



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

FIRST SECTION

CASE OF VR-BANK STUTTGART EG v. AUSTRIA

(Application no. 28571/06)

JUDGMENT

STRASBOURG

20 May 2010

FINAL

20/08/2010

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

In the case of VR-Bank Stuttgart eG v. Austria,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 29 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 28571/06) 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 a German company, VR-Bank Stuttgart eG (“the applicant”), on 4 July 2006.

2. The applicant was represented by Waldbauer, Paumgarten und Naschberger Partnerschaft, lawyers practising in Kufstein. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. On 23 June 2008 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

4. The Government of Germany, having been informed by the Registrar of their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1), indicated that they did not intend to do so.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is a bank incorporated under the laws of Germany and is located in Stuttgart.

6. In 1994 the applicant company had acquired real estate consisting of land, parts of which are designated as agricultural land, and a house in Tyrol. The land was subsequently sold to the company “de Vos Hotelbetriebs GmbH” (hereinafter “de Vos”), a limited liability company incorporated under Austrian law that was active in the hotel business. The contract was signed by the parties on 4 and 20 September 1996 respectively.

7. On 23 September 1996 de Vos notified the transaction to the Real Property Transactions Authority (*Grundverkehrsbehörde*). Under the Tyrolean Real Property Transaction Act (*Grundverkehrsgesetz*), transactions concerning certain categories of real estate are subject to approval by the said authority.

8. On 6 May 1997 de Vos filed a request for transfer of jurisdiction (*Devolutionsantrag*) to the Tyrolean Real Property Transactions Commission (*Landes-Grundverkehrskommission*) as the Real Property Transactions Authority had failed to decide on the case within the six-month period provided for by law.

9. In its decision of 16 October 1997, the Real Property Transactions Commission refused to authorise the transaction. This and subsequent decisions of the Real Property Transactions Commission were served on both de Vos and the applicant company.

10. On 9 February 1998 de Vos complained to the Constitutional Court.

11. On 26 February 2001 the Constitutional Court set aside the Real Property Transactions Commission's decision of 16 October 1997 and referred the case back to it.

12. On 29 November 2001 de Vos filed a request for transfer of jurisdiction to the Tyrol Regional Government, which the latter rejected on 31 January 2002 for lack of jurisdiction, holding that there was no higher authority to which jurisdiction could be transferred after the Real Property Transactions Commission.

13. On 20 February 2002 the Real Property Transactions Commission refused authorisation of the transaction as regards certain parts of the real estate; it granted the transaction as regards other parts of the property.

14. On 25 April 2002 de Vos complained to the Constitutional Court about the refusal to authorise the transaction with regard to parts of the real estate.

15. On 1 March 2005 the Constitutional Court set aside the decision refusing authorisation.

16. In January 2008 the parties were asked whether there had been any essential changes regarding the facts. In the end of May 2008 the applicants were asked to submit their comments on the question whether the land in issue was being used for agricultural purposes. On 9 July 2008 the Real Property Transactions Commission again refused to authorise the transaction regarding parts of the real estate.

17. On 26 August 2008 de Vos complained to the Constitutional Court; the case is still pending before that court.

II. RELEVANT DOMESTIC LAW

18. Under the Tyrol Real Property Transactions Act 1996 (*Tiroler Grundverkehrsgesetz*), a contract concerning the transfer of ownership over real property is subject to approval by the Real Property Transaction Commission if agricultural and forestry land or building plots are concerned or if the purchaser did not hold Austrian nationality (section 1). The purchaser of land is obliged to notify the contract within eight weeks; also the seller of land is entitled to notify the contract (section 23 § 1). So long as approval is withheld, the transfer of ownership must not be entered into the land register; the parties to the contract are, however, bound to the contract (section 31 § 1).

THE LAW

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

19. The applicant complained that the proceedings lasted for an unreasonably long period, contrary to Article 6 § 1 of the Convention which, in so far as material, provides:

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

20. The Government contested that argument.

21. The period to be taken into consideration started on 16 October 1997, when the Real Property Transactions Commission refused the buyer's request to authorise the real-property transaction, as it was from that moment that a “dispute” arose within the meaning of Article 6 § 1 of the Convention (see *König v. Germany*, 28 June 1978, § 98, Series A no. 27, and *Morscher v. Austria*, no. 54039/00, § 38, 5 February 2004).

A. Admissibility

22. The Government submitted that the applicant had failed to exhaust domestic remedies. They noted that although the proceedings had been initiated by de Vos, the applicant was a party to the proceedings and an addressee of the Real Property Transaction Commission's decisions. It could and should therefore have complained to the Constitutional Court about the

duration of the proceedings. In that context the Government referred to the case-law of the Constitutional Court, in which it had found violations of Article 6 § 1 of the Convention on account of the excessive length of proceedings. Where the Constitutional Court found a violation, damages in respect of the length of the proceedings could be claimed in proceedings under the Official Liability Act. The applicant company had remained totally inactive in the proceedings, however, leaving it to de Vos to make use of any available remedies.

23. The Government argued that the applicant company's failure to make use of any remedies also raised doubts as to its victim status, as it did not appear that the applicant had been affected by the violation of the Convention that it was now alleging.

24. The applicant company argued that pursuant to section 23 of the Tyrol Real Property Transactions Act it was for the buyer to notify the authorities of a contract requiring authorisation. However, the applicant company was also a party to the proceedings and was directly affected by their outcome. In fact, buyer and seller had a common interest in the proceedings.

25. The applicant company maintained that there was no remedy against the failure of the Real Property Transaction Commission to decide within a reasonable time. A complaint to the Constitutional Court was not an effective remedy as the Constitutional Court could not award any compensation for damages caused by the excessive length of the proceedings.

26. The Court notes that the Government's arguments to the effect that the applicant company failed to exhaust domestic remedies and that, as a result, it may not be regarded as a victim, are closely linked to each other. The Court will start by examining the question of non-exhaustion.

27. In the case of *Selmouni v. France* ([GC], no. 25803/94, § 74 *et cons*, ECHR 1999-V), the Court held with regard to the exhaustion of domestic remedies:

“74. The Court points out that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see, for example, the *Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, p. 18, § 33, and the *Remli v. France* judgment of 23 April 1996, *Reports* 1996-II, p. 571, § 33). Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 22, § 48, and the *Akdivar and Others* judgment cited above, p. 1210, § 65). Thus the complaint intended to be made subsequently to the Court must first have been

made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law (see the *Cardot v. France* judgment of 19 March 1991, Series A no. 200, p. 18, § 34).

75. However, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among other authorities, the following judgments: *Vernillo v. France*, 20 February 1991, Series A no. 198, pp. 11-12, § 27; *Akdivar and Others* cited above, p. 1210, § 66; and *Dalia v. France*, 19 February 1998, Reports 1998-I, pp. 87-88, § 38). In addition, according to the “generally recognised principles of international law”, there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see the *Van Oosterwijck v. Belgium* judgment of 6 November 1980, Series A no. 40, pp. 18-19, §§ 36-40).

...

77. The Court would emphasise that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism (see the *Cardot* judgment cited above, p. 18, § 34). It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (see the *Van Oosterwijck* judgment cited above, pp. 17-18, § 35). This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see the *Akdivar and Others* judgment cited above, p. 1211, § 69)."

28. The Court reiterates the above-mentioned finding that 16 October 1997, the date when the Real Property Transactions Commission refused to authorise the sales contract between the applicant company and de Vos, must be taken as the starting point of the proceedings. Subsequently, the proceedings were pending either before the Constitutional Court or before the Real Property Transaction Commission. Lengthy delays occurred before both instances.

29. The Court reiterates at the outset that no remedy lies against delays caused in the proceedings before the Constitutional Court itself (see *Hauser-Sporn v. Austria*, no. 37301/03, § 40, 7 December 2006).

30. It remains to be examined whether the applicant should have complained to the Constitutional Court about the duration of the proceedings before the Real Property Transaction Commission. In this connection, the Court reiterates that it has held in *Holzinger v. Austria* (no. 1), no. 23459/94, § 22, ECHR 2001-I that the effectiveness of a remedy may depend on whether it has a significant effect on the length of the proceedings as a whole. The Court confirmed in its judgment in the case of *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 187, ECHR 2006-V, that

remedies that only provide for compensation for a violation occurred can also be considered effective.

31. The Court notes that a Constitutional Court decision to the effect that the proceedings had lasted for an unreasonably long period has neither preventive nor compensatory effect in respect of the length of the proceedings, but has merely a declaratory effect. Such a remedy cannot be considered effective under the principles elaborated by the Court.

32. Turning to the Government's argument that the declaratory decision of the Constitutional Court may subsequently form the basis for claiming damages in official liability proceedings, the Court notes firstly that the Government did not provide any further details, nor did they refer to specific examples of case-law. The Court is therefore not required to examine whether a remedy requiring the applicant to conduct two sets of proceedings, one to obtain a declaratory decision by the Constitutional Court and a second to obtain damages, could possibly be regarded as an effective one. In the present case, given that the first set of proceedings before the Constitutional Court lasted three years, namely from February 1998 until February 2001, that the second set of proceedings lasted almost three years, namely from April 2002 until March 2005 and that the third set of proceedings has been pending before the Constitutional Court since August 2008, this possibility cannot be regarded as an effective remedy.

33. The Court therefore rejects the Government's argument that the domestic remedies were not exhausted.

34. Having regard to these considerations, the Court finds that the Government's argument that the applicant company cannot claim to be a victim on account of its failure to exhaust domestic remedies does not raise a separate issue.

35. 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

36. The Court notes that the proceedings began on 16 October 1997, when the Real Property Transactions Commission refused to authorise the sales contract. The case, which had come before two levels of jurisdiction, is now pending before the Constitutional Court for the third time. It has therefore lasted more than 12 years. On the two previous occasions that the case was pending before the Constitutional Court, considerable delays of about 3 years each occurred. Another delay of 3 years and more than 4 months occurred after the Constitutional Court had set aside the decision on 1 March 2005, when the case was pending before the Real Property Transactions Commission, which issued a decision on 9 July 2008.

37. 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 and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

38. The case has not been particularly complex, nor has the applicant company's conduct caused any delays. The proceedings have already lasted for more than 12 years, which cannot be considered reasonable. There has accordingly been a violation of Article 6 § 1 of the Convention as regards the length of the proceedings.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

39. The applicant company complained of a violation of Article 13 of the Convention, as no remedies were available to it to speed up proceedings while the case was pending before the Real Property Transaction Commission.

40. The Government did not submit any observations on that point.

41. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

42. Having regard to its findings above (see paragraphs 29 to 31 above), the Court concludes that the applicant did not have an effective remedy in respect of the duration of the proceedings before the Real Property Transaction Commission.

43. Accordingly, there has been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant company claimed at least 7,267.23 euros (EUR) in respect of pecuniary damage for loss of interest on parts of the purchase price, which is still deposited on a trustee's account, and only yields low interest. The applicant company did not claim any compensation in respect of non-pecuniary damage.

46. The Government contested the claim, arguing that there was no causal link between the damage and the alleged violation of the Convention. Also, it was an agreement between the applicant company and de Vos to deposit the outstanding amount of the purchase price on an account yielding low interest. Lastly, the calculation submitted was neither conclusive nor comprehensible and the alleged pecuniary damage is in fact lost potential profit.

47. The Court notes that the applicant company did not establish that it had actually incurred pecuniary damage, and to quantify the amount of the alleged pecuniary damage. The Court therefore rejects this claim.

B. Costs and expenses

48. The applicant also claimed EUR 7,000 for the costs and expenses incurred before the domestic courts and in the Convention proceedings.

49. The Government contested the claim, arguing that the applicant company had failed to establish that these costs had been incurred in order to prevent the violations of the Convention and that the applicant company failed to break down the costs and show that they had actually been incurred and were reasonable as to quantum.

50. 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 were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,500 for the proceedings before the Court.

C. Default interest

51. 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 application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *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), plus any tax that may be chargeable, 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President