



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

FIRST SECTION

CASE OF ABRAHAMIAN v. AUSTRIA

(Application no. 35354/04)

JUDGMENT

STRASBOURG

10 April 2008

FINAL

10/07/2008

This judgment may be subject to editorial revision.

In the case of Abrahamian v. Austria,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 20 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 35354/04) 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, Dr. Heidemarie Abrahamian (“the applicant”), on 20 September 2004.

2. The applicant was represented by Mr G. Witt, a lawyer practising in Vienna. 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. The applicant alleged, in particular, that the Administrative Court had failed to hold an oral hearing on her complaint to that court.

4. On 2 May 2006 the Court decided to give notice of 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**THE CIRCUMSTANCES OF THE CASE**

5. The applicant is a medical practitioner, employed by a public hospital in Vienna and has also a private surgery. She is a member of the Vienna Medical Association (*Ärztchamber*), a public law body established under

the Medical Practitioner's Act (*Ärztegesetz*) with compulsory membership. As a member of that association she is also compulsory affiliated to the pension and invalidity fund (*Wohlfahrtsfonds*) of that Medical Association under the relevant provisions of the Medical Practitioner's Act.

6. On 28 April 2000 the Administrative Committee (*Verwaltungsausschuss*) of the pension and invalidity fund issued an order against the applicant for payment of compulsory contributions for 1999. It applied the statutory rate of contribution of 15.8% as fixed in the statutes of the pension and invalidity fund.

7. On 9 May 2000 the applicant appealed. She submitted that the calculation was incorrect and that the obligation to pay contributions was unconstitutional.

8. On 20 July 2000 the Appeal Committee (*Beschwerdeausschuss*) of the Medical Association dismissed the applicant's appeal. It stated that the calculation had been correct and that the other issues raised by the applicant were too general or outside the competence of the Appeal Committee.

9. On 1 September 2000 the applicant filed a complaint with the Constitutional Court. She complained that the decision was arbitrary and breached her right to peaceful enjoyment of her property. She submitted that Section 112 of the Medical Practitioners Act, which allowed for exemption from the liability to pay contributions to the pension and invalidity fund, did not sufficiently allow for private initiatives in ensuring an adequate pension. Also the provisions of the Medical Practitioners Act which provided for compulsory membership and compulsory affiliation to the pension and invalidity fund were in breach of EU-law and a preliminary ruling on that issue should be obtained by the European Court. On 22 May 2002 she supplemented her complaint.

10. On 26 June 2002 the Constitutional Court declined to deal with the applicant's complaint for lack of prospect of success. It stated that, at the most, questions of ordinary law could arise in the applicant's case, but no issues of constitutional law or the law of the European Union. Insofar as the applicant had alleged that the ordinary law applied by the administrative authorities was unconstitutional, the Constitutional Court, referring to its case-law, considered this allegation unfounded.

11. The applicant filed a request for transfer of the case to the Administrative Court and, on 21 August 2002, the Constitutional Court did so.

12. On 8 January 2003 the Administrative Court invited the respondent authority to file observations, which it did on 25 January 2003. On 11 April 2003 the applicant replied.

13. On 23 May 2003 the Administrative Court quashed the appeal decision of 20 July 2000 and remitted the case back to the Appeal Committee. It found that on one point, namely as regards deductible

expenses, the Appeal Committee's decision had not been sufficiently reasoned.

14. On 15 October 2003 the Appeal Committee decided again, dismissing the appeal.

15. On 5 December 2003 the applicant filed a further complaint to the Administrative Court, she also requested that a public hearing be held and that suspensive effect be granted. However, at this stage of the proceedings the applicant failed to reiterate her request for referral to the European Court of Justice.

16. On 16 December 2003 the Administrative Court invited the respondent authority to file observations, which it did so on 6 February 2004.

17. On 15 March 2004 the applicant submitted further observations. In her further observations she reiterated her request to submit for a preliminary ruling to the European Court the question of the conformity of the compulsory affiliation to the pension and invalidity fund with EU-law.

18. Meanwhile, on 27 February 2004 the Administrative Court had dismissed the applicant's complaint without holding a public hearing. It found that the Appeal Committee had correctly calculated the amount of the applicant's contributions. This decision was served on the applicant's counsel on 23 March 2004.

THE LAW

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

19. The applicant complained that no public hearing before the Administrative Court had taken place. She relied on Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal...”

A. Admissibility

20. 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

21. The Government argued that in the first set of proceedings before the Administrative Court the applicant, represented by counsel, failed to request a hearing and has therefore waived her right thereto. In the second set of proceedings the Administrative Court had to deal with exclusively legal issues, *i.e.* whether the contributions to the Fund had been fixed correctly on the basis of the established facts, and could therefore refrain from holding a hearing, even though the applicant had requested one.

22. The applicant contested the Government's arguments and stated that she had explicitly requested a hearing in the second set of proceedings, and was thus entitled to be heard. She emphasised that she did not have an opportunity to be heard throughout the entire proceedings and that the facts were not properly assessed.

23. The Court recalls that Austria's reservation under Article 6 was found to be invalid (*Eisenstecken v. Austria*, no. 29477/95, §§ 24-30, ECHR 2000-X) and that the Court is therefore called upon to examine whether the requirements of this provision were complied with.

24. The Court further reiterates that the applicant was entitled in principle to have a public hearing (see, for example, the *Diennet v. France* judgment of 26 September 1995, Series A no. 325-A, pp. 14–15, § 33 and *Malhous v. the Czech Republic* [GC], no. 33071/96, § 55, 12 July 2001) and notes that only the Administrative Court could qualify as “tribunal” (*Fischer v. Austria* judgment of 26 April 1995, Series A no. 312, pp. 20-21, § 44, and *Pauger v. Austria* judgment of 28 May 1997, Reports 1997-III).

25. The Court considers that in the course of proceedings in which exclusively legal or highly technical questions are at stake, the requirements of Article 6 may be fulfilled even in the absence of an oral hearing. (*Schuler-Zraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, p. 19, § 58; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002; and *Schelling v. Austria*, no. 55193/00, § 30, 10 November 2005).

26. In the present case the Court reiterates that the practice of the Austrian Administrative Court is not to hear the parties unless one of them asks it to do so. The applicant expressly requested an oral hearing with the Administrative Court, which was refused without explicitly giving reasons. There is accordingly no question of the applicant having waived that right. Furthermore, there do not appear to have been any exceptional circumstances that might have justified dispensing with a hearing. The Administrative Court was the first and only judicial body before which the applicant's case was brought; it was able to examine the merits of her complaints; the review addressed not only issues of law but also important factual questions. This being so, the Court considers that her right to a

“public hearing” included an entitlement to an “oral hearing” (see *Fischer v. Austria*, no. 16922/90, judgment of 26 April 1995 § 44).

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

28. Lastly, the applicant complained under Article 6 of the Convention about the alleged unfairness and length of the above proceedings and that the Administrative Court had failed to seek a preliminary ruling from the Court of Justice of the European Communities without giving any reasons. Moreover, under Article 1 of Protocol No. 1 she complained that the contribution order violated her property rights.

29. 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

30. 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

31. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

32. The Government submitted that the finding of a violation constituted sufficient reparation in respect of any non-pecuniary damage suffered.

33. 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 *Brugger v. Austria*, no. 76293/01, 26 January 2006, § 31, with further references).

B. Costs and expenses

34. The applicant also claimed EUR 8,273.18 for costs and expenses incurred before the domestic courts and EUR 5,400 for those incurred before the Court. These sums include value-added tax (VAT).

35. The Government contested the costs and expenses incurred before the domestic courts. With regard to the costs before the Court they proposed to merely award costs on an equitable basis.

36. The Court reiterates that 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 demand for an oral hearing. Therefore no award can be made under this head.

37. The Court further notes that the applicant, who was represented by counsel, did not have the benefit of legal aid. Making an assessment on an equitable basis it awards the sum of EUR 3,000 as regards the costs and expenses incurred before the Court. This sum includes VAT.

C. Default interest

38. 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 lack of an oral hearing 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 3,000 (three thousand euros) in respect of costs and expenses inclusive of VAT);
 - (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 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President