CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

# DECISION

# AS TO THE ADMISSIBILITY OF

Application no. 29800/96
by Husein BASIC
against Austria

The European Court of Human Rights (Third Section) sitting on 16 March 1999 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J-P. Costa,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, J*udges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 8 January 1996 by Husein BASIC against Austria and registered on 12 January 1996 under file no. 29800/96;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 25 July 1997, and the observations in reply submitted by the applicants on 13 October 1997 and the Government's further observations of 1 December 1997;

Having deliberated;

Decides as follows:

**THE FACTS**

The applicant, born in 1951, states that he is a Yugoslav national. He is residing in Vienna. Before the Court he is represented by Mr. K. Bernhauser, a lawyer practising in Vienna.

The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

1. The seizure of the jewellery pledged and the applicant's requests for restoration

On 17 February 1990 the Salzburg police carried out a search in a gambling house. The applicant was found in possession of gold jewellery including a "Rolex" watch lacking an Austrian stamp (*Punzierung*). On 18 February 1990 the police questioned the applicant, who stated that the jewellery and the "Rolex" watch had been pledged to him for gambling debts in 1987. In addition he had paid 10,000 German marks (DEM) for the "Rolex".

On 19 February 1990 the Salzburg police filed an information against the applicant on suspicion of receiving goods for which no import duties had been paid (*fahrlässige Abgabenhehlerei*) and handed the jewellery as well as the "Rolex" watch over to the Salzburg Customs Office (*Zollamt*), which ordered their seizure (*Beschlagnahme*) with a view to their possible forfeiture (*Verfall*). Subsequently, on 26 February 1990, a certain E.W. contacted the Customs Office and claimed to be the owner of the "Rolex" watch. On 8 March 1990 the Customs Office received written submissions from the applicant, who claimed that he had accepted the jewellery and the watch as pledges for gambling debts, but had no reasons to suspect that import duties on them had not been paid.

On 13 April 1990 the applicant, represented by counsel, requested the Salzburg Customs Office to restore the "Rolex" watch and other jewellery to him.

On 16 July 1991 the applicant filed a second request for the restoration of the jewellery including the "Rolex" watch.

2. The tax assessment proceedings against E.W.

Subsequently, the Customs Office carried out investigations as to the question whether or not import tax had been paid on the watch. On 25 June 1991 it ordered E.W. to pay import tax of about 60,000 Austrian schillings (ATS) on the watch.

On 25 November 1991 the Customs Office issued a preliminary decision on E.W.'s appeal (*Berufungsvorentscheidung*). Thereupon, E.W. requested the Salzburg Regional Directorate of Finance (*Finanzlandesdirektion*) to decide on his appeal.

On 10 January 1994 the Salzburg Regional Directorate of Finance dismissed E.W.'s appeal.

3. The criminal proceedings against E.W.

Meanwhile, on 3 September 1991 the Salzburg Customs Office opened criminal proceedings against E.W. on the suspicion of evading import duties as regards the "Rolex" watch.

On 23 January 1992 the Customs Office called the applicant to join these proceedings as a private party (*Nebenbeteiligter*). On the same day he was heard by the Customs Office, which lifted the seizure of the jewellery, but not the seizure of the "Rolex" watch.

On 8 May 1992 the Customs Office issued a penal order (*Strafverfügung*) against E.W. It found him guilty of having evaded import duties as regards the "Rolex" watch and imposed a fine of ATS 30,000 on him. Further, it ordered the forfeiture of the watch. On 15 June 1992 E.W. lodged an objection (*Einspruch*) against the penal order.

On 15 September 1993 the Customs Office held a hearing. At its close it found E.W. again guilty of evading import duties. It also confirmed the forfeiture of the watch. On 6 May 1994 E.W. appealed against this decision. It appears that the applicant requested the restoration of the watch.

29 August 1994 was fixed as a date for the appeal hearing. However, the hearing had to be postponed as the summons could not be served on E.W..

On 25 January 1995 the Appeals Board (*Berufungssenat*) of the Salzburg Regional Directorate of Finance, after having held a hearing, partly upheld and partly dismissed E.W.'s appeal. It confirmed that he was guilty of evading import duties, but reduced the fine to ATS 20,000. It confirmed the forfeiture of the watch and stated that it took effect against the applicant.

As to the forfeiture of the watch the Appeals Board, referring to S. 17 of the Tax Offences Act (*Finanzstrafgesetz*), noted that objects in respect of which a tax offence has been committed are liable to forfeiture. Ownership or pledges of third parties would hinder forfeiture if they had not contributed negligently to the commission of the offence or negligently acquired the object thereafter. It noted the applicant's submissions, corroborated by E.W.'s statements, that the "Rolex" watch had been pledged to him for gambling debts. The applicant's further submissions that he had bought the watch by paying an additional amount of DEM 10,000 were not credible. It followed that the applicant had failed to prove his ownership of the watch. Further, a lien could only be created as a security for a valid claim, and claims arising out of illicit gambling were not actionable. Thus, the applicant had not acquired a valid pledge on the watch. Consequently, its forfeiture took effect against him. According to S. 17 § 7 of the Tax Offences Act, ownership of the forfeited items passes to the Federation when the forfeiture order becomes final and any rights of third parties are extinguished.

The decision was served on E.W. and on the applicant on 7 March 1996.

4. The criminal proceedings against the applicant

On 17 January 1992 the Salzburg Customs Office opened criminal proceedings against the applicant on suspicion of having negligently received goods for which no import duty had been paid.

On 8 May 1992 the Customs Office issued a penal order against the applicant finding him guilty of the above offence. It found that the applicant had, in 1987, negligently acquired the "Rolex" watch from E.W., who had evaded import duties when bringing it to Austria.

On 16 November 1993 the Salzburg Customs Office, upon the applicant's objection, held a hearing, at the close of which it decided to discontinue the proceedings on the ground that it had not been proven that the applicant had acted negligently when he acquired the watch.

5. The object liability proceedings

On 18 March 1994 the Salzburg Main Customs Office (*Hauptzollamt*) issued a decision seizing the "Rolex" watch as a security for the payment of the import duties evaded by E.W.. The Main Customs Office noted that, according to S. 178 of the Customs and Excise Act (*Zollgesetz*), goods for which import duties were due were liable for these duties regardless of the rights of third persons. Whether or not this object liability (*Sachhaftung*) was claimed, was in the discretion of the customs authorities, which had to exercise it in accordance with S. 20 of the Federal Code of Taxation (*Bundesabgabenordnung*). It followed from the case-law under this provision that the public interest in securing the payment of duties had to be weighed against the legitimate interests of the party concerned. The authority found that, having regard to the financial situation of E.W., who was liable to pay the duties, the collection of the duties was endangered. In the circumstances of the case, the public interest in the payment of taxes prevailed over the applicant's interest in the restoration of the watch.

On 28 June 1995 the Salzburg Main Customs Office issued a preliminary decision on the applicant's appeal (*Berufungsvorentscheidung*). On 20 July 1995 the applicant requested the Salzburg Regional Directorate of Finance to decide on his appeal.

On 28 April 1997 the Salzburg Regional Directorate of Finance quashed the decision of 18 March 1994. It found in particular that the “Rolex” watch at issue had already been seized by the Salzburg Customs Office on 19 February 1990 in order to secure its possible forfeiture in the context of criminal proceedings against E.W. and the applicant. The watch had thereafter remained in the custody of the Customs office. Thus, there was no room for its renewed seizure in the context of object liability proceedings and for addressing that order to the applicant, who did not have the watch in his possession.

The decision was served on the applicant on 21 May 1997.

B. Relevant domestic law

General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*)

Under S. 73 the authorities are obliged to give a decision on any request or appeal of a party within six months of its receipt, unless the law provides otherwise. If the decision is not served on the party within this time-limit, the party may file an application for the transfer of jurisdiction (*Devolutionsantrag*) with the competent superior authority. The application is to be dismissed if the delay was not exclusively caused by the authority's fault. The superior authority itself has to decide within six months from receipt of the application.

Federal Constitution (*Bundes-Verfassungsgesetz*)

Article 132 of the Federal Constitution provides for an application against the administration's failure to decide (*Säumnisbeschwerde*). Anyone who is, as a party, entitled to request a decision in administrative proceedings, may file an application about the authorities' failure to give a decision. Such an application does not lie in administrative criminal proceedings, except in private prosecution proceedings and in proceedings on tax offences.

Administrative Court Act (*Verwaltungsgerichtshofgesetz*)

S. 27 provides that an application against the administration's failure to decide may only be lodged, if the highest authority, before which the case could be brought either upon an appeal or by way of an application for transfer of jurisdiction, has been seized by the party concerned and has failed to decide on the merits within six months. The time-limit starts to run from the day on which the authority, with which the request for a decision on the merits has to be lodged, has received the request.

S. 36 § 2 provides that the Administrative Court, in preliminary proceedings, has to request the authority concerned to issue a decision within a time-limit of up to three months or to explain why a breach of its obligation to give a decision has not occurred. The time-limit may be extended once, if the authority proves that there are reasons which make it impossible to issue the decision in time. If the authority gives the decision within the time-limit, the Administrative Court discontinues the proceedings.

S. 42 § 4 deals with the judgment of the Administrative Court in proceedings relating to an application against the administration's failure to decide. The Administrative Court may limit its judgment to a finding on the main legal issues and request the authority to give its decision on the basis of this legal view within a time-limit of up to eight weeks. If the Administrative Court does not avail itself of this possibility or if the authority fails to give a decision, the Administrative Court decides on the merits.

**COMPLAINTS**

The applicant complains under Article 6 of the Convention about the length of the proceedings relating to the seizure and forfeiture of the "Rolex" watch.

**PROCEDURE**

The application was introduced before the European Commission of Human Rights on 8 January 1996 and registered on 12 January 1996.

On 21 May 1997, the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 25 July 1997. The applicant replied on 13 October 1997. The Government submitted further observations on 1 December 1997.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

**THE LAW**

The applicant complains under Article 6 of the Convention about the length of the proceedings relating to the seizure and forfeiture of the "Rolex" watch.

Article 6 § 1, so far as relevant, 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. Exhaustion of domestic remedies

The Government submit that the applicant failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. Referring to two decisions of the Commission, they argue that the applicant should have filed an application against the administration's failure to decide with the Administrative Court in accordance with Article 132 of the Federal Constitution. In particular he should have done so as regards the failure of the Salzburg Custom's Office to decide within the six months' time-limit on his request of 13 April 1990 for restoration of the watch and as regards the failure of the Salzburg Regional Directorate of Finance to decide within the said time-limit on his appeal against the decision of 18 March 1994. In reply to the applicant's submissions, the Government concede that, in accordance with S. 27 of the Administrative Court Act, the said application only lies against the highest competent authority's failure to decide. However, it may also be lodged against the failure of a lower authority if a request under S. 73 of the General Administrative Procedure Act for transfer of jurisdiction is excluded, as is the case in proceedings relating to tax offences.

The applicant contests the Government's view. He submits in particular that considerable delay was caused by the Salzburg Customs Office, i.e. the first instance authority. As an application against the administration's failure to decide only lies where the highest authority fails to decide, he could not make use of this remedy. Moreover, he argues

that he could not have filed such an application as regards the delay in opening criminal proceedings against him.

The Court recalls that under Article 35 § 1 of the Convention it "may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law". Article 35 § 1 requires the exhaustion of remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. The burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (see Eur. Court HR, Akdivar and Others v. Turkey judgment of 16 September 1996, Reports 1996-IV, pp. 1210-11, §§ 66-68).

An application against the administration's failure to decide under Article 132 of the Austrian Federal Constitution enables a party to administrative proceedings to challenge the failure of the highest authority competent in the proceedings at issue to give a decision within the statutory six months' time-limit. The Administrative Court then sets a time-limit of up to three months which may be renewed once. If the authority fails to issue a decision within the time-limit the Administrative Court may either limit its judgment to a decision on the main legal issues and request the authority to give a decision based on its legal view within a maximum time-limit of eight weeks or it may immediately give a judgment on the merits of the case.

In sum, an application against the administration's failure to decide enables the person concerned to speed up the proceedings to a certain extent. However, it cannot give rise to any finding as regards the length of the proceedings as a whole, nor can it give rise to redress, for example compensation or reduction of sentence, for any unreasonable delay to that point (see *mutatis mutandis* Eckle v. Germany jugdment of 15 July 1982, Series A no. 51, pp. 30-33, §§ 66-70).

In this context, the Court also recalls that the Commission generally found that measures available to an individual which might speed up the proceedings are matters which fall to be considered in the context of the merits of an application relating to the length of proceedings, rather than relating to the exhaustion of domestic remedies (No. 11269/84, Dec. 14.4.88, D.R. 56, p. 115 at p. 126 with further references). The case-law relied on by the Government does not warrant another conclusion. The Court notes that in the first case, relating to the length of proceedings concerning a claim for return of expropriated property, the Commission, though stating that an application to the Administrative Court against the administration's failure to decide appeared to be an adequate remedy in this context, did not base its finding of non-exhaustion of domestic remedies exclusively on the failure to file such an application (no.19343/92, Stolz v. Austria, Dec. 6.9.95, unpublished). In the second case, relating to proceedings for granting a trading authority licence, the Commission explicitly left open the question whether such an application constituted an effective remedy in the circumstances of the case, as it found the application inadmissible on other grounds (No. 22475/93, Kristavcnik-Reutterer v. Austria, Dec. 10.9.96, unpublished).

In conclusion, the Court considers that an application against the administration's failure to decide under Article 132 of the Austrian Federal Constitution would not have provided effective and sufficient redress as to the alleged unreasonable duration of the proceedings at issue. It was, therefore, not an effective remedy which the applicant was required to exhaust according to Article 35 § 1 of the Convention.

b. Applicability of Article 6 of the Convention

As regards the applicability of Article 6 of the Convention, the Government submit that a distinction has to be made between the different sets of proceedings. While they accept that the criminal proceedings against the applicant as well as the criminal proceedings against E.W., which the applicant joined as a private party, fell within the scope of this Article, they contest the applicability of Article 6 as regards the object liability proceedings. The Government submit in particular that these proceedings have to be seen as an integral part of the underlying tax assessment proceedings. Referring to the case-law of the Strasbourg organs, the Government argue that proceedings in which matters of taxation and other public dues are decided do not fall within the ambit of Article 6.

The applicant contests the Government's view as regards the object liability proceedings. He submits in particular that these proceedings involve a determination of the owner's civil rights.

The Court notes that the different sets of proceedings were linked to each other. The criminal proceedings against the applicant were conducted on suspicion of him having negligently received goods for which no import duties had been paid. In the context of these criminal proceedings the "Rolex" watch was seized with a view to its possible forfeiture. The seizure was not lifted when the proceedings against the applicant were discontinued but was upheld in view of the criminal proceedings conducted against E.W. on charges of having evaded import duties as regards the watch at issue. In the object liability proceedings the watch was seized as a security and was made liable for the import duties incumbent on E.W..

The Court will examine for each of the proceedings concerned whether Article 6 applies. It is undisputed that Article 6 applied to the criminal proceedings against the applicant.

Further, it is not disputed that Article 6 applied to the criminal proceedings against E.W. which the applicant was called to join as a private party in view of the possible forfeiture of the "Rolex" watch. The Court recalls that a private party to criminal proceedings can in principle invoke the civil head of Article 6 of the Convention where they concern a dispute over a right which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise; and, finally, the outcome of the proceedings must be directly decisive for the right in question, which must be of a civil character within the meaning of Article 6 § 1 (see ECHR, Hamer v. France judgment of 7 August 1996, Reports 1996-III, p. 1043, § 73; Aquaviva v. France judgment of 21 November 1995, Series A no. 333-A, pp. 14-15, §§ 46-47; Moreira de Azevedo v. Portugal judgment of 23 October 1990, Series A no. 189, pp. 16-17, §§ 66-67).

In the present case, the applicant requested the restoration of the watch which had been seized with a view to its possible forfeiture. He claimed that the watch had been pledged to him as a security for gambling debts and that he had then bought it by paying an additional amount. The Salzburg Customs Office when finding E.W. guilty of having evaded import duties, ordered the forfeiture of the watch. Its decision was confirmed by the Salzburg Regional Directorate of Finance, which found that the applicant had failed to prove his ownership and had not acquired a valid right to a pledge either. Thus there was a dispute

between the applicant and the authorities as to whether he had acquired ownership of the watch or, if not, whether he had at least a valid right of pledge. Both rights are civil rights within the meaning of Article 6 and the outcome of the proceedings was directly decisive for these rights.

As to the object liability proceedings, the Court notes the Government's argument that they are linked to the underlying tax assessment proceedings. However, the Court is not called upon in the present case to rule on the question whether or not proceedings relating to matters of taxation may fall within the scope of Article 6. The proceedings at issue did not concern the applicant's tax obligations, but the liability for import duties of the "Rolex" watch which had been pledged to the applicant and which he had allegedly bought thereafter. It follows from the decision of the Salzburg Main Customs Office of 18 March 1994 that it had to weigh the public interest in securing the payment of taxes against the applicant's interest in the restoration of the watch. The applicant had the position of a party in these proceedings which, just like the criminal proceedings against E.W., were directly decisive for the applicant's right of pledge or ownership.

In conclusion the Court finds, that Article 6 was applicable to all three sets of proceedings at issue.

c. Compliance with Article 6 of the Convention

As to the duration of the proceedings, the Government argue that the criminal proceedings against the applicant started on 19 February 1990 when the watch was seized. They were discontinued on 16 November 1993. Further, the criminal proceedings against E.W. were joined by the applicant as a private party on 23 January 1992 and were terminated by decision of 25 January 1995 which was served on 7 March 1996. As to the object liability proceedings, which were conducted in parallel since 18 March 1994, the Government argue that they became obsolete after the decision of 25 January 1995 ordering the forfeiture of the watch became final. The Government argue that the proceedings were of a certain complexity, necessitating extensive investigations, and conclude that any delays which occurred do not appear substantial enough for the overall length to be considered excessive.

The applicant submits that the proceedings were not complex. He points out that considerable delays occurred for which no viable explanation has been given. In particular, there was a delay of almost two years between the seizure of the watch on 19 February 1990 and the formal opening of criminal proceedings against him on 17 January 1992. Further, the hearing in these proceedings was only held on 16 November 1993.

The Court considers in the light of the criteria established by the case-law on the question of "reasonable time" and having regard to all the information in its possession, that an examination of the merits of the complaint is required.

For these reasons, the Court, unanimously,

**DECLARES THE APPLICATION ADMISSIBLE**, without prejudging the merits of the case.

S Dollé
Registrar

N. Bratza
President