



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

FIRST SECTION

CASE OF GÜRSOY v. AUSTRIA

(Application no. 20597/04)

JUDGMENT

STRASBOURG

5 June 2008

FINAL

05/09/2008

This judgment may be subject to editorial revision.

In the case of Gürsoy v. Austria,

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

Christos Rozakis, *President*,

Elisabeth Steiner,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 15 May 2008,

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

PROCEDURE

1. The case originated in an application (no. 20597/04) 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 a Turkish national, Ms Ilknur Gursoy (“the applicant”), on 1 June 2004.

2. The applicant was 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 September 2006 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 1977 and lives in Lustenau. Her father is an Austrian national of Turkish origin. In February 1998 she entered Austria on a temporary visa, valid until 30 June 1998.

5. Following a report by the Dornbirn Aliens Police (*Fremdenpolizei*), on 28 January 1999 the Dornbirn District Administrative Authority issued a provisional penal order (*Strafverfügung*) of 1,000 Austrian schillings (ATS)

– equal to 73 Euros (EUR) and 24 hours’ imprisonment in default against the applicant for illegal sojourn.

6. Subsequently, on 11 February 1999, she filed an objection (*Einspruch*) against that decision with the Dornbirn District Administrative Authority.

7. On 22 March 1999 the applicant, upon the District Administrative Authority’s request, filed a statement in which she specified that she had entered Austria with a valid visa on 26 February 1998. As proceedings for a residence permit were underway, she was in her view allowed to stay until the decision had become final. In addition she claimed that, according to certain EC directives and the Constitutional Court’s jurisprudence and in line with the ECJ’s constant case-law, she was legally residing in Austria, since her father had Austrian citizenship.

8. The Aliens Police submitted their observations on 16 August 1999, which were served on the applicant’s counsel on 23 August 1999. They stated that neither European Law nor domestic provisions could justify the applicant’s sojourn in Austria, which was in fact in breach of section 31 of the Aliens Act.

9. On 21 December 1999 the applicant filed further observations.

10. On 1 December 2000 the District Administrative Authority, having regard to the applicant’s objection and the above investigations, maintained its view and imposed a penal order in the amount of ATS 1,000 with 30 hours’ imprisonment in default. It found that although the applicant had entered with a valid visa, it had expired, following which her stay in Austria was in breach of the Aliens Act.

11. On 19 December 2000 the applicant filed an appeal with the Independent Administrative Panel (IAP). She alleged, *inter alia*, that the first-instance decision did not comply with EC law.

12. Having held an oral hearing, on 25 June 2001 the IAP, dismissed the applicant’s appeal. It referred to the Aliens Act, which exhaustively stipulated the conditions under which a foreigner’s residence could be deemed to be legal. Upholding the first-instance decision, it concluded that the applicant had disregarded her visa’s validity period, following which her sojourn was unlawful.

13. Subsequently, on 13 August 2001, the applicant lodged a complaint with the Administrative Court and the Constitutional Court.

14. On 10 October 2001 the Constitutional Court declined to deal with the case on account of its lack of prospects of success and transferred it to the Administrative Court.

15. The IAP submitted its observations to the Administrative Court on 25 October 2001.

16. On 19 November 2003 the Administrative Court, relying on section 33a of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), declined to deal with the applicant’s case, finding that it did not

raise important legal issues. On 1 December 2003 that decision was served on the applicant's counsel.

THE LAW

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

17. 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..."

18. The Government contested that argument.

19. The period to be taken into consideration began on 28 January 1999, when the Dornbirn District Administrative Authority issued a provisional penal order (*Strafverfügung*) and ended on 1 December 2003, when the final decision was served on the applicant's counsel. It thus lasted four years and eleven months.

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 applicant maintained that the proceedings had been unreasonably long.

22. The Government contested that argument.

23. 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, and 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)

24. The Court finds that the proceedings were not complex, nor did they require meticulous investigations. Moreover, there were periods of inactivity at the first instance and before the Administrative Court. After the

first instance had received both parties' observations in December 1999 it took its decision only one year later in December 2000. Later in the proceedings, the case was pending before the Administrative Court for more than two years, from 25 October 2001 to 19 November 2003, during which period no decision was taken other than to decline to deal with the case. Furthermore, the Court finds that the applicant did not cause any considerable delay.

25. Having examined all the material submitted to it, and having regard to its case-law on the subject (see *Yavuz v. Austria*, judgment of 27 May 2004, no. 46549/99, and *Pélissier and Sassi*, cited above), and in particular what was at stake for the applicant, 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. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

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

27. The Court reiterates that if an appeal is filed with an 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).

28. Under the same provision the applicant also complained about the lack of an oral hearing before the Administrative Court and that the Independent Administrative Panel did not fully deal with her submissions.

29. The Court reiterates that, as far as administrative criminal proceedings are concerned, the Administrative Court does not qualify as a tribunal within the meaning of Article 6 of the Convention as it does not have the required scope of review (see, for instance, *Schmautzer v. Austria*, judgment of 23 October 1995, Series A no. 328-A, p. 15, §§ 34-36). However, a hearing was held before the Independent Administrative Panel, which, according to the Court's settled case-law, meets the criteria of a "tribunal." Therefore the applicant had her case reviewed in a public hearing before a tribunal as set out under Article 6 of the Convention. Moreover, the Independent Administrative Panel assessed the case and its review did not disclose any arbitrariness.

30. Lastly, the applicant complained under Article 2 of Protocol No. 7 about the lack of a review.

31. According to the Court's case-law, the Administrative Court has the competence to review appeal decisions given by independent administrative panels. Even if the Administrative Court declines to deal with or rejects an appeal for lack of important legal issues, that has to be regarded as a review within the meaning of Article 2 of Protocol No 7 (see *Weh and Weh v. Austria*, (dec.) no. 38544/97, 4 July 2002, with reference to *Hauser v. Austria*, no. 26808/95, Commission decision of 16 January 1996, D.R. 84 A, p. 176).

32. Having regard to the above, the Court concludes 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

33. 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

34. The applicant claimed EUR 12,000 in respect of non-pecuniary damage and EUR 93 in respect of pecuniary damage for the fine and costs regarding the fine she had been sentenced to pay.

35. The Government contested these claims.

36. 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, on an equitable basis, it awards the applicant a total amount of EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. Costs and expenses

37. The applicant also claimed EUR 6,300.28, including VAT, for the costs and expenses incurred in the domestic proceedings and EUR 2,662.66, including VAT, for those incurred before the Court.

38. The Government contested these claims.

39. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are 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 those costs were not incurred in an attempt to accelerate the proceedings and there is no indication that the length of the proceedings increased the overall cost 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 1,800, plus any tax that may be chargeable to the applicant.

C. Default interest

40. 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 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 1,000 (one thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable to the applicant, 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 5 June 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President