



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

FIRST SECTION

CASE OF BÖSCH v. AUSTRIA

(Application no. 17912/05)

JUDGMENT

STRASBOURG

3 May 2007

FINAL

03/08/2007

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 Bösch 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 N. VAJIĆ,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 5 April 2007,

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

PROCEDURE

1. The case originated in an application (no. 17912/05) 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 Kurt Bösch (“the applicant”), on 10 May 2005.

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 Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant complained, in particular, about a breach of Article 6 of the Convention on account of unreasonably lengthy proceedings in which no oral hearing before a tribunal was held.

4. On 10 April 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is the owner of a farm in Frastranz. On 21 April 1999 he asked the Mayor (*Bürgermeister*) of Frastanz to grant him a permit for

the building of roofing between two buildings in order to create a tool shed on his farm.

6. On 12 July 1999 the Mayor, acting as building authority of first instance, dismissed this request as the project was contrary to the relevant area zoning plan (*Flächenwidmungsplan*). On 22 July 1999 the applicant appealed and submitted in particular that permits had been granted for the building of the other two buildings. He had constructed the roofing at issue at the same time and then sought a building permit for it as in the other cases. He further requested, should it be necessary, that the Municipal Council grant him an exemption permit under Section 22 of the Regional Planning Act (*Raumplanungsgesetz*). Under this provision a land owner may be exempted under certain conditions from the application of the relevant area zoning plan.

7. The Municipal Council (*Gemeindeamt*) remitted the case back to the Mayor. Having held a hearing on 15 March 2000, the Mayor, on 13 September 2000, again dismissed the applicant's request for a building permit. He referred to the relevant area zoning plan (*Flächenwidmungsplan*) and further noted that the local council (*Gemeindevorstand*) had not granted an exemption permit. The Mayor finally observed that for the construction of the two other buildings there had been proceedings for re-designation of the concerned land. The applicant had then promised to demolish the already existing roofing which had been built without the authorities' consent and the relating demolition order had not been challenged by the applicant.

8. By a decision of 15 January 2001 the local council dismissed the applicant's request for an exemption permit. It noted that the building project concerned 60 square metres while the relevant provisions of the Vorarlberg Regional Planning Act (*Raumplanungsgesetz*) provided such an exemption only for a small-sized project of around 25 square meters.

9. On 16 January and 11 July 2001 respectively the Municipal Council (*Gemeindeamt*) dismissed the applicant's appeals of 27 September 2000 against the above decisions.

10. The Feldkirch District Administrative Authority (*Bezirkshauptmannschaft*) confirmed these decisions on 28 March and 8 October 2001 respectively.

11. On 15 May 2001 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*) concerning the refusal of the building permit and requested the court to examine the lawfulness of the underlying area zoning plan. He further requested the Constitutional Court to hold an oral hearing.

12. On 20 June 2001 the Constitutional Court declined to deal with the applicant's complaint as it had no prospect of success.

13. The applicant subsequently filed two complaints with the Administrative Court (*Verwaltungsgerichtshof*). In the first complaint, of

24 September 2001, he submitted that the refusal to grant him a building permit had been unlawful as the actual designation of the land concerned was not clear and the underlying area zoning plan was unlawful. In the latter regard, he requested the Administrative Court to institute proceedings for examination of the lawfulness of the area zoning plan with the Constitutional Court after having established the relevant facts. He further submitted that the relevant authorities should have waited for the outcome of the proceedings concerning his request for an exemption permit. In his second complaint, of 20 November 2001, the applicant submitted that an exemption should have been granted as his project was small-sized within the meaning of the Regional Planning Act. In both complaints the applicant asked the Administrative Court to hold a hearing.

14. On 21 October 2004 the Administrative Court dismissed both complaints, which it had joined. The Administrative Court found, in accordance with Section 39(2) of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), that there was no need for a hearing as the applicant's complaints concerned only legal questions of no particular complexity. The question of the lawfulness of the area zoning plan had been considered by the Constitutional Court, which had no doubts as to the lawfulness either. This decision was served on the applicant's counsel on 11 November 2004.

15. In the meantime, on 29 June 2000, the Municipal Council dismissed the applicant's request for re-designation of the land concerned. The applicant did not pursue these proceedings any further.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained under Article 6 § 1 of the Convention about the long duration of the above proceedings. He further complained about the lack of an oral hearing before the Constitutional and the Administrative Courts.

Article 6 § 1, as far as relevant, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal...”

A. Admissibility

17. The Court notes that this part of the application 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

1. The complaint concerning the length of the proceedings

18. The applicant complained that the proceedings had been unreasonably long.

The Government referred to the facts of the case and maintained that there had been no violation of Article 6 of the Convention.

19. The Court notes that the applicant's complaint concerned what were originally two sets of proceedings later joined by the domestic authorities, namely the proceedings relating to the applicant's request for a building permit and the proceedings relating to his request for an exemption permit. The applicant filed his request for a building permit on 21 April 1999 and his request for an exemption permit on 22 July 1999. However, the relevant period for the purposes of Article 6 § 1 started only on 20 September 2000, when the applicant filed an appeal against the refusal to grant him an exemption permit since it was at that moment that a serious and genuine dispute about the existence and scope in domestic law of a right asserted by the applicant first arose (see, *mutatis mutandis*, *Wiesinger v. Austria*, judgment of 30 October 1991, Series A no. 213, p. 20, § 51, and *Kolb and Others v. Austria*, nos. 35021/97 and 45774/99, § 49, 17 April 2003). In this regard, the Court notes that the proceedings concerning the applicant's request for a building permit did not, in themselves, involve a determination of the applicant's civil rights within the meaning of Article 6 § 1 of the Convention as the relevant area zoning plan did not grant the applicant a right to build on the land concerned or to have the designation of that land changed (see, *mutatis mutandis*, *Enzi v. Austria* (dec.), no. 29268/95, 8 February 2000, with further references).

20. The proceedings terminated on 11 November 2004 when the Administrative Court's decision was served on the applicant's counsel. Thus, the proceedings lasted four years and nearly two months.

21. The Court reiterates that the reasonableness of the length of proceedings is to be assessed in each case according to the particular circumstances and having regard to the criteria laid down in the Court's case-law, namely the complexity of the case, the conduct of the authorities and the conduct of the parties.

22. The Court notes that the proceedings were not very complex and that the applicant did not contribute to their duration. As regards the conduct of the domestic authorities, the Court notes that while the lower instances dealt expeditiously with the case, it was pending before the Administrative Court for nearly three years. In the absence of any explanation for this period, the

Court finds that the applicant's case was not determined within a reasonable time. There has thus been a violation of Article 6 § 1 of the Convention.

2. The complaint about the lack of an oral hearing

23. The applicant further complained that there had been no oral hearing before the Administrative Court and no visit of the site by it.

24. The Government submitted in particular that the Administrative Court only had to deal with questions of law which could be determined on the basis of the case-file without a hearing. Furthermore, the applicant had failed to give any reasons for his requests for an oral hearing.

25. The applicant contested these arguments. He argued that there had been no “exceptional circumstances” justifying the absence of an oral hearing. His case requested the establishment of the facts by an independent tribunal in adversarial proceedings. Had the Administrative Court conducted an oral hearing he could have shown the site by video recordings.

26. The Court notes that, 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 a tribunal examining his case, unless there were exceptional circumstances which justified dispensing with such a hearing (see, for instance, *Fredin v. Sweden* (no. 2), judgment of 23 February 1994, Series A, no. 283 A, pp. 10-11, §§ 21-22; *Fischer*, cited above, pp. 20-21, § 44; *Stallinger and Kuso v. Austria*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-II, pp. 679-80, § 51; and *Allan Jacobsson v. Sweden* (no. 2), judgment of 19 February 1998, *Reports* 1998-I, p. 168, § 46).

27. 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, pp. 19-20, § 58; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002; and *Speil v. Austria* (dec.) no. 42057/98, 5 September 2002). In particular, the Court has 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 dispense with a hearing if the case could be adequately resolved on the basis of the case-file and the parties' written observations (see, amongst others, *Pitkänen v. Sweden* (dec.), no. 52793/99, 26 August 2003, and *Döry v. Sweden*, no. 28394/95, 12 November 2002).

28. In the present circumstances, the applicant's case was examined by the Municipal Council and the District Administrative Authority, i.e. purely administrative authorities, and then by the Administrative Court. The Court has repeatedly held that in proceedings like those at issue, namely administrative civil proceedings, the Administrative Court qualifies as the

one and only tribunal (see, as a recent authority, *Brugger v. Austria*, no. 76293/01, § 20, 26 January 2006, with further references). Thus, the Court will examine whether the lack of an oral hearing before the Administrative Court infringed the applicant's rights under Article 6 § 1 of the Convention.

29. The Court notes that the applicant complained to the Administrative Court in particular that an exemption should have been granted as his project was small-sized within the meaning of the Regional Planning Act.

30. The Court cannot find in such circumstances that the subject matter of the dispute was of such a nature, namely a highly technical issue or one of a mere legal nature, as to dispense the Administrative Court with its obligation to hold a hearing.

31. There has accordingly been a violation of Article 6 § 1 of the Convention on account of the lack of a public oral hearing before a tribunal.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 OF THE CONVENTION

Admissibility

32. The applicant complained that the refusal of the building permit was in violation of his right to property under Article 1 of Protocol no. 1 of the Convention.

33. The Court notes, however, that the authorities' decision refusing a building permit on the ground that it was contrary to the area zoning plan and rejecting the applicant's complaints that the said zoning plan was unlawful did not alter the already existing legal position of the applicant. Furthermore, the applicant did not pursue the proceedings concerning his request for re-designation of the concerned premises after the first-instance decision. Thus, the decision complained of does not disclose any appearance of a violation of the applicant's rights under Article 1 Protocol 1 (see, *mutatis mutandis*, *Schertler v. Austria* (dec.), no. 26575/95, 26 June 1996).

34. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. Under the head of pecuniary damage the applicant claimed reimbursement of the costs of the domestic proceedings. He did not, however, further substantiate this claim. He also claimed 12,000 euros (EUR) for non-pecuniary damage.

37. The Government contested that there was any causal link between the costs of the domestic proceedings and the complaints made before the Court. They further argued that the claim for non-pecuniary damage was excessive.

38. The Court does not discern any causal link between the violations found and the pecuniary damage claimed by the applicant; it therefore rejects this claim. On the other hand, the Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 2,500 under this head.

B. Costs and expenses

39. The applicant claimed EUR 9,992.27 for the costs incurred in the proceedings before the Court.

40. The Government submitted that this claim was excessive.

41. The Court notes that the applicant, who was represented by counsel, did not have the benefit of legal aid. Making an assessment on an equitable basis and having regard to the sums awarded in similar cases, the Court awards the applicant EUR 2,000 under this head.

C. Default interest

42. 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 complaints concerning the excessive length of the proceedings and the lack of an oral hearing before a tribunal 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 excessive length of the proceedings;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of an oral hearing before a tribunal;
4. *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;
 - (i) EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses;
 - (iii) plus any tax that may be chargeable on the above amounts;
 - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President