



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

FIRST SECTION

**CASE OF GABRIEL v. AUSTRIA**

*(Application no. 34821/06)*

JUDGMENT

STRASBOURG

1 April 2010

**FINAL**

*01/07/2010*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of** Gabriel 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,

Khanlar Hajiyev,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 11 March 2010,

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

## PROCEDURE

1. The case originated in an application (no. 34821/06) 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, Werner Gabriel (“the applicant”).

2. The applicant was represented by Ms Baumgartner-Gabriel, a lawyer practising in Graz. 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 complained, in particular, that there was no public hearing in the disciplinary proceedings against him before the Administrative Court.

4. On 1 December 2007 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

5. The applicant was born in 1939 and lives in Graz.

6. The applicant was, at the time of the events, a civil servant in a public employment relationship with the Styria Regional Government

(*Landesregierung*). He worked at the Department for Legal Affairs (Traffic Department).

7. On 17 May 1993 the Department for Legal Affairs (Human Resources) laid disciplinary information against the applicant.

8. The Disciplinary Commission at the Office of the Regional Styria Government (*Disziplinarkommission des Amtes der Landesregierung*) decided, on 21 June 1993, to institute the main disciplinary proceedings on account of seventeen specific charges dating from December 1990 to April 1993 and suspended the applicant from his duties (*Einleitungs- und Suspendierungsbeschluss*).

9. On 21 September 1994 the Disciplinary Commission decided to hold a hearing (*Verhandlungsbeschluss*) in the disciplinary matter against the applicant, charging him on twenty-four counts. However, in the summons for the hearing the Disciplinary Commission informed the applicant on 2 October 2005 that only counts 1 to 14 would be subject matter of the hearing.

10. A hearing was held in presence of the applicant and his counsel on 7 December 1995 following which the Disciplinary Commission held the applicant liable in respect of ten counts of misbehaviour. It imposed a disciplinary penalty of immediate retirement with a deduction of 20% of his pension benefits. On the remaining four counts the Disciplinary Commission found no reason to take further action.

11. On 7 November 1996 the Senior Disciplinary Board at the Office of the Styria Regional Government (*Disziplinaroberkommission des Amtes der Landesregierung*) on the basis of the result of an oral hearing upheld this decision with regard to six counts, but found no reason for criticism as regards the remaining four counts. As a result the disciplinary penalty was reduced by setting the deduction of the applicant's pension benefits at 15%.

12. The applicant lodged a complaint with the Constitutional Court on 9 January 1997. The applicant also requested the Constitutional Court to hold a public hearing.

13. The Constitutional Court declined to deal with the applicant's complaint for lack of prospect of success on 9 June 1998 and, on 24 June 1998, remitted the case to the Administrative Court at the applicant's request.

14. On 23 September 1998 the applicant supplemented his complaint as requested by the Administrative Court and requested again a public hearing to be held. In his complaint he argued that the Senior Disciplinary Board had not been properly composed and that there were inconsistencies as to the number of charges in the decision to institute proceedings, the decision to hold a hearing and for which he was eventually held liable. Further, the authorities had not properly gathered the evidence and had erred in its assessment.

15. On 15 December 1999 (served on the applicant's counsel on 24 January 2000) the Administrative Court, without a hearing, dismissed the applicant's complaint as unfounded.

## THE LAW

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

16. The applicant complained that no public hearing before the Administrative Court had taken place. He 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

##### *1. Compliance with the six-month time-limit*

17. The Government submitted that the application had been lodged outside the six-month time-limit, as the domestic proceedings had ended on 24 January 2000 when the Administrative Court's decision of 15 December 1999 was served on the applicant's counsel, while the application form transmitted to the Government bore the date 3 August 2006.

18. This is disputed by the applicant. He submitted that by 24 July 2000 he had already introduced an application with the Registry of the Court. For reasons beyond his control the file opened for this application was destroyed and he had to re-submit the same application later. Therefore the date of the initial introduction of the application should be taken into account and the application had therefore been introduced in time.

19. According to its case-law, the Court considers the date of introduction of an application to be the date of the first letter indicating an intention to lodge an application and giving some indication of the nature of the complaint. However, where a substantial interval follows before an applicant submits further information as to his proposed application, the Court examines the particular circumstances of the case in order to decide what date shall be regarded as the date of introduction and from which to calculate the running of the six-month period set out in Article 35 § 1 of the

Convention (see *Alzery v. Sweden* (dec.), no. 10786/04, 26 October 2004 with further references).

20. In the present case the Court notes that the applicant indeed lodged the present application on 24 July 2000. On 4 September 2000, in a letter addressed to his then counsel, the Registry requested the applicant to confirm his wish to pursue his application. As no reply was received the file was destroyed on 9 July 2002 in accordance with the Court's practice. On 7 January 2003 the applicant, through his then counsel, inquired about the state of the proceedings, but received no reply from the Court's Registry. On 5 July 2006 the applicant, through his present counsel, again inquired about the state of proceedings following which he was informed by the Court's Registry that the file had been destroyed. On 3 August 2006 the applicant requested the restoration of the original application and for its date of introduction the date when the application was initially introduced, namely 24 July 2000. He maintained that he had never received the letter of 4 September 2000 and had therefore assumed that his application was being dealt with by the Court in the usual manner.

21. Having regard to the above the Court finds that there is nothing to indicate that the applicant had reason to believe that his application, as submitted on 24 July 2000, was not dealt with. Moreover there is nothing in the facts challenging the bona fide of the applicant or his representative.

22. Thus, the Court considers the date of introduction of the application to be 24 July 2000. The application has therefore been submitted within the time-limit set down by Article 35 § 1 of the Convention. Accordingly the Government's objection has to be dismissed.

## *2. Applicability of Article 6 of the Convention*

23. The Government submitted that Article 6 of the Convention did not apply to the proceedings at issue because, at the time of the events, the Court's judgment in the case of *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-IV), had not yet been given and under the *Pellegrin* test (*Pellegrin v. France* [GC], no. 28541/95, § ..., ECHR 1999-VIII) Article 6 would not have been applicable to disciplinary proceedings against a civil servant such as the applicant.

24. This is disputed by the applicant. In his view, even when applying the criteria established by the Court in the now outdated judgment of *Pellegrin v. France*, Article 6 would apply.

25. The Court is not persuaded by the Government's argument. The question the Court has to deal with when it exercises its jurisdiction is not whether a Contracting State has complied with the courts' existing case-law on a specific issue but, under Article 19 of the Convention, whether a Contracting Party has complied with its obligation under Article 1 of the Convention, namely "to secure to everyone within [its] jurisdiction the rights and freedoms defined in Section I of this Convention" (see

*Weixelbraun v. Austria*, no. 33730/96, § 27, 20 December 2001). In the light of the *Vilho Eskelinen and Others v. Finland* judgment Article 6 § 1 is applicable to the proceedings at issue, because the applicant, as a civil servant, was not excluded from access to court in the present case. Article 6 therefore applies to the proceedings at issue.

26. 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**

27. The applicant submitted that throughout the entire proceedings he did not have an opportunity to have a public hearing even though he had explicitly asked for one. Furthermore the Government had failed to give clear reasons why the exclusion of the public was in the interests of secrecy in his case.

28. The Government submitted that the applicant, who was represented by counsel, had failed to request a hearing in his complaints with the Constitutional Court and Administrative Court and must therefore be deemed to have waived his right thereto. In any event a hearing before these courts had not been necessary. Moreover, since matters subject to official secrecy are as a rule discussed in disciplinary proceedings and as the civil servant charged with a disciplinary offence is not restricted in his defence by the duty of official secrecy, the exclusion of the general public from an oral hearing was therefore justified.

29. The Court finds that the Administrative Court was the only instance in the proceedings which qualifies as a tribunal within the meaning of Article 6 § 1 of the Convention (see *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). Thus the applicant would be entitled to a hearing before that court unless exceptional circumstances dispensed it from doing so (see *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171, p. 20 § 64).

30. No hearing was held before the Administrative Court, even though, contrary to the Government's contention, the applicant had explicitly requested one (§ 14 above). There is accordingly no question of the applicant having waived that right.

31. The Administrative Court gave no reason why it considered a hearing to be unnecessary. The Government argued that since the matters discussed in disciplinary proceedings are as a rule subject to official secrecy, the exclusion of the general public from the oral hearing was justified. The Court is not persuaded by this argument. The Court has accepted in the past that the requirement to hold a public hearing is not

absolute and that it is consistent with Article 6 § 1 for a State to designate an entire class of cases as an exception to the general rule of public hearings (see *B. and P. v. the United Kingdom*, nos. 36337/97 and 35974/97, § 39 ECHR 2001-III, and *Osinger v. Austria*, no. 54645/00, § 47, 24 March 2005). However, the justification under Article 6 § 1 of such an exclusion of the general public from a hearing in certain classes of cases is not the issue here, as hearings before the Administrative Court are in principle public (see *Zumtobel v. Austria*, 21 September 1993, § 20, Series A no. 268-A). Since the Administrative Court had not given any reason why it did not hold a hearing in the applicant's case the Court cannot speculate whether the exclusion of the public would have been justified had a hearing taken place.

32. Nor have the Government identified any other exceptional circumstances that might have justified dispensing with a hearing. Thus, as the applicant received no hearing there was a breach of the applicant's right to a "public hearing".

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

## II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

34. The applicant further complained under Article 6 § 1 about the length of the disciplinary proceedings against him and that his right to an independent and impartial tribunal had been infringed.

35. However, 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.

36. It follows that this part of the application is 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

37. 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

38. The applicant claimed 178,000 euros (EUR) in respect of pecuniary damage. He submitted that he had suffered financial losses because of his early retirement ordered in the disciplinary proceedings and as a result of his suspension in the course of the proceedings.

39. The Government contested these claims as, in their view, there was no causal link between the alleged violation and the pecuniary damage claimed. In respect of any non-pecuniary damage the Government asserted that the finding of a violation would be sufficient.

40. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It therefore rejects this claim.

#### B. Costs and expenses

41. The applicant also claimed EUR 40,000 for costs of his representation incurred in the domestic proceedings and before the Court, without giving details.

42. The Government contested the claim. They submitted that the costs of the applicant's representation in the domestic proceedings had not been caused by the alleged violations, as they would have been incurred in any event. Moreover the applicant merely gave a lump-sum figure and did not specify his claims, which in any event are excessive.

43. It is true that the applicant failed to specify the costs incurred by him and merely indicated a lump sum. However, noting that in the proceedings before the Court the applicant was represented by counsel and did not have the benefit of legal aid, the Court considers that the applicant must have incurred expenses for the fees of his legal representation before the Court. Making an assessment on an equitable basis and having regard to similar cases it considers it reasonable to award him EUR 1,000 under this head, plus any tax that may be chargeable to the applicant on this amount

### C. Default interest

44. 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 1,000 (one 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 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 1 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach  
Deputy Registrar

Christos Rozakis  
President