

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

FIRST SECTION

CASE OF POLZ v. AUSTRIA

(Application no. 24941/08)

JUDGMENT

STRASBOURG

25 October 2011

FINAL

25/01/2012

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



In the case of Polz v. Austria,

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

Nina Vajić, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 4 October 2011,

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

PROCEDURE

1. The case originated in an application (no. 24941/08) 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 Norbert Polz ("the applicant"), on 5 May 2008.

2. The applicant was represented by Mr J. Buchmayr, a lawyer practising in Linz. 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 8 December 2009 the President of the First Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1952 and lives in Wels. He worked as an official for the Austrian customs office.

5. Apparently in 1998, suspicions of smuggling, bribery and abuse of authority arose against the applicant and one other person, W. On 29 January 1998 the Review Chamber (*Ratskammer*) of the Linz Regional

Court authorized the applicant's telephones to be intercepted and the data on and content of the calls to be recorded.

6. On 15 May 1998 the investigating judge at the Linz Regional Court decided to open preliminary investigations on suspicion of abuse of authority (*Amtsmißbrauch*) and a number of offences under the Tax Offences Act against the applicant and, apparently, also against his co-accused. On 16 September 1998 the Review Chamber of the Linz Regional Court again authorized an interception of the applicant's telephone lines.

7. On 25 November 1998, the Linz Public Prosecutor introduced a bill of indictment against the applicant's co-accused W. On an unknown date, the proceedings against the applicant were separated from the ones against W. The applicant's case was transferred to the Wels Regional Court.

8. On 18 December 1998 the investigating judge at the Wels Regional Court extended the preliminary investigations against the applicant to include suspicions of aggravated tax evasion and a number of further offences under the Tax Offences Act. On 21 December 1998 the investigating judge ordered the Regional Finance Directorate for Upper Austria (*Finanzlandesdirekton Oberösterreich*) to conduct investigations in respect of these offences. It appears that the Regional Police Command for Upper Austria (*Landespolizeikommando Oberösterreich*) was also involved in these investigations.

9. On 24 September 1999 the investigating judge at the Wels Regional Court issued decisions to inspect the applicant's bank accounts in Austria. By letters rogatory, the judge also requested to inspect bank accounts in Germany.

10. On an unknown date, a search had been carried out at the applicant's work place, and on 24 November 1999 the Wels Regional Court decided to seize the evidence discovered during that search.

11. On 24 December 1999 the applicant was suspended from his office.

12. From 20 December 2000 to 16 February 2001 the applicant was in pre-trial detention as he allegedly tried to influence witnesses. On 2 February 2001 and 20 February 2001, further decisions to inspect bank accounts were taken. On 13 March 2001 the investigating judge extended the preliminary investigations against the applicant to include the suspicion of inciting a witness to give false testimony.

13. On 23 May 2001 an expert was appointed to give an opinion about the money flows on the applicant's accounts. The expert asked twice for an extension of the deadline for submission of the opinion, and the extensions were granted. The court urged the expert three times for delivery of the opinion (on 4 January 2002, 4 February 2002 and 18 March 2002). The opinion was eventually delivered on 24 April 2002.

14. A questioning of the applicant by the investigating judge scheduled for 17 May 2002 had to be postponed to 24 June 2002 as the applicant,

despite having received the expert's opinion at some time in April 2002, had requested an adjournment on 17 May 2002.

15. A report drawn up by the Regional Finance Directorate for Upper Austria reached the court on 27 August 2002.

16. On 20 November 2002 the investigating judge urged the Regional Police Command for Upper Austria to submit its final report on the case. On 18 March 2003 the file including the final report was submitted to the Public Prosecutor's Office.

17. On 5 November 2003 the public prosecutor issued the bill of indictment, charging the applicant with abuse of authority, accepting bribes (*Geschenkannahme durch Beamte*), smuggling, interference with the tobacco monopoly, having received goods for which no import duties had been paid (*Abgabenhehlerei*), breaking of official seals (*Verletzung der Verschlußsicherheit*) and infliction of bodily harm, all in conjunction with Section 313 of the Criminal Code, a provision which provides for higher penalties when offences have been committed by a civil servant abusing this position.

18. The applicant lodged objections against the bill of indictment on 24 November 2003. The objections were rejected on an unknown date.

19. The Wels Public Prosecutor's Office amended the bill of indictment on 1 December 2003. The Linz Court of Appeal (*Oberlandesgericht* Linz) confirmed the bill of indictment on 8 March 2004.

20. The case was tried before the Wels Regional Court sitting as a panel of two professional and two lay judges (*Schöffensenat*). Hearings were held on 15 June 2004, 14, 15 and 16 September 2004, 15 October 2004, 18 and 19 October 2004, 18 May 2006, 12 June 2006 and 29 March 2007. The court heard the applicant, an expert on accountancy, and a number of witnesses, namely colleagues of the applicant.

21. At the hearing on 19 October 2004, the hearing was adjourned for an indefinite period in order to review the summonses of the witnesses living abroad. The summons that had been issued to those witnesses for the hearing on 19 October 2004, had been sent to the Ministry of Justice on 23 July 2004, and returned to the court on 5 August 2004, as the Ministry could not forward them to the respective authorities without a certified translation. The reply from the Ministry had been put into the file without having been shown to the presiding judge, who had assumed that the summonses had been forwarded. Only in the preparation of the hearing did the judge discover the error. Subsequently, the judge addressed a new request, via the Ministry of Justice, to the Turkish and Bulgarian authorities requesting them to summon the witnesses concerned. On 1 July 2005 the judge scheduled a hearing for 13 October 2005, which was cancelled because none of the witnesses had appeared: It follows from the file that in some cases the Turkish and Bulgarian authorities had, despite their investigations, not been able to establish their addresses. In the other cases

the authorities had not provided any reply despite repeated requests from the Austrian Ministry of Justice.

22. At the hearing on 18 May 2006 the applicant's counsel lodged objections to the expert's opinion being read out. The opinion was discussed at the hearing of 12 June 2006, and the Public Prosecutor's Office moved that the expert's opinion be supplemented. Further decisions to inspect savings and bank accounts were issued on 10 November 2006, and the court received the supplementary opinion of the expert on 30 January 2007.

23. The statements of the witnesses, whom the court had not been able to summon (see paragraph 21 above), were read out in the trial during the hearing on 29 March 2007. Those statements had been made by the witnesses during the pre-trial investigations in the presence of the defence counsel. During the trial, the defence counsel objected to having those statements read out.

24. By judgment of 29 March 2007 the Wels Regional Criminal Court found the applicant guilty of abuse of authority and accepting bribes. The court relied on the witness' statements. In the judgment it gave reasons why it found these statement which had been read out credible and noted that they had been partly corroborated by the statements of the witnesses heard. Moreover, it had regard to certain pieces of documentary evidence. The applicant, who was acquitted of all the other charges, including some charges of accepting bribes, was sentenced to 14 months' imprisonment suspended for a one-year probationary period. When fixing the sentence, the court noted that the law provided for a prison term between six months and five years. It went on to say:

> "In fixing the sentence, the long period over which the offences were committed and the repetition of the offences were considered as aggravating circumstances. The fact that the offences were committed quite some time ago, that the accused has shown proof of good conduct in the meantime and that he previously led a law-abiding life were seen as mitigating factors ... as was the fact that the proceedings lasted a disproportionately long time, through no fault of the accused or his defence counsel.
>
> Given the above-mentioned mitigating and aggravating factors, a sentence of fourteen months' imprisonment would appear to be proportionate to the nature and seriousness of the offence. The sentence is less than one third of the maximum five-year sentence; however, in view of the aggravating circumstances, the court considered that a sentence in excess of one year should be imposed."

25. The applicant lodged a plea of nullity and an appeal against the sentence and asked for a hearing to be held. The Public Prosecutor lodged an appeal against the sentence.

26. On 16 October 2007 the Supreme Court rejected the applicant's plea of nullity pursuant to Article 285d of the Code of Criminal Procedure, without having held a hearing. It found that the conditions laid down in Article 252(1) subparagraph (1) of the Criminal Code for reading out the statements of the witnesses living abroad had been met, as it had not been

possible to summon these witnesses and the statements had been made in an adversarial manner at the pre-trial stage. Moreover, the Supreme Court noted that the applicant's further submissions amounted to an inadmissible attempt to challenge the first instance court's assessment of evidence. The case was transferred to the Court of Appeal to decide on the appeals.

27. By judgment of 22 November 2007 the Linz Court of Appeal, after having held a hearing in presence of the applicant and his counsel, dismissed the applicant's appeal and partly granted the Public Prosecutor's appeal, sentencing the applicant to 14 months' imprisonment of which 12 months were suspended for a one-year probationary period. Its reasoning reads as follows:

> "On the basis of the comprehensive sentencing guidelines the decision by the panel of judges (*Schöffensenat*) to impose a term of barely one fifth of the possible sentence, within the range of six months to five years, takes into account above all the numerous and significant mitigating factors. There is therefore no scope for further reduction; by the same token, however, the sentence should not be increased.
>
> Nevertheless, the prosecuting authorities rightly point out that there are no grounds for suspending the sentence in full, not least on account of the nature of the offences, which also constitute a serious breach of official duty. Contrary to the view of the first-instance court, it is therefore deemed necessary, if only on general crime prevention grounds ... for a portion of the sentence to be served in prison..."

The judgment was served on the applicant's counsel on 23 January 2008.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION WITH RESPECT TO THE LENGTH OF THE PROCEEDINGS

28. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, as laid down in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

29. The Government contested that argument.

A. Admissibility

1. Exhaustion of domestic remedies

30. The Government argued that the applicant had not exhausted domestic remedies, as he did not file a request for the setting of a time-limit under Section 91 of the Courts Act (*Gerichtsorganisationsgesetz*). The applicant could have filed such a request during the preliminary investigations. After the hearing was postponed on 19 October 2004 to review the service of the witness summons, the applicant could also have filed a request under Section 91 of the Courts Act.

31. The applicant argued that the preliminary investigations lasted from January 1998 to August 2002 and during that time, a request under Section 91 of the Courts Act was not an effective remedy, as such a request can only be made against delays caused in judicial proceedings. In the present case, however, the investigations carried out by the Regional Finance Directorate had caused the delay in the preliminary investigations, and no remedy lay against that delay.

32. The applicant further stated that a request under Section 91 of the Courts Act also would not have remedied the delay in the proceedings after the hearing of 19 October 2004 had been postponed. The summons had accidentally been put into the file, and by filing a request under Section 91 of the Courts Act, a new hearing might have been scheduled only to find out that the summons had not been served on the witnesses accordingly, and the hearing would have been cancelled again.

33. The Court reiterates that it held in numerous cases that the application under Section 91 of the Courts Act is in principle an effective remedy against court delays, both in the context of civil proceedings (see *Holzinger v. Austria (no. 1)*, no. 23459/94, § 25, ECHR 2001-I) as well as in the context of criminal proceedings (see *Talirz v. Austria* (dec.), no. 37323/97, 11 September 2001). However, the Court also held that the effectiveness of a remedy to accelerate proceedings may depend on whether it has a significant effect on the length of the proceedings as a whole (see *Holzinger*, cited above, § 22). Thus, where proceedings include a substantial period during which there is no possibility to accelerate them by making a request under Section 91, such remedy cannot be considered effective (see *mutatis mutandis, Holzinger (no. 2) v. Austria*, no. 28898/95, §§ 21-22).

34. Turning to the present case, the Court notes that the investigations before the indictment was issued had already lasted for more than five years, and the investigations and drawing up of reports by the Regional Police Command for Upper Austria and the Regional Finance Directorate for Upper Austria took a considerable amount of time. Section 91 of the Courts Act does not provide an effective remedy against delays caused by these administrative authorities. Also the delay in the trial after the hearing

was adjourned on 19 October 2004 was unlikely to have been effectively remedied by a request under Section 91 of the Courts Act. On the basis of the file it appears that the delay was linked to the difficulties in summoning the witnesses living abroad. There is no indication that the court remained inactive. Attempts to summon the witnesses were made, a hearing was scheduled for 13 October 2005 but had to be cancelled. In these specific circumstances the Court considers that the applicant was not required to make use of the remedy provided for by Section 91 of the Courts Act.

35. The Court thus rejects the Government's argument that the applicant failed to exhaust domestic remedies.

2. The applicant's victim status

36. While the Government did not explicitly raise the issue of whether the applicant can claim to be a victim of a violation of Article 6 of the Convention, the Government referred to the fact that the courts took the long duration of the proceedings into consideration as a mitigating circumstance when fixing the sentence.

37. The Court reiterates that the applicant can loose his victim status only where the state has acknowledged, either expressly or in substance, the breach of the Convention and has afforded adequate redress for such breach, such as reducing the sentence in an express and measurable manner (see *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X, *Beck v. Norway*, no. 26390/95, 26 June 2001, §27, and *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51).

38. Turning to the present case, the Court notes that the penalty for the offences the applicant was convicted of was in a range between six months' and five years' imprisonment. The first instance court noted the long period of time during which the offences were committed and repeated as an aggravating circumstance. The time that had elapsed since the commission of the offences, the applicant's good conduct in the meantime, his previous law-abiding life and the disproportionately long duration of the criminal proceedings were considered as mitigating circumstances.

39. The first instance court fixed the sentence at 14 months' imprisonment, all of which were suspended on probation. It did not state how the duration of the proceedings was taken into account, but relied on an overall view of the circumstances. The Court of Appeal fixed the sentence at 14 month's imprisonment, of which 12 months were suspended on probation, also without explicitly stating in how far the duration of the proceedings was taken into consideration.

40. In these circumstances the Court considers that, even assuming that the statement of the domestic authorities that the proceedings had lasted disproportionately long amounted to an implicit acknowledgement of a breach of Article 6 of the Convention, the second requirement for removal

of the applicant's victim status, namely the adequate redress for such a breach, is not fulfilled.

41. Consequently, the Court finds that the applicant can still claim to be a victim of an alleged violation of Article 6 of the Convention.

42. The Court notes that this 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

43. The Court notes the applicant's argument that 29 January 1998, when the Review Chamber of the Linz Regional Court authorized the interception of his telephones should be taken as a starting point for the calculation of the length of the proceedings. The Government have not commented on this issue.

44. The Court reiterates that in criminal cases the period of proceedings which have to be terminated within the "reasonable time" referred to in Article 6 § 1 begins to run as soon as a person is "charged". Being "charged" usually occurs on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened. "Charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see *Reinhardt and Slimane-Kaïd v. France*, 31 March 1998, § 93, *Reports of Judgments and Decisions* 1998-II; and *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51).

45. The Court is not convinced by the applicant's argument that 29 January 1998 should be taken as a starting point of the proceedings. At that time he was not "charged" within the meaning of Article 6 § 1: He was not given any official notification of an allegation that he had committed a criminal offence, nor can it be said that his situation has been "substantially affected". In the Court's view, the proceedings started on 15 May 1998, when preliminary investigations were opened against the applicant. They ended on 23 January 2008, when the Court of Appeal's judgment was served on his counsel. The proceedings lasted thus for nine years and eight months for three levels of jurisdiction.

46. 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 (see, among many other

authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

47. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Pélissier and Sassi*, cited above, *Rösslhuber v. Austria* (no. 32869/96, § 27, 28 November 2000 and *Hennig v. Austria*, no. 41444/98, § 33 and 34, 2 October 2003).

48. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that although the case was of some complexity the overall length of the proceedings was excessive and failed to meet the "reasonable time" requirement. There has accordingly been a breach of Article 6 § 1.

II. FURTHER ALLEGED VIOLATIONS OF ARTICLE 6 § 1 AND ARTICLE 6 §§ 2 AND 3 OF THE CONVENTION IN RESPECT OF THE ALLEGED UNFAIRNESS OF THE PROCEEDINGS

49. Relying on Article 6 § 1 of the Convention, the applicant complained that the Supreme Court did not hold a hearing when deciding on his plea of nullity, despite him having applied for one.

50. Under Article 6 § 2 and § 3 of the Convention, the applicant complained that his conviction violated the right to be presumed innocent and that his conviction was based on statements of witnesses whom he could not question during the trial.

51. 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. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed 100,000 euros (EUR) in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage.

54. The Government contested these claims, arguing that the pecuniary damage claimed for loss of income was not caused by the duration of the proceedings. The Government further argued that the amount claimed in respect of non-pecuniary damage was excessive.

55. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It therefore rejects this claim. On the other hand, it awards the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

56. The applicant also claimed EUR 12,000 for the costs and expenses incurred before the domestic courts and the Court.

57. The Government contested the claim, arguing that the applicant was represented by legal aid counsel and did thus not have to bear any costs at the domestic proceedings; furthermore the costs and expenses incurred in the domestic proceedings did not serve to prevent the long duration of the proceedings. Moreover, the costs claimed for the proceedings before the Court were excessive.

58. 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 costs have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court notes that none of the costs incurred in the domestic proceedings served to prevent or redress the violation found. Consequently, it does not make an award in respect of the domestic proceedings. Moreover, it considers it reasonable to award the sum of EUR 1,500 for the proceedings before the Court.

C. Default interest

59. 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 excessive length of the proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention with regard to the length of the proceedings;

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 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 1,500 (one thousand and five hundred euros), plus any tax that may be chargeable on 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 amounts 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 25 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President