



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

1959 · 50 · 2009

FIRST SECTION

CASE OF KOOTTUMMEL v. AUSTRIA

(Application no. 49616/06)

JUDGMENT

STRASBOURG

10 December 2009

FINAL

10/03/2010

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 Koottummel v. Austria,

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

Christos Rozakis, *President*,

Nina Vajić,

Elisabeth Steiner,

Khanlar Hajiyeu,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 19 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 49616/06) 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, Ms Geethakumari Koottummel (“the applicant”), on 6 December 2006.

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 for Foreign Affairs.

3. The applicant complained that there had been no oral hearing before the Administrative Court in the proceedings concerning her request for an employment permit for an Ayurvedic chef.

4. On 23 June 2008 the Court decided to give notice of the application to the Government. Under the provision 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 who was born in India lives in Lustenau. She runs an Indian restaurant with Ayurvedic cuisine in Lustenau.

6. On 1 October 2004 she lodged a request with the Dornbirn Labour Market Service (*Arbeitsmarktservice* – LMS) for the grant of an employment permit for an Ayurvedic chef from the South of India as a key worker (*Schlüsselarbeitskraft*).

7. On 2 November 2004 the Dornbirn LMS refused the request in accordance with section 2(5) of the Aliens' Employment Act (*Ausländerbeschäftigungsgesetz*). It found that the chef did not fulfil the conditions to be a key worker as defined in section 2(5).

8. The applicant appealed against the refusal to the Vorarlberg LMS on 17 November 2004. She maintained in substance that the authority had failed to assess properly the evidence.

9. On 15 February 2005 the Vorarlberg LMS dismissed the applicant's appeal. It held that the submitted documents did not sufficiently prove her contention that the proposed chef fulfilled the conditions required to be a key worker or that the requested employment would secure existing jobs or create new jobs, as required by section 2(5) of the Aliens' Employment Act. His professional skills could not be seen as specific and extraordinary since any chef could with further training obtain a certificate in Ayurvedic cuisine.

10. The applicant filed a complaint with the Administrative Court on 31 March 2005 and requested an oral hearing. In her appeal the applicant maintained that the authorities had failed to assess the evidence properly and give appropriate reasons. Had they done so they should have concluded that the person to be employed qualified as a key worker. On 7 June 2005 the Vorarlberg LMS submitted its comments.

11. On 24 April 2006 the Administrative Court dismissed the applicant's complaint. In accordance with section 39(2) of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) it also dismissed the applicant's request for an oral hearing as it found that it would not be likely to contribute to the clarification of the case. The decision was served on the applicant's counsel on 6 June 2006.

II. RELEVANT DOMESTIC LAW

12. The Employment of Foreigners Act (*Ausländerbeschäftigungsgesetz*) regulates a foreigner's access to the Austrian labour market. Section 2 (5) of this act, as in force at the relevant time, reads as follows:

“(5) Key workers are foreigners who have particular training or specific know-how and professional experience which are requested on the domestic labour market and who would receive for their employment a monthly gross salary of at least 60% of the maximum contribution level under Section 108 para. 3 of the General Social Security Act. Moreover, at least one of the following conditions must be fulfilled:

1. the intended employment goes beyond the interest of the employing company and is of specific relevance for the region or the sector of the labour market concerned or
2. the intended employment fosters the creation of new employments and ensures the protection of existing employments or
3. the foreigner has a crucial influence on the management of the company (executive managerial post) or
4. the intended employment leads to a transfer of capital investment to Austria or
5. the foreigner is a university or polytechnics graduate or holds a certificate proving that he has accomplished a specially recognised training.”

Further relevant provisions of that act can be found in the judgments in the cases of *Juriscic and Collegium Mehrerau v. Austria* (no. 62539/00, 27 July 2007) and *Coorplan-Jenni GmbH and Hascic v. Austria* (no. 10523/02, 27 July 2006).

13. Section 39(1) of the Administrative Court Act requires the Administrative Court to hold a hearing after its preliminary investigation of the case where the complainant has requested a hearing within the time-limit. Section 39(2) (6) provides, however, that, notwithstanding such a request, the Administrative Court may decide not to hold a hearing if it is apparent from the written pleadings of the parties and the files relating to the previous proceedings that an oral hearing would not be likely to contribute to the clarification of the case and that the lack of a hearing would not be in breach of Article 6 of the Convention.

THE LAW

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

14. The applicant complained that there had been no oral hearing before the Administrative Court in the proceedings concerning her complaint of refusal to issue an employment permit. She relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

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

A. Admissibility

15. The Court finds 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

16. Referring to the judgments of the Court in the cases of *Jurisic and Collegium Mehrerau v. Austria* (no. 62539/00, 27 July 2007) and *Coorplan-Jenni GmbH and Hascic v. Austria* (no. 10523/02, 27 July 2007), the applicant submitted that the lack of an oral hearing before the Administrative Court had violated her right under Article 6 of the Convention. In this regard she also referred to a case which had been decided by the Administrative Court (Collection of decisions no. 17083 A/2006) and which, in her view, was similar to the present one. In that case the Administrative Court had actually held a hearing which had eventually been decisive for the outcome of the proceedings. In her submission, this clearly showed that an oral debate was more effective and fruitful than a mere exchange of written submissions.

17. The Government argued that there had been no breach of the applicant's right to an oral hearing before a tribunal as the special features of the proceedings constituted "exceptional circumstances" which justified the absence of a hearing. They noted in this regard that in her submissions to the Administrative Court the applicant had not substantiated her complaint relating to the fulfilment of the conditions required for a key worker or made out a valid case in support of her request for an oral hearing. Furthermore the other questions at issue had exclusively been questions of law, so that the Administrative Court had been able adequately to decide the case on the basis of the case file.

18. The Court notes that the applicant's case was considered by the Dornbirn Labour Market Service and the Vorarlberg Labour Market Service, i.e. purely administrative authorities, and then by the Administrative Court. The applicant did not contest that the Administrative Court qualifies as a tribunal, and there is no indication in the file that the Administrative Court's scope of review was insufficient in the circumstances of the case. Thus, the Administrative Court was the first and only tribunal which examined the applicant's case (see *mutatis mutandis Schelling v. Austria*, no. 55193/00, § 29, 10 November 2005)

19. The applicant was thus in principle entitled to a public oral hearing before the first and only tribunal examining her case, unless there were exceptional circumstances which justified dispensing with such a hearing. The Court has accepted such exceptional circumstances in cases where

proceedings concerned exclusively legal or highly technical questions (see *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002; and *Speil v. Austria* (dec.) no. 42057/98, 5 September 2002).

20. The Court cannot find that in the present case the subject matter of the proceedings before the Administrative Court was of such a nature, namely a highly technical issue or of mere legal nature, as to dispense with its obligation to hold a hearing (see *Jurisic and Collegium Mehrerau v. Austria*, no. 62539/00, 27 July 2007, and *Coorplan-Jenni GmbH and Hascic v. Austria*, no. 10523/02, 27 July 2006).

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

II. OTHER ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

22. The applicant further complained under Article 6 about the length of the proceedings concerning her request for an employment permit.

23. As regards the period to be taken into account under Article 6 § 1, the Court observes that the proceedings started on 2 November 2004, when the Dornbirn LMS refused the applicant's request for the employment permit and ended on 6 June 2006, when the final judgement of the Administrative Court was served on the applicant's counsel. Thus the proceedings lasted approximately one year and eight months for three jurisdictions, a period which can be regarded as reasonable.

24. It follows that this complaint 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

25. 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

26. The applicant claimed 3,000 euros (EUR) in respect of pecuniary damage on the grounds that she had had to provide accommodation for the chef whose employment permit was eventually refused and had suffered loss of income due to the denial of a work permit for him.

27. The Government contested her claim.

28. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim.

B. Costs and expenses

29. The applicant also claimed 3,800 euros (EUR) including value added tax (VAT) for costs and expenses incurred before the Court. She furthermore claimed EUR 3,569.14 based on the assumption that if the Administrative Court had held an oral hearing it would have quashed the LMS's decision and awarded her that sum.

30. The Government contested the claim for costs incurred before the Court as being excessive. As regards the other claim it argued that this sum was based on mere speculation about the outcome of the domestic proceedings.

31. The Court reiterates that an applicant is only entitled to the reimbursement of costs and expenses in so far as they have actually been incurred. The Court does not find it established that the applicant incurred, in the domestic proceedings, any costs related to the violation found. It therefore dismisses the applicant's claim under this head.

32. As to the costs of the proceedings before the Court, it notes that the applicant, who was represented by counsel, did not have the benefit of legal aid and was only partly successful. It considers it reasonable, having regard to similar cases, to award her EUR 2,000 under this head, plus any tax that may be chargeable to the applicant on this amount.

C. Default interest

33. 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 2,000 (two thousand 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 10 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President