



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

FIRST SECTION

**CASE OF SCHUTTE v. AUSTRIA**

*(Application no. 18015/03)*

JUDGMENT

STRASBOURG

26 July 2007

**FINAL**

***26/10/2007***

*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 Schutte 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 S.E. JEBENS,

Mr G. MALINVERNI, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 5 July 2007,

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

**PROCEDURE**

1. The case originated in an application (no. 18015/03) 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 Roland Schutte (“the applicant”), on 23 May 2003.

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

3. On 15 September 2005 the Court decided to communicate the complaints concerning the length of the proceedings and the lack of remedies in that respect and the complaint about the alleged violation of the *ne bis in idem* principle 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 Government, in their observations, requested the Court to give a separate decision on the admissibility of the application. However, the Court has found no reasons to discontinue the application of Article 29 § 3. It therefore rejects the request.

**THE FACTS****I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1963 and lives in Ostermiething.

5. In the early hours of 5 October 1997 the applicant drove a car through a village. Police officers required him to stop by giving a sign with a red light. The applicant disregarded their sign and drove on, obliging the police officers to step aside.

6. On 21 November 1997 the Ried im Innkreis Public Prosecutor's Office charged the applicant with resisting the exercise of official authority (*Widerstand gegen die Staatsgewalt*) under Article 269 § 1 of the Criminal Code (*Strafgesetzbuch*) in that he had prevented the police officers from carrying out a traffic control by driving towards them with his vehicle, thus threatening them with bodily harm.

7. On 12 December 1997 the Ried im Innkreis Regional Court (*Landesgericht*), having held a trial, acquitted the applicant of the above charge. As neither party appealed, the judgment became final.

8. By letter of 29 January 1998 the Braunau District Administrative Authority (*Bezirkshauptmannschaft*) charged the applicant with failure to comply with a request to stop for the purpose of a traffic control contrary to Section 97 § 5 of the Road Traffic Act (*Straßenverkehrsordnung*).

9. The applicant submitted his defence on 4 February 1998, asserting in particular that the conduct of proceedings for the said traffic offence violated Article 4 of Protocol No. 7, given that he had been acquitted of the offence of resisting the exercise of official authority in respect of the same act.

10. On 11 March 1998 the District Administrative Authority issued a penal order (*Straferkenntnis*) against the applicant finding him guilty of the offence under Section 97 § 5 in conjunction with Section 99 § 3 (a) of the Road Traffic Act, and imposed a fine of 4,000 Austrian schillings on him (approximately 290 euros) with 6 days' imprisonment in default. Furthermore, it ordered the applicant to pay a contribution to the costs of the proceedings.

11. Upon the applicant's appeal, the Upper Austria Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) held a hearing on 17 September 1998 at which it heard the applicant and the three police officers concerned.

12. By decision of 15 December 1998 the Independent Administrative Panel dismissed the applicant's appeal. It noted that the applicant admitted to having disregarded the police officers' request to stop. It dismissed his argument that his conviction under the Road Traffic Act violated the *ne bis in idem* principle. The offence under Section 97 § 5 of the Road Traffic Act concerned a simple omission, namely the failure to comply with a request to stop for the purpose of a traffic control whereas Article 269 § 1 of the Criminal Code required the use of dangerous threat or force. It followed from the court file and from the police officers' statements that the applicant had been acquitted of resisting the exercise of official authority, as it had not been shown that he had driven towards the police officers and thus

threatened them with bodily harm. In sum, the two offences were distinct and the applicant's acquittal under Article 269 § 1 of the Criminal Code did not hinder his conviction under Section 97 § 5 of the Road Traffic Act.

13. On 8 February 1999 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). The Independent Administrative Panel submitted observations in reply on 24 March 1999.

14. On 19 June 2000 the Constitutional Court dismissed the applicant's complaint as being unfounded. Referring to the Court's judgment in the case of *Oliveira v. Switzerland* (30 July 1998, *Reports of Judgments and Decisions* 1998-V), it found that the present case concerned an example of a single act constituting more than one offence (*Idealkonkurrenz*) which was in itself not contrary to Article 4 of Protocol No. 7. Further, it confirmed the Independent Administrative Panel's view that the offences at issue differed in their constituent elements.

15. Upon the applicant's request the Constitutional Court referred the case to the Administrative Court (*Verwaltungsgerichtshof*) by decision of 17 August 2000.

16. The latter requested the applicant to supplement his complaint on 2 October 2000. The applicant complied with that request on 8 November 2000. He reiterated his complaint about a violation of the *ne bis in idem* principle and requested the Administrative Court to hold a hearing. On 11 April 2002 the Administrative Court requested the Independent Administrative Panel to submit observations. The latter did so on 23 May 2002.

17. On 20 December 2002 the Administrative Court refused to deal with the applicant's complaint pursuant to Section 33a of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) as the fine imposed did not exceed 726 euros and the case did not raise an important legal issue.

18. The decision was served on the applicant's counsel on 31 January 2003.

## II. RELEVANT DOMESTIC LAW

19. Article 269 § 1 of the Criminal Code (*Strafgesetzbuch*) provides as follows:

“Anyone who hinders the authorities in the performance of an official act through the use of force or the threat of force, or who hinders an official in the performance of his or her duties through the use of force or dangerous threat, shall be liable to a prison sentence of up to three years...”

20. Section 97 § 5 of the Road Traffic Act (*Strassenverkehrsordnung*) reads as follows:

“Traffic officers may, by the use of clearly visible or audible signs, request a driver to stop for the purposes of carrying out checks on the driver or the vehicle, for the accomplishment of other official acts relating to the driver or a passenger or for the

purposes of road traffic analysis (such as a traffic count). The driver of the vehicle must comply with the request.”

Section 99 § 3 (a) in the version in force at the material time provided for a fine of up to 10,000 Austrian schillings with up to two weeks' imprisonment in default.

## THE LAW

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

21. The applicant complained that the length of the criminal proceedings under the Road Traffic Act had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

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

22. The Government contested that argument.

23. The period to be taken into consideration began on 29 January 1998, when the District Administrative Authority brought charges against the applicant and ended on 31 January 2003 when the Administrative Court's judgment was served on the applicant's counsel. It has thus lasted five years.

#### A. Admissibility

24. 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

25. The applicant maintained that the case was not complex and emphasised that there was a long delay in the proceedings before the Administrative Court.

26. The Government asserted that the case was legally complex, since it raised a *ne bis in idem* issue. At the material time the Constitutional Court had to review numerous provisions of Austrian administrative criminal law in the light of the Court's case-law under Article 4 of Protocol No. 7.

27. 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).

28. The present case, which came before four levels of jurisdiction, was not complex in terms of fact. The Government's argument as to the legal issues raised by the case may explain the duration of the proceedings before the Constitutional Court. However, it does not provide an explanation for the considerable periods of delay before the Administrative Court, which remained inactive between 8 November 2000 and 11 April 2002 and again between 23 May and 20 December 2002, i.e. for a total period of two years. The applicant did not contribute to the duration of the proceedings.

29. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, in particular, *Fehr v. Austria*, no. 19247/02, §§ 19-26, 3 February 2005; *Blum v. Austria*, no. 31655/02, §§ 22-24, 3 February 2005; and *Yavuz v. Austria*, no. 46549/99, §§ 36-40, 27 May 2004, all concerning administrative criminal proceedings of a duration comparable to the present case and with considerable delays before the Administrative Court).

30. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

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

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

31. The applicant further complained about the lack of a remedy in respect of his complaint about the length of the proceedings. He relied on Article 13 of the Convention, which, so far as material, provides as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority..."

### A. Admissibility

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

## B. Merits

33. The applicant asserted that no remedies were available against the length of administrative criminal proceedings.

34. For their part, the Government stressed that the Constitutional Court examined complaints about the length of proceedings before the lower courts. According to the Constitutional Court's case-law, excessive length was also a mitigating circumstance which might lead to a reduction of sentence. As far as the proceedings before the Constitutional Court and the Administrative Court itself were concerned, the Government contended that under the Convention there was no obligation for a State to provide for additional levels of appeal and a further legal remedy by which to challenge decisions of last-instance courts. Such a requirement would affect basic issues of the Austrian Federal Constitution and most likely also the legislation of most Contracting States and their freedom to organise their judicial system. Having regard to the average duration of proceedings before the Constitutional Court and the Administrative Court: eight and a half months and twenty-two months respectively, the Austrian legislator had found no need to provide a remedy in respect of the length of proceedings before those courts.

35. The Court reiterates that the correct interpretation of Article 13 of the Convention is that this provision guarantees an effective remedy before a national authority for an alleged violation of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudla v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI). As established in its case-law, it reiterates that the remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are “effective”, within the meaning of Article 13 of the Convention if they “[prevent] the alleged violation or its continuation, or [provide] adequate redress for any violation that [has] already occurred” (see *Kudla*, cited above, § 158). Article 13 therefore offers an alternative: a remedy is “effective” if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see *Kudla*, cited above, § 159; see also *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 186-87, ECHR 2006-...).

36. The Government argue in essence that a Contracting State should not be required under Article 13 to provide a remedy against delays caused by one of its highest courts. The Court observes that the State's primary duty is to organise its judicial system so as to ensure that the overall duration of civil or criminal proceedings, including the duration before the highest courts, remains “reasonable”. As regards remedies against excessive length of proceedings, it follows from the Court's case-law cited above, that Contracting States have a choice as regards their nature, since they may opt either for a preventive or for a compensatory remedy. Moreover, they

remain free to establish the modalities for its exercise. The Court therefore finds that the States enjoy considerable freedom in complying with the requirements of Article 13.

37. Turning to the circumstances of the present case, the Court will examine whether there had been a remedy compatible with Article 13 of the Convention available to grant the applicant appropriate relief as regards his complaint about the length of proceedings.

38. The present proceedings exceeded the reasonable-time requirement under Article 6 of the Convention in particular as delays occurred while the case was pending before the Administrative Court (see paragraph 28 above). Since the Government have not shown that any form of relief – either preventive or compensatory – was available for these delays or for the overall duration of the proceedings, there has been a violation of Article 13 of the Convention in that the applicant had no domestic remedy whereby he could enforce his right to a hearing within a reasonable time as guaranteed by Article 6 § 1 of the Convention (see, as a similar case, *Hauser-Sporn v. Austria*, no. 37301/03, § 40, 7 December 2006).

### III. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

39. The applicant complained that his conviction under Section 97 § 5 of the Road Traffic Act in the administrative criminal proceedings following his acquittal under Article 269 § 1 of the Criminal Code by the criminal courts violated Article 4 of Protocol No. 7 which, so far as material, reads as follows:

“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

#### **Admissibility**

40. The Government submitted that the case differed from a number of previous Austrian cases concerning Article 4 of Protocol No. 7 (*Gradinger v. Austria*, judgment of 23 October 1995, Series A no. 328-C; *Franz Fischer v. Austria*, no. 37950/97, 29 May 2001; and *Sailer v. Austria*, no. 38237/97, June 2002). Arguing along the same lines as the domestic authorities, they asserted that the applicant's conviction for failure did not violate the *ne bis in idem* principle, since the offences differed in their essential elements

41. The Court reiterates its findings in the *Franz Fischer v. Austria* judgment (cited above, § 35). In that case, after having analysed its previous judgments in the cases of *Gradinger* (cited above) and *Oliveira v.*

*Switzerland* (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V), the Court found that the mere fact that one act constitutes more than one offence is not contrary to Article 4 of Protocol No. 7. However, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements.

42. In the present case the applicant was prosecuted consecutively of two offences relating to the same act, namely continuing to drive despite the police officer's request to stop. The Court finds that an analysis of the two offences at issue leads to the conclusion that they differ in their essential elements. It observes in particular that the domestic authorities, including the Constitutional Court found that the essential element of the offence under Article 269 § 1 of the Criminal Code was the use of dangerous threat or of force as a means of resisting the exercise of official authority, while the administrative offence under Section 97 § 5 of the Road Traffic Act punished a simple omission in the context of road safety, namely the failure to stop for the purpose of a traffic control.

43. Having regard to the differences in the two offences' essential elements, the Court does not find that the applicant was "tried ... again ... for an offence of which he had already been finally acquitted" within the meaning of Article 4 of Protocol No. 7.

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

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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**

46. The applicant claimed that the imposition of the fine and the costs in the administrative criminal proceedings were the result of a violation of Article 4 of Protocol No. 7. He therefore requested reimbursement of the amount of 5,200 Austrian schillings (ATS), i.e. 377.90 euros (EUR) under the head of pecuniary damage. Moreover he claimed EUR 1,000 in respect of non-pecuniary damage.

47. The Government commented that there was no causal link between the length of the proceedings or the lack of an effective remedy in that respect and the pecuniary damage claimed by the applicant. As to non-

pecuniary damage, they held that the finding of a violation would constitute sufficient just satisfaction.

48. The Court found violations of Articles 6 § 1 and 13 in respect of the length of the proceedings and the lack of a remedy. It does not discern any causal link between the violations found and the pecuniary damage claimed and therefore rejects this claim. On the other hand, it awards the applicant EUR 1,000 in respect of non-pecuniary damage.

### **B. Costs and expenses**

49. The applicant also claimed a total amount of EUR 6,932.92, composed of EUR 3,932.92 for the costs and expenses incurred in the domestic proceedings and EUR 3,000 for those incurred before the Court.

50. The Government contested these claims. Moreover, they submitted that they assumed the sums claimed included value-added tax (VAT).

51. 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.

52. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses of the domestic proceedings since they were not incurred to prevent or redress the violations found. Furthermore, the Court having regard to the sums awarded in comparable cases considers it reasonable to award EUR 2,000 in respect of the costs and expenses incurred in the Convention proceedings. This sum includes VAT.

### **C. Default interest**

53. 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**

1. *Declares* by a majority the complaints concerning the excessive length of the proceedings and the lack of an effective remedy admissible and the remainder of the application inadmissible;
2. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;
4. *Holds* by six votes to one
  - (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 1,000 (one thousand euros) in respect of non-pecuniary damage and EUR 2,000 (two thousand euros) 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;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 July 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 concurring opinion of Mr Malinverni, joined by Mr Rozakis and Mr Jebens, is annexed to this judgment.

C.L.R.  
S.N.

CONCURRING OPINION OF JUDGE MALINVERNI  
JOINED BY JUDGES ROZAKIS AND JEBENS

(Translation)

I concur with the operative provisions of the judgment according to which there has been a violation of Article 13 of the Convention in this case, on the ground that in the respondent State there was no domestic remedy allowing the applicant to complain about the breach of his right to a hearing within a reasonable time as guaranteed by Article 6 § 1.

In reaching this conclusion, the judgment states that Article 13 must be construed as guaranteeing an effective remedy before a national authority for the victim of an alleged violation of Article 6 § 1. Referring to the judgment in *Kudła v. Poland* ([GC], no. 30210/96, § 156, ECHR 2000-XI), the judgment goes on to say that domestic remedies may be regarded as “effective”, within the meaning of Article 13 of the Convention, “if they “[prevent] the alleged violation or its continuation, or [provide] adequate redress for any violation that [has] already occurred” (see *Kudła*, § 158).

The judgment thus concludes that Article 13 offers States an *alternative*: “a remedy is 'effective' if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred” (paragraph 35).

Further on the judgment reasserts that “[a]s regards remedies against excessive length of proceedings, it follows from the Court's case-law ... that Contracting States have a *choice* as regards their nature, since they may *opt* either for a preventive or for a compensatory remedy” (paragraph 36).

It is on this latter point that I wish to make a few complementary remarks.

Contrary to what the judgment would seem to imply, I do not believe that preventive remedies and compensatory remedies are really *equivalent* and it should not be open to States to choose or to opt for one or the other of these two solutions.

In my view, priority should be given to the *preventive measures* that States must adopt in order to eradicate the phenomenon of an excessive length of proceedings. Such measures are numerous and varied, ranging from an increase in the number of judges and clerks, or even the number of courts, to an overhaul of judicial organisation, for example by generalising the system of single judge at first instance. It is also important, however, not to underestimate the benefits of more frequent recourse to methods of alternative dispute resolution, such as mediation, arbitration or conciliation, although the scope of such solutions is confined to disputes arising in connection with certain private law matters.

Moreover, the solutions to the problem of an excessive length of proceedings have to be divided into two main categories: those concerning proceedings that have already ended and those applicable to proceedings that are still pending.

Where the proceedings have already ended, there is only one remedy that would seem appropriate: redress for the damage caused to the victim, in the form of compensation. But such a measure should be reserved exclusively for proceedings that have already come to an end.

As regards proceedings that are still pending, an award of compensation to the victim cannot be regarded as equivalent to measures adopted in order to *expedite* those proceedings. Where the proceedings have not yet ended, preference must therefore be given to “accelerative measures”, as they represent the most effective way of enforcing the right to a hearing within a reasonable time.

Examples of “accelerative measures” to expedite proceedings are numerous and varied: a higher court could set a time-limit within which the court responsible for the delay has to bring the proceedings to a close; the time allowed for pleadings to be submitted by the parties, expert reports to be filed, possible witnesses to be summoned, etc., could be reduced.

In order to uphold the right to a hearing within a reasonable time, as guaranteed by Article 6 § 1, States thus cannot confine the solution to systematic compensation awards to victims of violations of that right. Payment of compensation cannot therefore be regarded as an adequate means for States to fulfil their obligations under Articles 6 and 13 of the Convention.

In conclusion, States must above all do their best to avert the phenomenon of an excessive length of proceedings. An award of compensation to victims is no more than a stopgap solution. It cannot replace the obligation for States to organise their judicial systems so as to address the root cause of the problem, in particular by adopting “accelerative measures” to expedite proceedings that are still pending.