

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

FIRST SECTION

CASE OF DENK v. AUSTRIA

(Application no. 23396/09)

JUDGMENT

STRASBOURG

5 December 2013

This judgment is final but it may be subject to editorial revision.



In the case of Denk v. Austria,

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

Linos-Alexandre Sicilianos, *President,*
Elisabeth Steiner,
Ksenija Turković, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 12 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 23396/09) 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 Wolfgang Denk ("the applicant"), on 21 April 2009.

2. The applicant was represented by Mr H. Pochieser, 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 of European and International Affairs.

3. On 15 June 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1966 and lives in Vienna.

5. In 2007, the applicant was recipient of emergency relief payments (*Notstandshilfe*) under the Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz*).

6. On 15 March 2007 the Vienna Labour Market Service (*Arbeitsmarktservice*) withdrew payments of emergency relief for six weeks finding that the applicant had thwarted an employment offer. The applicant appealed contesting the establishment of facts by the authority and requesting the taking of further evidence.

7. On 4 July 2007 the Vienna Regional Labour Market Service, without holding an oral hearing, dismissed the applicant's appeal as unfounded. It

found that the applicant, when he had applied for a post as an IT-trainer, had declared an excessive salary expectation and had emphasised that he was handicapped and that a potential employer had to expect him to be absent for three weeks' sick leave every three years. The applicant had also stated in his application that his handicap would not hinder him to fully perform the exigencies of a post in the IT-area. The Regional Labour Market Service thereupon concluded that the reference to a handicap that was not relevant for the post advertised, the reference to expected sick leave and the high salary expectation showed the applicant's negative attitude towards a reasonable employment opportunity.

8. The applicant lodged a complaint with the Administrative Court (*Verwaltungsgerichtshof*) *inter alia* contesting the assumptions made by the administrative authorities, complaining of the lack of taking of evidence and explicitly requesting an oral hearing.

9. On 11 September 2008 the Administrative Court, without holding an oral hearing, dismissed the complaint as unfounded. On the merits it found that the applicant's salary expectation had been communicated to the potential employer without indicating an acceptable margin of negotiation. Therefore, his statement in this respect gave the impression that the applicant was not willing to take the post with a lower salary. His initial application could therefore be understood as an attempt to thwart an employment offer. With regard to the decision not to hold an oral hearing, the Administrative Court found that the facts had been sufficiently clear in the present case and that a hearing had therefore not been necessary.

10. That judgment was served on the applicant's counsel on 21 October 2008.

11. The applicant did not lodge a complaint with the Constitutional Court.

II. RELEVANT DOMESTIC LAW

12. Section 39 § 1 of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) provides that the Administrative Court is to hold a hearing after its preliminary investigation of the case where a complainant has requested a hearing within the time-limit. Section 39 § 2 (6) provides however:

> "Notwithstanding a party's application, the Administrative Court may decide not to hold a hearing when (...)
>
> 6. It is apparent to the Court from the written pleadings of the parties to the proceedings before the Administrative Court and from the files relating to the prior proceedings that an oral hearing is not likely to contribute to clarifying the case, and if this is not against Article 6 § 1 of the European Convention on Human Rights."

THE LAW

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

13. 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 ..."

14. No observations were submitted by the Government.

A. Admissibility

15. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

16. The Court reiterates that the applicant was entitled in principle to have a public hearing (see *inter alia Malhous v. the Czech Republic* [GC], no. 33071/96, § 55, 12 July 2001). It further observes that the administrative authorities dealing with the proceedings presently at issue are not "tribunals" within the meaning of Article 6 of the Convention. Only the Administrative Court – and the Constitutional Court – could qualify as such "tribunals" (see *Fischer v. Austria*, 26 April 1995, § 43, Series A no. 312, *mutatis mutandis Pauger v. Austria*, 28 May 1997, § 59, *Reports of Judgments and Decisions* 1997-III and *Bakker v. Austria*, no. 43454/98, § 29, 10 April 2003).

17. The Court further found before that in the course of proceedings in which exclusively legal or highly technical questions are at stake, the requirements of Article 6 may be fulfilled even in the absence of an oral hearing (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 *Schelling v. Austria*, no. 55193/00, § 30, 10 November 2005).

18. In the present case the Court firstly observes that the applicant expressly requested an oral hearing before the Administrative Court and can therefore not be considered to have waived that right. Furthermore, there do not appear to have been any exceptional circumstances that might have justified dispensing with a hearing. The Administrative Court was the first and only judicial body before which the applicant's case was brought; it was able to examine the merits of his complaint, and the review not only

addressed issues of law but also important factual questions. This being so, the Court considers that the applicant's right to a "public hearing" included an entitlement to an "oral hearing" (see *Abrahamian v. Austria*, no. 35354/04, § 26, 10 April 2008).

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

20. The applicant further alleged that the withdrawal of the emergency relief payments for six weeks violated Articles 3 and 1 of Protocol No. 1 of the Convention, which read as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

and

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Admissibility

21. The Court however notes that the applicant did not lodge a complaint with the Austrian Constitutional Court and did hence not exhaust the domestic remedies available to him (see *mutatis mutandis Martinovic v. Austria*, no. 28949/95, Commission decision of 27 November 1996, unreported). The further complaints are therefore to be rejected as inadmissible within the meaning of Article 35 § 1 and § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

22. 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

23. The applicant claimed 1,317.46 euros (EUR) in respect of pecuniary and EUR 3,000 in respect of non-pecuniary damage.

24. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As regards the claim for non-pecuniary damage the Court considers that the finding of a violation constitutes sufficient just satisfaction (see *Bakker*, cited above, § 36 and *Abrahamian*, cited above, § 33).

B. Costs and expenses

25. The applicant also claimed EUR 4,990.57 for the costs and expenses incurred before the domestic courts and before the Court.

26. The Court reiterates that an applicant is entitled to reimbursement of his costs and expenses only insofar as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case it does not appear from the documents submitted or the applicant's comments that any specific costs were incurred in relation to the request for an oral hearing. Therefore no award can be made under this head in relation to costs incurred before the domestic courts.

27. However, and with regard to the documents in its possession, the Court awards to the applicant the sum of EUR 1,979.52 as regards the costs and expenses incurred in the proceedings before the Court. This sum includes VAT.

C. Default interest

28. The Court considers it appropriate that the default interest rate 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 Article 6 § 1 about the lack of an oral hearing before the Administrative Court 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, EUR 1,979.52 (one thousand nine hundred and seventy nine euros and fifty two cents), 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 5 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach Deputy Registrar	Linos-Alexandre Sicilianos President