



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

FIRST SECTION

CASE OF BARTENBACH v. AUSTRIA

(Application no. 39120/03)

JUDGMENT

STRASBOURG

20 March 2008

FINAL

20/06/2008

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 Bartenbach v. Austria,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 28 February 2008,

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

PROCEDURE

1. The case originated in an application (no. 39120/03) 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 two Austrian nationals, Mr Hanno Bartenbach and Mr Helmut Bartenbach (“the applicants”), on 4 December 2003.

2. The applicants were represented by Mr W.L. Weh, a lawyer practising in Bregenz. 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 5 December 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 FACTS

THE CIRCUMSTANCES OF THE CASE

4. The first applicant was born in 1959 and lives in Bludenz, the second applicant was born 1940 and lives in Bürs.

5. The applicants are owners of a painting company in Bürs. The first applicant is also the sole owner of another company.

6. On 15 July 1997 the Bregenz District Administrative Authority informed the applicants of its suspicion that they had illegally employed C.,

a Turkish citizen, on 19 June 1997. It invited the applicants either to comment in writing or to make an appointment with the authority for an oral justification within two weeks.

7. On 11 September 1997 the applicants replied to the District Administrative Authority by referring in essence to the Association Agreement between the European Community and Turkey (decree no. 1/80 of the Association Council). Stating that C. had therefore been employed in conformity with European Law standards, they objected to the allegations made by the Administrative Authority.

8. On 4 December 1997 the applicants again filed submissions. Referring to comments by the Regional Employment Office, they repeated their position that C.'s employment had been in conformity with EU law at the relevant time.

9. On 22 March 1999 the Bludenz District Administrative Authority imposed a fine of 15,000 Austrian schilling (ATS), equivalent to 1,090.09 Euro (EUR), on each of the applicants for breach of the Employment of Foreigners Act (*Ausländerbeschäftigungsgesetz*).

10. On 23 March 1999 the same authority imposed a further fine (10,000 ATS equivalent to EUR 727) on the first applicant, after having informed him about its suspicion on 1 September 1998 that he had illegally employed C. on 26 August 1998 for the first applicant's company.

11. On 6 and 7 April 1999 respectively the applicants filed appeals to the Vorarlberg Independent Administrative Panel (*Unabhängiger Verwaltungssenat*, IAP), submitting that the District Authority's decisions were contrary to the mentioned Association Agreement between the European Community and Turkey and furthermore in breach of the Employment of Foreigners Act.

12. Having held an oral hearing on 17 June 1999, the IAP dismissed the applicants' appeal on 9 November 1999. It found that C. did not have a work permit (*Arbeitserlaubnis*) or an exemption certificate (*Befreiungsschein*) at the relevant dates. Therefore he was not entitled to work, neither under Austrian nor under European Law.

13. On 17 January 2000 the applicants lodged a complaint with the Constitutional Court. They submitted, *inter alia*, that the wording of the relevant provision of the Association Agreement lacked sufficient clarity and precision and would therefore be in breach of Article 7 of the Convention. Moreover they alleged that the IAP would not meet the criteria of a tribunal within the meaning of Article 6 as its members acted both as judge and prosecutor.

14. On 6 March 2000 the Constitutional Court declined to deal with the applicants' complaint for lack of prospect of success and referred it to the Administrative Court.

15. On 29 June 2000 the latter requested the applicants to supplement their complaint.

16. On 17 August 2000 the applicants made submissions concerning allegedly inadequate interpretation of law.

17. According to the Government, the Administrative Court invited the IAP to file observations on each of the three complaints. It appears that the authority submitted comments, which were sent to the applicants' counsel on 7 November 2000. According to the applicants, neither the Administrative Court's invitation, nor the statements made by the IAP were brought to their knowledge.

18. On 24 April 2003 the Administrative Court, holding that the applicants' submissions were unfounded, dismissed the complaint. Furthermore, it referred to the Administrative Court Act, which required the Administrative Court to examine the contested decision on the basis of the facts found by the respondent authority, and thus did not allow for the raising of new issues which had not previously been dealt with by the administrative authorities (*Neuerungsverbot*). The judgment was served on the applicants' counsel on 26 May 2003.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION CONCERNING THE LENGTH OF THE PROCEEDINGS

19. The applicants 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..."

20. The Government contested that argument.

21. The period to be taken into consideration began on 15 July 1997 and 1 September 1998 respectively, when the District Administration Authority informed the applicants of its suspicion that they had illegally employed C. and ended on 26 May 2003, when the final judgment of the Administrative Court was served on the applicants' counsel. It thus lasted five years and some ten months and four years and nine months respectively for four levels of jurisdiction. The proceedings were pending before the Administrative Court for three years and two months.

A. Admissibility

22. 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

23. The Government argued that, since the applicants had requested to wait for the final decision in the proceedings concerning C.'s application for an exemption certificate, the duration was not solely attributable to the State. The length of the proceedings may therefore still be regarded as reasonable.

24. The applicants maintained that the proceedings were unreasonably long, because the Administrative Court's failure to decide more rapidly in the proceedings concerning C.'s application for the exemption certificate could not be counted towards the applicants' conduct.

25. 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 applicants and the relevant authorities (see, among other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II)

26. 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 *Blum v. Austria*, no. 31655/02, judgment of 3 February 2005).

27. 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 of the Convention concerning the length of proceedings.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION CONCERNING THE RIGHT TO A FAIR HEARING

28. The applicants further complained that they had neither been informed about the Administrative Court requesting the IAP to draft observations in reply, nor given the chance to comment on these counterstatements. This had been contrary to the right to be heard as 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 fair ... hearing ... by [a] ... tribunal..."

A. Admissibility

29. 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

30. The Government argued that the IAP had submitted its counterstatements to the Administrative Court on 2 November 2000. Subsequently, on 7 November 2000, they were sent to the applicants' counsel according to the routinely applied process.

31. The applicants contested the Government's argument, because no proof was submitted to show that the counterstatements were in fact sent to their counsel. The stamps on the documents only show that they were sent on 7 November 2000, but not to whom.

32. The Court reiterates that the principle of equality of arms - one of the elements of the broader concept of fair trial - requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (*Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 33; *Ankerl v. Switzerland*, judgment of 23 October 1996, Reports 1996-V, pp. 1567-68, § 38). Each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (*Ruiz Mateos v. Spain*, judgment of 24 June 1993, Series A no. 262, p. 25, § 63; *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, Reports 1997-I, p. 108, § 24; *Beer v. Austria*, no. 30428/96, 6 February 2001, § 17; *Lanz v. Austria*, no. 24430/94, 31 January 2002, § 62-64; and *Josef Fischer v. Austria*, no. 33382/96, § 18-22, 17 January 2002).

33. In the present case, the Administrative Court apparently obtained information from the IAP, which had issued a decision on the same matter before. As the Court previously held it is an inherent part of a "fair hearing" in criminal proceedings as guaranteed by Article 6 § 1 of the Convention that the defendant should be given an opportunity to comment on evidence obtained in regard to disputed facts even if the facts relate to a point of procedure rather than the alleged offence as such (see *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, p. 43, § 102). Although the Court has no reason to doubt that the Administrative Court, as a rule, forwards observations in order to obtain counterstatements from the concerned parties, it failed to submit proof of having done so in the present case.

34. There has therefore also been a violation of Article 6 § 1 of the Convention on account of the right to a fair hearing.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

35. The applicants further complained under Article 6 of the Convention that no prosecuting authority participated in the proceedings, including the hearing before the Independent Administrative Panel, and that therefore the member of the Panel acted both as judge and prosecutor.

36. The Court reiterates that if an appeal is filed with the Independent Administrative Panel against a penal order, the authority which issued the impugned decision assumes the function of the prosecuting authority in appeal proceedings before the Panel. Furthermore, the absence of a representative of that authority from the hearing does not give rise to objectively justified fears as regards impartiality of the Panel (see *Weh and Weh v. Austria* (dec.), no. 38544/97, 4 July 2002). 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.

37. Moreover the applicants complained under Article 7 of the Convention in that the legislation on employment of foreigners lacked sufficient clarity and precision to satisfy the requirements of the Convention.

38. However, this issue was raised by the applicants for the first time before the Constitutional Court and the Administrative Court respectively, which rejected it as the procedural regulations did not allow for the raising of new issues which had not previously been dealt with by the administrative authorities (*Neuerungsverbot*). Since the domestic appeal has been declared inadmissible on account of a failure to observe a procedural requirement, the Court finds that the applicants have not exhausted the domestic remedies and this complaint is therefore inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicants claimed EUR 36,000 in respect of non-pecuniary damage and EUR 3,197.60 in respect of pecuniary damage for the fines they had been sentenced to pay.

41. The Government contested these claims.

42. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicants a total amount of EUR 3,600 in respect of non-pecuniary damage.

B. Costs and expenses

43. The applicants also claimed EUR 18,393.89, including VAT, for the costs and expenses incurred before the domestic courts and EUR 3,687.42, including VAT, for those incurred before the Court.

44. The Government contested these claims.

45. 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, 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, because these costs have not incurred in an attempt to accelerate the proceedings and there is no indication that the length of the proceedings increased the overall costs of the proceedings (see *mutatis mutandis Bouilly v. France*, no. 38952/97, § 33, 7 December 1999). As regards the costs before the Court, the Court considers it reasonable to award the sum of EUR 3,687.42, including VAT.

C. Default interest

46. 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 alleged violation of the applicants' rights to a fair hearing admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the proceedings;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the right to a fair hearing;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,600 (three thousand six hundred euro) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, and EUR 3,687.42 (three thousand six hundred eighty seven euro and forty two cent), including VAT, 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 March 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President