



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

FIRST SECTION

CASE OF KAMMERER v. AUSTRIA

(Application no. 32435/06)

JUDGMENT

STRASBOURG

12 May 2010

FINAL

12/08/2010

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

In the case of Kammerer 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,

Giorgio Malinverni, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 22 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 32435/06) 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, Mr Hermann Kammerer (“the applicant”), on 30 July 2006.

2. The applicant was represented by Mr W. Rainer, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged, invoking Article 6 of the Convention, that his right to be heard had been infringed.

4. On 18 September 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

THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Axams.

6. On 30 June 2004 the Innsbruck District Administrative Authority (*Bezirkshauptmannschaft*, DAA) issued a provisional penal order (*Strafverfügung*) against the applicant, imposing a fine under the Motor

Vehicles Act (*Kraftfahrzeuggesetz*) for non-compliance with the obligations of registered owners to have their cars inspected on a regular basis for security reasons.

7. On 6 July 2004 the applicant lodged an objection to this decision.

8. On 12 July 2004 the DAA issued a penal order (*Straferkenntnis*) confirming its previous decision and imposing a fine of 72 euros (EUR), with twenty-four hours' imprisonment in case of default, on the applicant.

9. Assisted by counsel, the applicant appealed on 28 July 2004 to the Tirol Independent Administrative Panel (*Unabhängiger Verwaltungssenat*, IAP) alleging that he was not responsible for the regular car inspection since the car was permanently used by another person. Furthermore he argued that the car had been parked at the same spot for more than five weeks and was not in active use at the relevant time. He also requested that an oral hearing be held in which he and the actual user of the car could be heard as witnesses.

10. On 31 January 2005 the IAP scheduled an oral hearing for 22 February 2005.

11. A summons was served on the applicant's counsel on 3 February 2005, containing the standard text that the accused does not have to appear before the IAP personally but is free to send a representative instead.

12. On the morning of 22 February 2005 the replacement of the applicant's counsel informed the IAP that the applicant had been informed about the hearing only a few days before and that he could not attend the hearing since he was ill, neither could the requested witness appear as she was on holiday. He requested an adjournment of the hearing, but the IAP refused.

13. On 22 February 2005 the hearing took place in the absence of the applicant but in the presence of his counsel, who again requested that the hearing be adjourned to hear the applicant and the witness. The IAP dismissed the applicant's appeal and only amended a citation of the DAA's decision. It found that even though the car was used by somebody else the applicant, as the registered owner has to check that the car undergoes regular inspections. Therefore, the IAP did not consider it necessary to question the witness. As regards the request for an adjournment of the hearing, the IAP found that the applicant's interests had been taken care of by his counsel and that his presence had therefore not been necessary, all the more so as the facts were clear and it was only questions of law which had to be decided.

14. On 4 May 2005 the applicant lodged a complaint with the Constitutional Court in which he complained, *inter alia*, that the IAP had convicted him *in absentia*.

15. On 13 June 2005 the Constitutional Court declined to deal with the applicant's case since it did not involve a question of fundamental rights.

16. At the request of the applicant the Constitutional Court transmitted the case on 29 July 2005 to the Administrative Court.

17. On 15 September 2005 the applicant modified his complaint lodged with the Administrative Court.

18. On 27 January 2006 the Administrative Court refused to deal with the applicant's complaint under section 33a of the Administrative Court Act since the amount of the penalty did not exceed EUR 750 and no important legal issue was at stake

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

19. The applicant complained that the IAP had held its hearing in his absence. He relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

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 submitted that even though he had made repeated requests, he had never been heard in person throughout the administrative criminal proceedings against him. Furthermore his counsel had twice

requested that the hearing be adjourned, since the applicant could not take part for health reasons. In this regard he referred to the cases of *Yavuz v. Austria* (no. 46549/99, judgment of 27 May 2004) and *Kaya v. Austria* (no. 54698/00, judgment of 8 June 2006).

22. The Government argued that a hearing held in the absence of the defendant did not violate Article 6 of the Convention if the defendant was not punished for his absence in the proceedings and if his right to legal assistance was not restricted, on account of the fact that the defendant was represented in the proceedings by legal counsel. Moreover, the presence of the defendant at an oral hearing was not necessary when the only questions addressed were those which merely required an assessment of evidence and did not relate to the personality of the defendant. According to the applicant's written submission, which was completely identical to the counsel's oral pleadings, he merely claimed that he had left the motor vehicle with a third person and that therefore the applicant's presence was not necessary. Moreover the IAP took full account of the applicant's submissions. Lastly, the Government argued that the applicant had waived his right to attend the hearing on 22 February 2005, since he had not presented any medical certificate as evidence of his sudden illness.

23. The Court reiterates that an oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 79). Moreover, the right of an accused to participate in person in the proceedings is a fundamental element of a fair trial (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 27; *Stoichkov v. Bulgaria*, no. 9808/02, § 55, 24 March 2005).

24. That said, these obligations are not absolute. There may be proceedings in which an oral hearing may not be required, for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (*Jussila v. Finland* [GC], no. 73053/01, § 41, ECHR 2006-XIII). Likewise, an accused may waive the exercise of his right to participate in person in the proceedings, even though this waiver must be established unequivocally (see, as a recent authority, *Stoichkov v. Bulgaria*, cited above).

25. In arguing that his absence from the hearing of 22 February 2005 was in breach of Article 6 of the Convention the applicant relied on the cases of *Yavuz* (cited above) and *Kaya* (cited above). The Government, for their part, maintained that the applicant's presence at the hearing of 22 February 2005 had not been necessary because he was represented in the proceedings by legal counsel and the only questions addressed at the

hearing were those which merely required an assessment of evidence and did not relate to the personality of the defendant.

26. The Court observes that in the case of *Jussila v. Finland* the Court qualified tax surcharge proceedings against the applicant as falling under the criminal law limb of Article 6 § 1 of the Convention (cited above § 38). However, as regards compliance with Article 6 § 1, the Court found no breach of that provision on account of a lack of an oral hearing. It emphasised that the obligation to hold a hearing was not absolute and, in particular, acknowledged that the national authorities may have regard to the demands of efficiency and economy in deciding whether or not to hold an oral hearing (cited above § 42). Even though requirements of a fair hearing under Article 6 § 1 for the sphere of criminal law were stricter than civil law, the Court did not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it was self-evident that there were criminal cases which did not carry any significant degree of stigma. There were clearly “criminal charges” of differing weight and, consequently, the criminal-head guarantees did not necessarily apply with their full stringency (cited above § 43). The Court concluded that the requirements of fairness were complied with and did not necessitate an oral hearing, since no issue of credibility arose in the proceedings which required oral presentation of evidence or cross-examination of witnesses. Further, a minor sum of money was at stake and the applicant was given ample opportunity to put forward his case in writing, (cited above §§ 46-49).

27. The approach adopted in the *Jussila v. Finland* case, namely to apply the criminal head guarantees of Article 6 in a differentiated manner depending on the nature of the issue and the degree of stigma certain criminal cases carried, is, in the Court's view, not limited to the issue of the lack of an oral hearing but may be extended to other procedural issues covered by Article 6, such as, in the present case, the presence of a accused at a hearing.

28. The Court observes at the outset that a fine order under the Motor Vehicles Act for non-compliance with the obligations of registered owners to have their cars duly inspected, does not belong to the traditional categories of the criminal law and, under domestic law, does not fall within the jurisdiction of ordinary criminal courts but of the Independent Administrative Panel which has jurisdiction in administrative criminal cases (see *Hubner v. Austria* (dec.), no. 34311/96, 31 August 1999). The Court therefore finds that such an accusation did not carry any significant degree of stigma.

29. The applicant, who had also been aware of the hearing of 22 February 2005, was represented by counsel throughout the proceedings and counsel attended the hearing in which he had been able to argue the applicant's case. Moreover, in the course of the hearing no witnesses were examined. Lastly the Court observes that the proceedings before the IAP concerned a minor sum of money, namely a fine of EUR 72.

30. In such circumstances the Court cannot find that the administrative criminal proceedings against the applicant had been unfair on account of his absence from the hearing before the IAP.

31. There has, accordingly, been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. OTHER ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

32. The applicant further complained under Article 6 that he did not have enough time to prepare his defence before the IAP and that the IAP had failed to hear a witness requested by him.

33. 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.

34. 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.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning his right to be heard admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention;

Done in English, and notified in writing on 12 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President