. 53/1990 (*Gesetz vom 26. Juni über den Unabhängigen Verwaltungssenat Wien, Landesgesetzblatt no. 53/1990*), as in force at the time of the events, repeated the provisions of the Federal Constitution as regards appointment, removal and freedom from instructions of the members of the Vienna Independent Administrative Panel (ss. 4-6). It further stated that the members of the Independent Administrative Panel should be chosen in a procedure including public announcement of the vacancy and a hearing of the Panel's president. At least a quarter of the members of the Independent Administrative Panel should be taken from departments of the federal authorities.

14. Section 5 § 1 of the Code of Administrative Offences provides:

“Unless a provision of administrative law states otherwise, negligent behaviour is sufficient to establish guilt. Negligence is to be assumed in the case of failure to observe a prohibition or a prescription where damage or danger is not an element of the administrative offence, and the defendant does not convincingly show that no fault lies with him for the contravention of the provision of administrative law.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION CONCERNING THE LENGTH OF THE PROCEEDINGS

15. 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, as far as relevant in the present case, reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by an independent and impartial tribunal...”

16. The Government contested that argument.

17. The period to be taken into consideration began on 11 August 1994 when the applicant was invited to comment on the charge against him and ended on 3 October 2002 when the Administrative Court's decision was served on the applicant's counsel. It thus lasted for eight years and nearly two months before four levels of jurisdiction.

A. Admissibility

18. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

19. The Government argued that the proceedings before the Vienna municipality and the IAP had been handled without long delay. The longer duration of the proceedings before the Constitutional Court was proportionate in regard of the complexity of the case which resulted from a global consideration of all proceedings concerning the M company and its managing directors. These proceedings were connected to one another in factual and legal aspects. In addition, the applicant's complaint raised

complex legal questions concerning, firstly, the independence of the IAP and its quality as a tribunal and, secondly, the issue of double punishment.

20. The applicant contested these arguments. He submitted that the proceedings concerning the M company and another of its managerial directors did not have any effects on the proceedings at issue. No delays had been caused by him and the case was not really complex.

21. 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 (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II)

22. In the present case, the applicant did not contribute to the duration of the proceedings. The Court further cannot find that the proceedings were particularly complex. As to the Government's argument that the case raised complex legal questions before the Constitutional Court, the Court notes that this court, referring to its previous case-law, declined to deal with the applicant's complaint for lack of prospect of success. In any event, the Court observes that there was a period of inactivity of three years three months and some two weeks before the Administrative Court, namely from 17 May 1999 (when the IAP filed its observations) until 3 September 2002 (when the Administrative Court decided). In the absence of any explanation for this period and having regard to the overall duration of the proceedings, the Court finds that the applicant's case has not been determined within a reasonable time.

23. There has thus been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

Admissibility

24. The applicant complained that his case was not considered by a tribunal within the meaning of Article 6 § 1. In this regard he complained about the alleged lack of independence of the IAP which judges might be civil servants liable to return to lower instances after their term of office. He further referred to the possibility of removal of judges from office before end of term. He submitted that in proceedings under the Aliens' Act the Vienna IAP allegedly aligns itself to some extent to the opinion of the competent executive authorities. He finally referred to alleged interrelations between the Vienna municipality and the Vienna IAP but did not give any further details in this regard. In any event, the applicant complained under Article 2 of Protocol No. 7 of the Convention about a lack of review by a higher tribunal. He submitted that the Administrative Court's review was

insufficient as it cannot be regarded as a judicial body with full jurisdiction on facts and law, and that the Administrative Court generally does not hold oral hearings in administrative criminal proceedings.

25. The Court notes that the applicant's case was first considered by the Vienna municipality, a body which does not satisfy the above requirements of Article 6 § 1. The applicant's appeal against the penal order of the Vienna municipality was dealt with by the Vienna IAP. The Court has repeatedly found that the Independent Administrative Panel has to be regarded as a tribunal within the meaning of Article 6 § 1 of the Convention (see, for example, *Liedermann v. Austria*, (dec.), no. 54272/00, 5 December 2002, with further reference to *Baischer v. Austria*, no. 32381/96, § 25, 20 December 2001). The applicant does not submit any argument sufficient to call these findings into doubt.

As regards the complaint under Article 2 of Protocol no. 7, the Court recalls that the Contracting States may limit the scope of the review by a higher tribunal by virtue of the reference in § 1 of this Article to national law. In several Member States of the Council of Europe such a review is limited to questions of law or may require the person wishing to appeal to apply for leave to do so (see *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I (extracts)). In the present case, there is no indication that the scope of review of the Administrative Court was insufficient for the purposes of Article 2 of Protocol no. 7.

26. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

27. The applicant further complained about the amount of his fine of ATS 10,000 (approximately 700 EUR) which he considered excessive in comparison to his monthly salary of ATS 25,000 (approximately 1,820 EUR) and, generally, to the fines imposed in criminal proceedings under the Criminal Code (*Strafgesetzbuch*). The applicant did not invoke any Article of the Convention in this regard.

28. The Court recalls that matters of appropriate sentencing largely fall outside the scope of Convention, as it is not the Court's role to decide what is the appropriate sentence applicable to a particular offence (see, *mutatis mutandis*, *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI). The sentence imposed on the applicant neither appears arbitrary nor disproportionate and, therefore, does not raise any issue under the Convention.

29. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

30. The applicant alleged a breach of Article 4 of Protocol no. 7 of the Convention in that subsequent to the present proceedings he had been punished for the illegal employment of other foreigners and that the other managing director of the M company had also been punished in this respect. He further referred to ss. 28b and 30 of the Employment of Aliens Act

providing that a company's previous illegal employment of a foreigner may be disclosed by the Minister of Finance in tendering procedures and may justify the refusal of an employment permit to the company concerned.

31. The Court notes that Article 4 of Protocol no.7 of the Convention relates to a new set of proceedings against the same person in respect of the same offence. Consequently, neither the applicant's conviction of illegal employment of other foreigners, nor the conviction of another person in this respect raises an issue under this Article. The Court further does not find it necessary to consider the compliance of ss. 28b and 30 of the Employment of Aliens Act with the guarantees under the Convention as such, as it is not the Court's task to examine the domestic legislation in the abstract.

32. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

33. The applicant finally alleged a violation of Article 6 § 2 of the Convention and submitted that he was required by section 5 § 1 of the Code of Administrative Offences to exculpate himself, rather than the burden being on the prosecution.

34. The Court notes that section 5 § 1 of the Code of Administrative Offences contains a presumption that a person who contravened a prohibition has acted at least with negligence, unless he or she is able to show that no fault lies with him or her. The Court reiterates that Article 6 § 2 does not prohibit the use of presumption of fact or law, if they remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, § 28). In the present case, the applicant was not left without means of defence: Mr S, a Polish national was found to be working on the construction site of the M company without an employment or work permit. The applicant, the managing director of the M company, tried to allege that he was not at fault as he had not known about the illegal employment of Mr S and had ordered a subordinate to observe the legality of the company's employment policy. The Austrian authorities rejected this argument as they found that the applicant had not set up an effective control system on whether his orders had been respected. The Court cannot find that by doing so, the Austrian authorities overstepped the limits set out by Article 6 § 2 (see *mutatis mutandis Bruckner v. Austria*, no. 21442/93, Commission decision of 18 October 1994).

35. It follows that also this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. 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 claimed 6,000 euros (EUR) in respect of non-pecuniary damage.

38. The Government contested the claim and submitted that in the present case a finding of violation constituted in itself sufficient just satisfaction.

39. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 4,000 under that head.

B. Costs and expenses

40. The applicant also claimed EUR 4,348.45 including VAT for the costs and expenses incurred before the domestic courts and EUR 2,001.96 including VAT for those incurred before the Court.

41. The Government contested the claim concerning the costs of domestic proceedings for lack of causal link with the alleged violation of the length of the proceedings.

42. 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 or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Alge v. Austria*, no. 38185/97, § 39, 22 January 2004). In the present case, it does not appear from the applicant's submissions that any specific costs were incurred in an attempt to accelerate the proceedings. Therefore, no award can be made under the head of the costs of the domestic proceedings.

43. As to the costs of the Convention proceedings, the Court notes that the applicant, who was represented by counsel, did not have the benefit of legal aid. It considers that the sum claimed should be awarded in full. The Court considers it reasonable to award the applicant the full amount claimed, namely EUR 2,001.96 under this head. This amount includes any taxes chargeable on this amount.

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. *Declares* the complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the proceedings;
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 4,000 (four thousand euros) in respect of non-pecuniary damage and EUR 2,001.96 (two thousand and one euros and ninety six 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President