



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

FIRST SECTION

CASE OF HOFBAUER v. AUSTRIA (No. 2)

(Application no. 7401/04)

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 Hofbauer v. Austria (no. 2),

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 10 April 2007,

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

PROCEDURE

1. The case originated in an application (no. 7401/04) 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 Mr Alois Hofbauer (“the applicant”) on 19 February 2004.

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

3. The applicant alleged, in particular, that the Administrative Court had failed to hold an oral hearing and had thus breached Article 6.

4. On 24 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

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1935 and lives in Gföhl.

6. On 1 May 1994 the applicant requested the mayor of Gföhl to issue a demolition order for his neighbour's wicker fence. He submitted, in particular, that the fence had not been constructed in accordance with the

provisions of the Building Act relating to fire-protection measures. Further, the fence hindered him in the exercise of his right to carry out maintenance works on a wooden fence he had erected on his own land.

7. As the mayor had not taken a decision within the statutory time-limit, the applicant lodged a request for transfer of jurisdiction with the Gföhl municipal council on 28 August 2001. On 6 September 2001 the applicant repeated his request of 1 May 2004 for the removal of the neighbour's fence.

8. The mayor notified the applicant on 27 September 2001 that, according to his neighbours' statements, the applicant would be allowed to enter their property provided that they were given eight days' notice. The issuing of an administrative decision (*Bescheid*) would therefore be superfluous. The applicant filed a further request on 30 September 2001, insisting on a decision by the mayor.

9. By notification of 4 October 2001 the mayor informed the applicant that, according to his neighbours, the fence had already been removed. He asked the applicant if he still wanted the municipal council to decide on his request for transfer of jurisdiction.

10. On 7 October 2001 the applicant wrote to the municipal council saying that he was still waiting for a decision. On 18 October 2001 the Gföhl municipal council, informed the applicant that it did not find it necessary to take a formal decision on the case, as the fence had been removed.

11. On 5 November 2001 the applicant lodged an appeal (*Vorstellung*) with the Lower Austria Regional Government stating that even though the fence itself had been removed, there were still five iron fence posts standing along the common border.

12. On 3 May 2002 the Lower Austria Regional Government rejected the appeal, finding that the letter of 18 October 2001 could not be regarded as a formal decision (*Bescheid*), which is why an appeal was not admissible. An appeal lay only against formal decisions.

13. The applicant then lodged an application with the Administrative Court on 23 May 2002 against the administration's failure to decide (*Säumnisbeschwerde*).

14. On 3 June 2002 the Administrative Court ordered the municipal council to issue a decision within three months. On the municipal council's request, the Administrative Court extended the time-limit to 15 November 2002.

15. By decision of 9 October 2002 the municipal council dismissed the applicant's request, holding that the fence had already been removed in October 2001.

16. On 21 October 2002 the applicant lodged an appeal (*Vorstellung*) with the Lower Austria Regional Government claiming that as there were still five posts standing on the neighbours' premises the fence had not been entirely removed.

17. Confirming the municipal council's decision, the Lower Austria Regional Government dismissed the applicant's appeal on 23 March 2003. It stated that the fence had been removed and that the wooden fence standing on his own premises was an even greater fire risk than the five iron posts at issue.

18. On 11 April 2003 the applicant lodged a complaint with the Administrative Court. He also requested a public hearing before that court.

19. On 24 April 2003 the Administrative Court ordered the applicant to supplement his complaint, which he did on 14 May 2003. The Lower Austria Regional Government submitted their comments on the applicant's complaint on 21 July 2003.

20. On 18 November 2003 the Administrative Court dismissed the applicant's complaint as being unfounded. It found that the posts did not constitute a risk endangering the applicant's property and therefore no removal could be requested. Furthermore, the Administrative Court dismissed the applicant's request for an oral hearing, relying on Section 39(2)(6) of the Administrative Court Act, which allows it to forego a hearing if it is not likely to contribute to the clarification of the case. The decision was served on the applicant's counsel on 4 December 2003.

THE LAW

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

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

A. Admissibility

22. 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

23. 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 the conduct of such a hearing. As the questions in the present case merely concerned the correct application of the relevant provisions of the Lower Austria Building Act, the Administrative Court could forego an oral hearing as those questions could adequately be decided on the basis of the case file. Moreover the applicant had not given any specific reasons why a hearing before the Administrative Court was necessary. In particular, he had not requested the Administrative Court to hear him in person.

24. The applicant submitted that the Administrative Court should have held a hearing in which questions of facts and law had to be discussed. He submitted that the relevant provisions of the Lower Austria Building Act required that an oral hearing be held before the building authorities. The Administrative Court should therefore have held one. In addition, there was nothing to indicate that he should have given reasons for wanting an oral hearing.

25. The Court notes that the applicant's case was heard by 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.

26. 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, *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 the proceedings concerned exclusively legal or highly technical questions (see *Schuler-Zraggen 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).

28. 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 competent authorities should have issued a removal order and, in that context, had to decide questions of fact, namely, whether the remaining posts constituted a danger for the applicant's land.

29. 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.

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

II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 AND ARTICLE 3 OF THE CONVENTION

31. Invoking Article 6 of the Convention, the applicant also complained about the length of proceedings. In addition, he complained about the Administrative Court's limited scope of review. Without specifying his complaint, he alleged a breach of Article 3 of the Convention.

32. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application 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

A. Damage

33. The applicant claimed 20,000 euros (EUR) in respect of pecuniary damage for the costs incurred on account of the unlawful erection of the wicker fence, which violated his rights as a neighbour under the Lower Austria Building Act. Under the head of non-pecuniary damage the applicant claimed EUR 25,000 and submitted that he had suffered as a result of the treatment by the competent municipal authorities, which had refused to deal with his request for political reasons.

34. The Government submitted that there was no causal link between the pecuniary damage claimed and the lack of an oral hearing before the

Administrative Court. They further contended that the finding of a violation constituted sufficient reparation in respect of any non-pecuniary damage suffered.

35. The Court reiterates that it cannot speculate what the outcome of the proceedings would have been 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

36. The applicant claimed EUR 3,987.23 (including turnover tax) for the costs and expenses incurred before the domestic courts and EUR 1,331.90 (including turnover tax) for those incurred in the proceedings before the Court, plus EUR 396 for an expert opinion of 29 March 2006 on the costs of maintenance work on his wooden fence.

37. The Government argued that there was no casual link between the costs incurred before the domestic courts and the lack of an oral hearing. They further asserted that the applicant's claims concerning the proceedings before the Court were excessive.

38. 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 and were reasonable as to quantum. In the present case, it does not appear from the applicant's submissions that any specific costs were incurred in relation to the request for an oral hearing. As to the costs of a further expert opinion, the Court notes that the claim has nothing to do with the subject matter of the proceedings before the Court. Therefore no award can be made under this head.

39. As regards the costs and expenses incurred before the Court, the Court notes that the applicant, who was represented by counsel, did not have the benefit of legal aid. It considers it reasonable that the sum claimed should be awarded in full.

C. Default interest

40. 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* admissible the complaint concerning the lack of an oral hearing before the Administrative Court and the remainder of the application inadmissible;
2. *Holds* 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*
 - (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 1,331.90 (one thousand three hundred and thirty one euros ninety 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 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 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President