



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

FIRST SECTION

CASE OF GIERLINGER v. AUSTRIA

(Application no. 38032/05)

JUDGMENT

STRASBOURG

29 November 2007

FINAL

29/02/2008

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 Gierlinger v. Austria,

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

Mr L. LOUCAIDES, *President*,

Mrs N. VAJIĆ,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr A. WAMPACH, *Deputy Section Registrar*,

Having deliberated in private on 8 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 38032/05) 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 Ernst Gierlinger (“the applicant”), on 20 October 2005.

2. The applicant was represented by Dr. H. Blum, a lawyer practising in Linz. 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 11 January 2007 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 FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1964 and lives in Neustift.

5. In December 1999 the Neustift community (*Gemeinde*) requested a permit from the Rohrbach District Administrative Authority (*Bezirkshauptmannschaft*) to enlarge its canalisation system. At a hearing scheduled on 4 May 2000 the applicant, who had not been summoned as a party, filed

objections and submitted that the project would interfere with his property rights as it would affect the drainage system on his real estates.

6. On 15 June 2000, after having heard an official expert on water construction technology and biology, the Administrative Authority granted the requested permit. The applicant lodged an appeal with the Upper Austrian Regional Governor (*Landeshauptmann*).

7. In the subsequent proceedings the Regional Governor ordered the expert to supplement his opinion which was then submitted to the applicant for comment.

8. On 25 January 2001 the Regional Governor (*Landeshauptmann*) dismissed the applicant's appeal. Referring to the supplemented expert opinion, the Regional Governor found that the project at issue would not affect the drainage system on the applicant's premises.

9. On 16 March 2001 the applicant filed a complaint with the Administrative Court (*Verwaltungsgerichtshof*).

10. Having held an oral hearing, upon the applicant's request, the Administrative Court dismissed this complaint on 31 March 2005. It noted that the breach of the applicant's right to being summoned to be heard as a party before the District Administrative Authority had been remedied in the course of the proceedings. The applicant had been given an opportunity to submit comments and objections before the second instance and had thus been heard as a party. As to the remaining complaint concerning the alleged interference of the project with his property, the Administrative Court found that the applicant's general submissions could not disprove the conclusive findings of the expert. This decision was served on the applicant's counsel on 26 April 2005.

THE LAW

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

11. 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 his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

12. The Court reiterates that in civil matters the reasonable time may begin to run in some circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 15, § 32). This is the situation, if the applicant cannot

seize an authority or court before receiving a decision which could be appealed against (see *Vilho Eskelinen and others v. Finland*, [GC] judgment of 19 April 2007, § 65).

13. In the present case, the period to be taken into consideration began on 4 May 2000, when the applicant filed his objections at the hearing of the District Administrative Authority. Without these objections the applicant would not have received the decision of the authority and could therefore not have appealed against it. The period ended on 26 April 2005. It thus lasted almost five years for three levels of jurisdiction but was pending before the Administrative Court for four years.

A. Admissibility

14. 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

15. The applicant maintained that the proceedings were unreasonably long.

16. The Government contested that argument.

17. 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 and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

18. The present case, which was not particularly complex, came before three levels of jurisdiction. It was dealt with expeditiously by the authorities of the first and second instance. However, the proceedings were pending before the Administrative Court between 16 March 2001 and 26 April 2005, *i.e.* for four years and one month.

19. 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 *Alge v. Austria*, no. 38185/97, judgment of 22 January 2004).

20. 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.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

22. The applicant complained under Article 6 of the Convention that the proceedings at issue were unfair in that he had not been summoned to the hearing before the District Administrative Authority and could, therefore, not sufficiently prepare his case. Furthermore the Administrative Authority did not record all his comments in a transcript. He also complained that all three instances failed to deal with the merits of his submissions. Under Article 1 of Protocol No.1 the applicant complained that the granting of the permit to the municipality affected the drainage system on his real estates.

23. With regard to the complaints concerning the proceedings at the first and second instance the Court notes that the applicant filed a complaint with the Administrative Court, but did not file a complaint with the Constitutional Court and therefore failed to exhaust all available domestic remedies. The question of exhaustion of domestic remedies must, however, be assessed differently as regards the complaint about the proceedings before the Administrative Court, since no complaint from the Administrative Court to the Constitutional Court, both being at the same level, was possible.

24. The complaint that the Administrative Court did not deal with the merits of the case is unsubstantiated. The Court further notes that the Administrative Court followed the applicant's request to hold a hearing and gave sufficient reasons in its decision. There is no indication that the applicant, who was assisted by counsel at the second instance and before the Administrative Court, could not duly forward his arguments or that the proceedings were otherwise unfair.

25. It follows that these complaints are 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

26. 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

27. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

28. The Government contested the claim pointing out that the applicant failed to substantiate the claim in detail and that the amount seemed excessive.

29. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 2,000 under that head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

30. The applicant also claimed EUR 3,068 for the costs and expenses incurred before the domestic courts and EUR 1,554 for those incurred before the Court.

31. The Government contested the first claim, because only the costs incurred for activities taken in the course of the proceedings in an attempt to prevent the violation of the Convention found could be compensated. However, the applicant did not take any such step.

32. 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 (see *inter alia*, *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, p. 573, § 49, and *Craxi v. Italy*, no. 34896/97, § 115, 5 December 2002).

33. 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 in the domestic proceedings since they were not incurred to prevent or redress the violation found. Furthermore, the Court considers the applicant's claim in respect of the costs and expenses incurred in the Convention proceedings reasonable and awards the amount in full, *i.e.* EUR 1,554. This sum includes VAT.

C. Default interest

34. 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 complaint concerning the excessive length of the proceedings 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*

(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 2,000 (two thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, and EUR 1,554 (one thousand five hundred fifty four 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André WAMPACH
Deputy Registrar

Loukis LOUCAIDES
President