



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

FIRST SECTION

CASE OF EMMER-REISSIG v. AUSTRIA

(Application no. 11032/04)

JUDGMENT

STRASBOURG

10 May 2007

FINAL

10/08/2007

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 Emmer-Reissig v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr G. MALINVERNI, *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. 11032/04) 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 Herwig C. Emmer-Reissig (“the applicant”), on 11 March 2004.

2. The Austrian Government (“the Government”) were represented by their Agent, Ambassador Mr F. Trauttmannsdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that the Administrative Court failed to hold an oral hearing, which was in breach of Article 6.

4. On 30 November 2005 the Court decided to communicate 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**THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1921 and lives in Klosterneuburg.

6. He is a lawyer practising in Klosterneuburg and the owner of a parcel of land in the municipality of Königstetten, which is designated as “forest” land in the zoning plan. On parts of this parcel – approximately

1,500 square meters – he runs an organic farm on a part-time basis, breeding sheep and goats. Besides that, he keeps bees and grows herbs.

7. On 18 August 1998 the applicant applied to the mayor of Königstetten for a building permit for a shed, to be used as a shelter for sheep and goats in summer and beehives in winter. It is also designed as a refuge for farm workers. He therefore submitted construction plans for the planned shed and a map of the land in question.

8. The mayor rejected the applicant's request on 16 February 2000. Relying on a report by an agricultural expert at the Lower Austria Regional Government, he stated that, in view of its shape, size and design, it would not qualify as a farm building and that even if it was an agricultural construction, it could not be erected on the land in question, as the latter had been designated as forest and grassland.

9. The applicant lodged an appeal with the municipality of Königstetten on 10 April 2000. On 3 July 2000 the municipality dismissed his appeal on the same grounds.

10. Subsequently, on 13 September 2000, the applicant filed an objection (*Vorstellung*) with the Lower Austria Regional Government and requested it to hear representatives of the District Farmer's Association (DFA, *Bezirksbauernkammer*) and the Austrian beekeeper association (ABA, *Österreichischer Imkerbund*) as experts who would prove that the building he intended to erect was necessary for the intended agricultural enterprise.

11. The Regional Government quashed the municipality's decision on 10 January 2001 and referred the case back to the municipal council. It stated that the municipality had failed to address all the points of appeal.

12. The applicant lodged further grounds in support of his appeal on 19 March, 4 and 24 April 2001. In addition to his comments on the decision of 3 July 2000, he filed requests for the taking of evidence. He also submitted a statement by the Tulln Administrative District Authority and a document he referred to as a business plan.

13. On 23 November 2001 the Königstetten Municipality requested the applicant to comment on an expert opinion it had obtained from the Planning Office at the Lower Austria Regional Government (*Gebietsbauamt*) on 31 October 2001. It stated that by far the largest part of the land was covered by forest, which would impede serious agricultural activities. With reference to the earlier decisions, it repeated that, judging by its design and shape, the building at issue would be untypical of an agricultural shed and that the applicant could be assumed never to have intended to carry on agricultural activities, but rather to use it for different purposes.

14. The applicant commented on the expert opinion on 10 December 2001. Claiming that the authorities had incorrectly established the relevant facts, he contended that the expert opinion was in breach of Austrian law and European Community law. Besides that, the applicant

repeated his request to obtain opinions from the DFA, the ABA and a certain organic farming association (*Biobauernverband Ernte*) in order to prove the feasibility of the business plan and its compliance with the relevant legal criteria. He also filed an application for an on-site inspection of the land at issue.

15. On 29 January 2002 the municipal council also rejected the applicant's appeal. It held that the planned construction would conflict with the zoning plan and that the building would not resemble a shed for agricultural use.

16. The applicant filed an objection (*Vorstellung*) with the Lower Austria Regional Government again on 11 February 2002, submitting that the municipality had relied solely on an incorrect expert opinion without carrying out investigations of its own. In addition, he claimed that the decision was in breach of European Community law.

17. Subsequently, on 12 March 2002, the applicant lodged a complaint with the Administrative Court and requested an oral hearing.

18. On 30 July 2002, without holding an oral hearing, the Administrative Court rejected the complaint as inadmissible for non-exhaustion of administrative remedies, as the applicant had failed to file an objection against the decision of 29 January 2002.

19. The applicant's objection of 12 March 2002 was dismissed by the Lower Austria Regional Government on 22 July 2002.

20. The applicant lodged a further complaint with the Administrative Court on 22 August 2002 and repeated his request for an oral hearing.

21. On 16 September 2003 the Administrative Court dismissed the applicant's complaint and rejected his request for an oral hearing. It found that, despite its request for a detailed business plan, the applicant had failed to provide one. Accordingly, the alleged need for a shed for the so-called agricultural enterprise had not been made out.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF THE LACK OF AN ORAL HEARING BEFORE THE ADMINISTRATIVE COURT

22. The applicant complained under Article 6 § 1 of the Convention about the Administrative Court's refusal to hold an oral hearing.

A. Admissibility

23. 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

24. The applicant submitted that the Administrative Court had unlawfully dismissed his request to hold an oral hearing, thereby depriving him of the opportunity to discuss the expert opinions in the context of a public hearing. Since an oral hearing could have elucidated the facts of the case, the Court's refusal to hold one was in breach of Article 6 of the Convention.

25. The Government, referring to the Court's case-law, argued that under exceptional circumstances the domestic courts, for reasons of efficiency, could refrain from holding a public and oral hearing where only questions of law or highly-technical questions were to be determined or where questions of fact or law raised by the applicant did not require such a hearing. Since both the facts and the question of law had been determined in the light of the Administrative Court's constant case-law, it could abstain from holding a public hearing, thus avoiding further procedural delays. Furthermore, the applicant had failed to indicate why he considered a public hearing necessary.

26. The Court notes that the applicant's case was heard by the mayor, the municipal council and the Regional Government, that is, purely administrative authorities, and then by the Administrative Court, which dismissed the applicant's complaint. Although the applicant argued that the Administrative Court did not qualify as a tribunal, 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.

27. 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 hearing before the first and only tribunal examining his case, unless there were exceptional circumstances which justified dispensing with such a hearing (see, for instance, *Stojakovic v. Austria*, no. 30003/02, § 53, 9 November 2006, with further references).

28. The Court has accepted such exceptional circumstances in cases where the 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 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, among other authorities, *Döry v. Sweden*, no. 28394/95, 12 November 2002, and *Pitkänen v. Sweden* (dec.), no. 52793/99, 26 August 2003).

29. Turning to the circumstances of the present case, the Court notes that the dispute, as presented by the applicant to the Administrative Court, concerned the issue whether the plot of land in question could be used as an agricultural estate.

30. The Court cannot find that the subject matter of the dispute was of such a nature – namely, highly technical or exclusively legal – as to dispense the national authorities from their obligation to hold a hearing.

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

II. OTHER ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

32. The applicant further complained about the authorities' refusal to hear evidence from certain experts on agriculture and organic farming.

33. The Court notes that this complaint is closely linked to the complaint examined above. It must therefore be declared admissible as well.

However, in view of its findings in paragraph 31 above the Court does not find it necessary to examine these complaints separately under Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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.”

35. The applicant did not submit any claim for just satisfaction. Accordingly, the Court considers it unnecessary to award him a sum under that head.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;
2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention as regards the lack of an oral hearing before the Administrative Court;
3. *Holds* by four votes against three that it is unnecessary to examine the applicant's further complaint under Article 6 § 1 of the Convention.

Done in English, and notified in writing on 10 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following is annexed to this judgment:

- dissenting opinion of Mr Loucaides joined by Mr. Spielmann, and Mr. Malinverni.

C.L.R.
S.N.

**DISSENTING OPINION OF JUDGE LOUCAIDES JOINED
BY JUDGES SPIELMAN AND MALINVERNI**

I am unable to agree with the view of the majority according to which having found a violation of Article 6 § 1 of the Convention because of the lack of an oral hearing before the Administrative Court it is unnecessary to examine the applicant's further complaint under the same Article about unfairness of the proceedings in this case. This additional complaint, relates, in my view, to a separate and autonomous breach which if it is established needs a different remedy than the one relating to the oral hearing. And, conversely, if the oral hearing breach is remedied that does not automatically give a solution to the other complaint. The two complaints being completely unconnected a separate examination of them was necessary.