



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

FIRST SECTION

CASE OF MÜLLER v. AUSTRIA (no. 2)

(Application no. 28034/04)

JUDGMENT

STRASBOURG

18 September 2008

FINAL

18/12/2008

This judgment may be subject to editorial revision.

In the case of Müller v. Austria (no. 2),

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 28 August 2008,

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

PROCEDURE

1. The case originated in an application (no. 28034/04) 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 Pierre Müller (“the applicant”), on 14 July 2004.

2. The applicant was represented by Mr H. Pochieser, 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 criminal proceedings against him had lasted an unreasonably long time and that there had been a breach of his right not to be tried or punished twice.

4. On 14 March 2007 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

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Vienna. He is the owner and managing director of M, a building company.

6. On 10 October 1997 a worker employed by the M company mounted a scaffold (which was owned, however, by another building firm) at one of the company's building sites at M. Street in Vienna. He fell and died a few days later.

7. Subsequently the Vienna District Public Prosecutor (*Bezirksanwalt*) started preliminary inquiries (*Vorerhebungen*) against the applicant on suspicion of having caused death by negligence (*fahrlässige Tötung*), an offence under Article 80 of the Criminal Code. On 27 March 1998 he discontinued the inquiries.

8. On 31 March 1998 the Vienna Municipality issued a penal order (*Straferkenntnis*) against the applicant as manager of the M company, imposing a fine for an administrative offence under section 130(1), no. 16, of the Industrial Safety Act (*Arbeitnehmerschutzgesetz*) read in conjunction with several provisions of the Construction Worker Safety Regulations (*Bauarbeiterschutzverordnung*). It found that the applicant had disregarded the duties of an employer concerning the properties, conditions, use, inspection or maintenance of equipment (*Verpflichtungen betreffend die Beschaffenheit, die Aufstellung, die Benutzung, die Prüfung oder die Wartung von Arbeitsmitteln*) as, on 10 October 1997, a scaffold used at the building site at M. Street, Vienna, had lacked protective barriers on three sides at head, chest and foot level and the protective barriers on the fourth side had not been properly secured.

9. On 31 March 1998 the applicant, assisted by counsel, appealed to the Vienna Independent Administrative Panel ("the IAP" – *Unabhängiger Verwaltungssenat*). He submitted that at the building site at M. Street in Vienna 25 scaffolds owned by different construction companies had been in use. While the one belonging to the M company had all the necessary protective elements, the defective scaffold used by the employees of the M company, which had led to the industrial accident, was owned by another company. On 29 May 2000 the applicant submitted further that the IAP should quash the penal order as the administrative criminal proceedings had been conducted in breach of the principle of *ne bis in idem*.

10. On 20 June 2000 the IAP quashed the penal order of 31 March 1998. Referring to the Constitutional Court's case-law on Article 4 of Protocol No. 7, the IAP found that criminal proceedings for causing death by negligence under Article 80 of the Criminal Code and proceedings under section 130(1), no. 16, of the Industrial Safety Act, read in conjunction with the Construction Worker Safety Regulations, concerned essentially the same conduct as in both cases the authorities and courts had to examine whether the provisions for the protection of construction workers had been complied with. In such circumstances, the person responsible for compliance with these rules was also criminally liable under Article 80 of the Criminal Code in the event of an accident at work leading to the death of the victim. Therefore the IAP was prevented from conducting administrative criminal

proceedings against the applicant even though finally the District Public Prosecutor had discontinued his inquiries into the charge of causing death by negligence against the applicant.

11. On 25 August 2000 the Federal Minister for Economy and Labour (*Bundesminister für Wirtschaft und Arbeit*) filed a complaint with the Administrative Court against the IAP's decision. The Federal Minister pointed to the Constitutional Court's case-law, according to which a conviction under Article 80 of the Criminal Code concerned essentially the same punishable conduct as the offence under section 130(1), no. 16, of the Industrial Safety Act. Thus, to conduct two sets of criminal proceedings concerning these offences would be in breach of Article 4 of Protocol No. 7. The IAP had, however, overlooked the fact that in the present case no proceedings had been conducted against the applicant before a criminal court. The inquiries by the District Public Prosecutor, an employee of the Public Prosecutor's Office, had the purpose of verifying whether or not a charge should be brought against a person and whether proper criminal proceedings should be opened. As a result the District Public Prosecutor had discontinued the preliminary inquiries since he had not found sufficient reasons to prosecute the applicant. That being so, it could not be said that an act had been committed which fell within the scope of Article 80 of the Criminal Code. The *ne bis in idem* principle did not therefore apply.

12. On 26 April 2002 the Administrative Court quashed the IAP's decision of 20 June 2000. The Administrative Court found that the *ne bis in idem* principle was not at stake if a public prosecutor discontinued preliminary inquiries on a criminal information pursuant to Article 90 of the Code of Criminal Procedure, as in such a case the public prosecutor – either immediately or after conducting inquiries – arrived at the conclusion that the criminal information was unfounded, and that the act to which it referred was not punishable or did not justify prosecution. Such a case must be distinguished from the material facts in the Constitutional Court's decision to which the IAP had referred, as that case had not concerned the termination of investigations under Article 90 of the Code of Criminal Procedure.

13. On 11 February 2003 the IAP gave a fresh decision on the applicant's appeal and this time upheld the Municipality's penal order after having held oral hearings on 16 October and 13 December 2002. The IAP noted that the workers present at the building site had used a scaffold belonging to another building company. The applicant, as the person responsible, had not installed a properly functioning control system, verifying that the scaffolds and other materials used by the workers complied with safety regulations and that the workers had been trained in complying with these regulations. The applicant had therefore been responsible for the non-compliance with the safety regulations.

14. On 11 June 2003 the applicant lodged a complaint with the Constitutional Court, alleging, *inter alia*, that the impugned decision disregarded the principle of *ne bis in idem*.

15. On 23 September 2003 the Constitutional Court declined to deal with the applicant's complaint for lack of prospect of success, and on 19 December 2003 the Administrative Court also declined to deal with the applicant's complaint for lack of prospect of success in accordance with section 33a of the Administrative Court Act.

II. RELEVANT DOMESTIC LAW

16. Sections 84 to 115 of the Code of Criminal Procedure (*Strafprozeßordnung*) concern the conduct of preliminary inquiries (*Vorerhebungen*) and preliminary investigations (*Voruntersuchungen*).

17. In order to procure the necessary evidence for the institution of criminal proceedings or for the closing of the file (*Zurücklegung*) on a criminal information, the public prosecutor may first have preliminary inquiries carried out by the investigating judge, the District Court or the police authorities (Section 88 § 1).

18. Where the public prosecutor is satisfied that there are sufficient grounds for bringing a criminal prosecution, he or she must either request the institution of preliminary investigations or file a formal indictment (*Anklageschrift, Strafantrag*; Section 90 § 1). Section 91 § 2 provides that preliminary investigations pursue the aim of provisionally examining the criminal charges laid against a person and of establishing the facts to the extent necessary to decide whether to discontinue the criminal proceedings or to commit the person for trial and prepare the taking of evidence at the trial.

19. Section 93 § 1 provides that preliminary investigations are in principle conducted by the investigating judge personally and directly.

20. Section 5 § 1 of the Code of Administrative Offences provides:

“Unless a provision of administrative law states otherwise, negligent behaviour is sufficient to establish guilt. Negligence is to be assumed in the case of failure to observe a prohibition or a prescription where damage or danger is not an element of the administrative offence, and the defendant does not convincingly show that no fault lies with him for the contravention of the provision of administrative law.”

THE LAW

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

21. The applicant complained that the length of proceedings had been incompatible with the “reasonable time” requirement as provided in Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

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 applicant submitted that the subject matter of the present case was not of a nature to raise complex legal questions since there already existed a clear decision of the Constitutional Court regarding a similar case. Furthermore, no delays had been caused by him and all the delays that had occurred must be attributed to the Austrian authorities and courts.

24. The Government contended that the length of proceedings before the Vienna Municipality and the IAP had complied with the “reasonable time” requirement. The IAP had had to deal with a particular question of law, namely whether the ruling issued by the administrative authority of first instance, after the criminal information had been set aside by the public prosecutor, had violated Article 4 of Protocol No. 7. At that time no relevant case-law of the highest Austrian courts had existed on this specific matter. Moreover, given the complex questions of law the Administrative Court had had to decide on, the length of the proceedings before that court should also be regarded as reasonable.

25. The Court observes that the period to be taken into consideration began at the latest on 31 March 1998, when the Vienna Municipality issued a penal order, and ended on 19 December 2003, when the Administrative Court decided on a complaint by the applicant. The proceedings therefore lasted approximately five years, eight months and two weeks. During this period the case was dealt with by various authorities: the Vienna

Municipality and the Constitutional Court once, the IAP and the Administrative Court twice.

26. 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).

27. In the present case, the Court is not persuaded that the questions the authorities and courts had to decide on were so complex that they could justify the whole period that elapsed until the final decision was taken. As regards the conduct of the parties, the Court cannot find that the applicant contributed to the duration of the proceedings. As regards the conduct of the authorities, the Court observes that the IAP and the Administrative Court dealt twice with the applicant's case. However, it notes that there was a period of inactivity of one year and eight months before the Administrative Court, namely from 25 August 2000 (when the Federal Minister for Economy and Labour filed his complaint) until 26 April 2002 (when the Administrative Court gave its decision). Having regard to this and to the overall duration of the proceedings, the Court finds that the applicant's case has not been determined within a reasonable time.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

Admissibility

29. The applicant further complained of a breach of the *ne bis in idem* principle, relying on Article 4 of Protocol No. 7, which, in so far as relevant, reads as follows:

“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

30. The Government argued that the effect of setting aside an information after preliminary investigations by the public prosecutor was that no criminal proceedings were conducted at all. The applicant had only been questioned by the police and not a judge; thus, he had not attained the status of an accused or a suspect. The public prosecutor's refraining from prosecution could not be considered a final judicial decision within the meaning of Article 4 of Protocol No. 7.

31. The applicant contested these arguments. He submitted that the preliminary investigations carried out by the District Public Prosecutor on

suspicion of his having caused death by negligence and the subsequent administrative proceedings for breaching workers' safety regulations had concerned essentially the same conduct. In his view, the preliminary investigations had been carried out on behalf of the Döbling District Court, and during these investigations he had been questioned as a suspect and the police had acted as officers of the court.

32. The Court notes that the main accusation against the applicant in the criminal proceedings, namely that he had failed to prevent an accident at work, and the charge against him in the administrative criminal proceedings, namely that he had failed to ensure compliance by his employees with safety regulations, were essentially the same.

33. The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. In the case of *Sundqvist v. Finland* the Court found that under Finnish law, the decision by a State prosecutor not to prosecute the applicant did not constitute a final decision (see *Sundqvist v. Finland* (dec.), no. 5602/01, 2 November 2005).

34. The Court observes that according to the wording of the Austrian Code of Criminal Procedure, the aim of preliminary investigations is to examine provisionally the criminal charges laid against a person and to establish the facts to the extent necessary to decide whether to discontinue the criminal proceedings. Therefore, the setting aside of an information by the public prosecutor in the present case cannot be regarded as a final decision either. Hence it is not relevant what status the applicant had when he was questioned by the police. In these circumstances the Court finds no appearance of a violation of Article 4 of Protocol No. 7 of the Convention.

35. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

36. Furthermore the applicant complained under Article 2 of Protocol No. 7 of the Convention of a lack of a review by a higher tribunal. He submitted that the Administrative Court's review was insufficient as it could not be regarded as a judicial body with full jurisdiction as to the facts and the law, and that the Administrative Court did not generally hold oral hearings in administrative criminal proceedings. He also relied on Article 13 in respect of that complaint.

37. The Court reiterates that the Contracting States may limit the scope of the review by a higher tribunal by virtue of the reference in paragraph 1 of Article 2 of Protocol No. 7 to national law. In several member States of the Council of Europe such a review is limited to questions of law or may require the person wishing to appeal to apply for leave to do so (see *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I). In the present case, there is no indication that the scope of review of the Administrative Court was insufficient for the purposes of Article 2 of Protocol No. 7 (see *Müller v. Austria* (no. 1), no. 12555/03, § 25,

5 October 2006). As regards Article 13, the Court notes that the effectiveness of a remedy for the purposes of that Article does not depend on the certainty of a favourable outcome.

38. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

39. The applicant lastly alleged a violation of Article 6 § 2 of the Convention and submitted that he was required by Section 5 § 1 of the Code of Administrative Offences to exculpate himself, rather than the burden being on the prosecution.

40. The Court notes that Section 5 § 1 of the Code of Administrative Offences contains a presumption that a person who contravened a prohibition acted at least with negligence, unless he or she is able to show that no fault lies with him or her. The Court reiterates that Article 6 § 2 does not prohibit the use of presumptions of fact or law, if they remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, § 28). In the present case, the applicant was not left without any means of defence, as he had the opportunity to show that he had established an effective control system ensuring that the workers employed by the M company were informed about safety regulations and that compliance with such regulations was checked. The Austrian authorities found, however, that the applicant had not set up an effective system to check whether his orders had been complied with. The Court cannot find that in so holding, the Austrian authorities overstepped the limits set by Article 6 § 2 (see, *mutatis mutandis*, *Bruckner v. Austria*, no. 21442/93, Commission decision of 18 October 1994, and *Müller (no. 1)*, cited above, § 34).

41. It follows that this complaint must likewise 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

42. 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

43. The applicant claimed 1,417.13 euros (EUR) in respect of pecuniary damage, corresponding to the amount of the fine he had to pay, and EUR 10,000 in respect of non-pecuniary damage.

44. The Government contested the applicant's claim for pecuniary damage as not justified and his claim for non-pecuniary damage as excessive.

45. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim. On the other hand, the Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards the applicant EUR 1,500 under that head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

46. The applicant also claimed EUR 16,025.66 including value-added tax (VAT) for costs and expenses incurred before the domestic courts and EUR 6,833.88 including VAT for those incurred before the Court.

47. The Government contested the claim for costs as being excessive.

48. 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 in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Müller (no. 1)*, cited above, § 42). In the present case, it does not appear from the applicant's submissions that any specific costs were incurred in an attempt to accelerate the proceedings. Therefore, no award can be made as regards the costs of the domestic proceedings.

49. As to the costs of the proceedings before the Court, the Court notes that the applicant, who was represented by counsel, did not have the benefit of legal aid and that he was only partly successful.

It considers it reasonable, having regard to similar cases, to award him EUR 1,670 under this head.

C. Default interest

50. 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 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant;
 - (b) EUR 1,670 (one thousand six hundred and seventy euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (c) 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 18 September 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President