



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

FIRST SECTION

CASE OF VITZTHUM v. AUSTRIA

(Application no. 8140/04)

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 Vitzthum 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. 8140/04) 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 Andreas Vitzthum (“the applicant”), on 27 February 2004.

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 give notice of the application 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 rejected the request.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1968 and lives in Geretsberg.

5. On 24 June 1999 the Braunau District Administrative Authority (*Bezirkshauptmannschaft*) charged the applicant with drunken driving. The

applicant, represented by counsel, submitted observations on 13 July and 8 September 1999.

6. On 21 September 1999 the District Administrative Authority issued a penal order (*Straferkenntnis*) finding the applicant guilty of drunken driving contrary to Sections 5 § 1 and 99 § 1 (a) of the Road Traffic Act (*Strassenverkehrsordnung*). As to the alcohol level the authority had regard to the results of a breathalyser test and to the corroborating results of a blood alcohol analysis carried out the following day. It imposed a fine of 16,000 Austrian schillings (approximately 1,160 euros) on him with 14 days' imprisonment in default.

7. The applicant appealed on 12 October 1999.

8. On 9 December 1999 the Upper Austria Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) held a hearing at which it questioned the applicant and the two police officers who had carried out the breathalyser tests and a further witness.

9. By decision of 21 December 1999 the Independent Administrative Panel, having held a hearing, dismissed the applicant's appeal. It found that the applicant had driven his car on 15 June 1999 at 8 p.m. having a proportion of alcohol in his breath exceeding the statutory level. He admitted to having consumed alcohol in the afternoon. Having run out of petrol, the applicant had left the car and had gone to the next petrol station. Upon his return, he had been requested by two police officers to undergo breathalyser tests. The tests, carried out at 8.52 and 8.54 p.m. respectively, had yielded results of 0.84 and 0.86 mg alcohol/litres. The Independent Administrative Panel dismissed the applicant's request to take an expert opinion in order to show that the difference in these results was due to his having consumed one and a half litres of beer when he went to fetch petrol and that he had, before that, not been driving his car in a state of drunkenness. Having regard to the instructions for use of the breathalyser at issue, the Independent Administrative Panel noted that the difference in the two test results was not significant.

10. In any case, it found that the applicant's defence was not credible as he had stated at his first interrogation to have parked his car at 8 p.m. and had explicitly answered the police officers' question whether he had consumed alcohol after that in the negative. It was only in his written submissions of 13 July that he had claimed to have consumed more beer after 8 p.m. The bill submitted by the applicant did not support his defence as the innkeeper had stated that he had given the applicant this bill two weeks after the incident on his explicit request. He had not remembered the applicant and could not confirm whether he had actually consumed beer at his inn at the relevant time.

11. The applicant lodged a complaint with the Administrative Court (*Verwaltungsgerichtshof*) on 3 February 2000. He complained in particular about the refusal of his request to take an expert opinion. On 3 April 2000

the Independent Administrative Panel submitted observations in reply. The applicant made further submissions on 3 May and 21 June 2000.

12. On 7 August 2003 the Administrative Court, having deliberated on 4 July 2003, dismissed the applicant's complaint as being unfounded. It found in particular that the Independent Administrative Panel's assessment of evidence did not suffer from any defects and that it had given detailed and convincing reasons for its refusal to take the expert opinion requested by the applicant.

13. The decision was served on the applicant's counsel on 1 September 2003.

THE LAW

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

14. The applicant complained that the length of the proceedings 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...”

15. The Government contested that argument.

16. The period to be taken into consideration began on 24 June 1999 and ended on 1 September 2003. It thus lasted four years and two months for three levels of jurisdiction.

A. Admissibility

17. The Court notes 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

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

19. The Government asserted that the case was of a certain legal and factual complexity. They underlined that the proceedings before the District Administrative Authority and the Independent Administrative Panel were conducted expeditiously. Noting that only a fine of some 1,160 euros was at

stake for the applicant, they argued that the duration of the proceedings could still be considered as reasonable.

20. 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).

21. The present case, which was not complex, came before three levels of jurisdiction. It was dealt with speedily by the authorities of first and second instance. However, the proceedings were pending before the Administrative Court between 3 February 2000 and 1 September 2003. During that time, there was a period of complete inactivity lasting for more than three years, namely from 21 June 2000 until 4 July 2003.

22. 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 relating to criminal administrative proceedings which lasted somewhat longer than the present case but came before four levels of jurisdiction instead of three, and in which considerable delays occurred before the Administrative Court).

23. 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

24. 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

25. 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

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

27. 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.

28. 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-...).

29. 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.

30. 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.

31. The present proceedings exceeded the reasonable-time requirement under Article 6 of the Convention on account of the delays occurred before the Administrative Court (see paragraph 21 above). Since the Government have not shown that any form of relief – either preventive or compensatory – was available for these delays 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. OTHER ALLEGED VIOLATIONS

Admissibility

32. The applicant alleged that the proceedings at issue were unfair in that the administrative authorities refused to take an expert opinion. The Government argued that the applicant had failed to exhaust domestic remedies, since he had not filed a complaint with the Constitutional Court.

33. The Court notes that the applicant raised the issue before the Administrative Court, which dealt with its merits. However, the Court is not called upon to examine whether in the circumstances of the cases the applicant can be considered to have exhausted domestic remedies, since the complaint is in any case inadmissible for the following reasons. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task is limited to ascertaining whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, *Lucà v. Italy*, no. 33354/96, § 38, ECHR 2001-II). In the present case, the authorities gave detailed and convincing reasons for their refusal to take the evidence proposed by the applicant. There is no indication, that the applicant, who was assisted by counsel, could not duly forward his defence or that the proceedings were otherwise unfair.

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

35. Finally, the applicant complained under Article 2 of Protocol No. 7 that he did not have a proper review of his conviction as the Administrative Court's scope of review is limited. Again the applicant has not raised this complaint before the Constitutional Court. In any case, even assuming exhaustion of domestic remedies, the complaint is inadmissible, since the Court has already found in a comparable case that the Administrative Court's scope of review in administrative criminal proceedings complied with the requirements of Article 2 of Protocol No. 7 (see *Weh and Weh v. Austria* (dec.), no. 38544/97, 4 July 2002).

36. 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

37. 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

38. The applicant claimed 1,000 euros (EUR) in respect of non-pecuniary damage.

39. The Government commented that the finding of a violation would constitute sufficient just satisfaction.

40. The Court, ruling on an equitable basis, awards the applicant EUR 1,000 under the head of non-pecuniary damage.

B. Costs and expenses

41. The applicant also claimed a total amount of EUR 5,090, composed of EUR 1,090 for the costs and expenses incurred in the domestic proceedings and EUR 3,000 for those incurred before the Court.

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

43. 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.

44. 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 in order 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

45. 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 effective remedy admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 13 of the Convention;
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, 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* 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 28).

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 29).

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.