

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

FIRST SECTION

DECISION

Application no. 13556/07
Friedrich EFFERL
against Austria

The European Court of Human Rights (First Section), sitting on 13 March 2012 as a Committee composed of:

Peer Lorenzen, *President,*
Elisabeth Steiner,
Khanlar Hajiyev, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having regard to the above application lodged on 21 March 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Friedrich Efferl, is an Austrian national who was born in 1935 and lives in Vienna. His application was lodged on 21 March 2007. He is represented before the Court by Proksch und Fritzsche, a partnership of lawyers 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 European and International Affairs.

A. The circumstances of the case

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

1. The background of the case

The applicant is the owner of land in the municipality of Krakauhintermühlen in Austria. In 1973 he requested a certificate declaring his land suitable for building purposes (*Widmungsbewilligung*). On 16 January 1978 this certificate was issued to him.

On 22 June 1981 the Styria Regional Government adopted a regulation according to which the area of the municipality of Krakauhintermühlen, situated in the region of the Schladminger Tauern mountain range, was declared a landscape protection zone (*Landschaftsschutzgebiet*) in order to protect its particularly beautiful landscape, unusual features and recreational value. That regulation was published in the Regional Law Gazette no. 54/1981 (*Landesgesetzblatt Nr. 54/1981*).

On 30 June 1983, 21 October 1983 and 31 August 1985 the Krakauhintermühlen municipal council (*Gemeinderat*) adopted an area zoning plan (*Flächenwidmungsplan*), according to which use of the applicant's land was designated as "previously earmarked in undeveloped land" (*bestehende Widmung im Freiland*). The regulation contained, *inter alia*, the provision that land designated as building land in a certificate declaring land suitable for building purposes before 12 July 1980 would remain building land within the terms of such a certificate.

2. The proceedings for a nature conservation permit

On 23 January 1995 the mayor of Krakauhintermühlen (*Bürgermeister*) granted the applicant a building permit, which, in accordance with the relevant provisions of the Building Act for Styria (*Baugesetz*), was valid for five years. The building permit contained a number of specifications and, in its point 18, stated that before starting to build a nature conservation permit (*naturschutzbehördliche Genehmigung*) had to be obtained.

On 17 November 1995 the Murau District Administrative Authority (*Bezirkshauptmannschaf*t) granted the applicant a nature conservation permit. It noted that the applicant's land was situated in a landscape protection zone. However, since the applicant's plans, as specified in the building permit of 23 January 1995, would not disturb the visual landscape and was well-adapted to its surroundings, permission had to be granted.

On 6 December 1995 the Regional Officer for the Environment (*Umweltanwalt*) appealed against the decision to issue the permit of 17 November 1995. He argued that on the basis of the expert opinions obtained in the proceedings, the District Administrative Authority should have refused to issue a permit.

On 3 June 1996 the Styria Regional Government (*Landesregierung*) allowed the appeal lodged by the Regional Officer for the Environment. It found that since the expert opinion of the nature conservation expert (*Naturschutzbeauftragter*) dealt to a large extent with questions of law, it could not be considered an expert opinion in the proper sense. That expert should not have merely stated that in order to minimize the impact of the applicant's construction on the landscape conditions should be imposed, but should have specified what those conditions should be. The report by the expert on building matters (*Bausachverständiger*), which opposed the construction, on the other hand, was clear and logical. Therefore, the authority had to follow the conclusions drawn by the latter expert.

On 18 July 1996 the applicant lodged a complaint with the Administrative Court.

On 19 October 1998 the Administrative Court quashed the decision of the Styria Regional Government. Since the applicant's land was situated within a landscape protection zone, a landscape protection permit was necessary for any building plans to be carried out. Such a permit could only be granted if no adverse effects on the landscape could be expected. However, not every adverse effect could justify the refusal of a permit, but only those adverse effects which constituted a serious and lasting visual disturbance (*nachhaltige Störung*) of the landscape. The expert opinion, on which the authority had relied when quashing the permit, did not state in a logical manner that the building project would have a serious visual impact on the landscape. The mere fact that the applicant's building would be isolated was not sufficient in itself to conclude that it would constitute an eyesore. In the light of that, the decision was insufficiently reasoned and had to be quashed.

Subsequently, by a decision of 27 March 2000, the Styria Regional Government, following the legal opinion of the Administrative Court, dismissed the appeal by the Regional Officer for the Environment, thereby confirming the validity of the nature conservation permit issued to the applicant.

3. Proceedings on an order for stopping construction work

The applicant started to build on his land. On 6 July 2004 the mayor issued a building prohibition order, ordering the applicant to stop the construction work immediately. He found that the applicant had not started building within five years of the building permit being issued. Therefore, the validity of the building permit had expired.

On 22 July 2004 the applicant lodged an appeal arguing that he could not have started building his house until the final decision on the nature conservation permit had been given and that he was by no means responsible for the delays in those proceedings.

On 17 September 2004 the municipal council dismissed the appeal. It observed that the construction work had only started in September 2003, after the five-year period had ended and the building permit had expired (*erloschen*). The fact that the decision in the applicant's favour in the landscape protection proceedings had been taken at a relatively late stage had no bearing on the building permit and its validity.

On 5 October 2004 the applicant lodged an objection (*Vorstellung*) with the Regional Government and requested that suspensive effect be granted to the prohibition order.

On 3 February 2005 the Styria Regional Government, as a supervisory authority, dismissed the applicant's appeal. It found that the decision of the first-instance was correct. Since the five-year period of validity of a building permit was provided for by the relevant law, that period could not be extended.

4. Proceedings on a fresh request for a building permit

On 7 January 2005 the applicant requested a new building permit.

On 23 March 2005 the mayor refused his request, as he found that the area zoning plan in force designated his property as "undeveloped land". Therefore, building on the land was not allowed.

On 1 June 2005 the municipal council dismissed the applicant's appeal against that decision.

On 24 August 2005 the Regional Government dismissed the applicant's objections against the municipal council's decision of 1 June 2005. It found that the certificate of 1978 declaring his land suitable for building purposes could no longer be the basis for a new building permit, as it had been used (*konsumiert*) as the basis for a building permit issued in 1995 which had meanwhile also expired. In any event the certificate of 1978 was no longer valid, as under section 119 § 3 of the Building Act all such certificates issued before March 1989 had expired on 1 March 1999. Point 18 of the building permit of 1995 was not a condition imposed by that decision, but merely information for the applicant reminding him to apply for any other permit necessary before starting to build.

On 4 October 2005 applicant lodged a complaint with the Constitutional Court and requested an oral hearing. He submitted that the impugned decision violated his property rights and was in breach of Article 6 of the Convention.

On 26 June 2006 the Constitutional Court dismissed the complaint and, at the applicant's request, remitted the case to the Administrative Court. It found that the area zoning plan at issue was in accordance with the relevant legislation. As to the applicant's further arguments, it found that there was no need to establish whether point 18 of the building permit of 23 January 1995 was actually a condition and whether the building permit had expired because of the time that had elapsed, as this question could only have been

examined in proceedings against the Regional Government's decision of 3 February 2005. Since the applicant had failed to raise a complaint against that decision, it had become final and the matter could not be examined in the present proceedings.

On 28 August 2006 the applicant supplemented his complaint to the Administrative Court and asked for an oral hearing.

On 19 September 2006 the Administrative Court dismissed the complaint without having held an oral hearing. It found that the question of the time span during which the building permit of 23 January 1995 had been valid was of no relevance to the present proceedings, which concerned a different request for a building permit. Moreover, it agreed with the Constitutional Court that this matter could only have been examined appropriately in proceedings against the Regional Government's decision of 3 February 2005 which the applicant, however, had failed to institute. On the basis of the relevant provisions, in particular section 25 of the Regional Land Planning Act (*Raumordnungsgesetz*), the applicant clearly had no right to obtain a permit for building on his land. This being so, there was no need to hold an oral hearing on the applicant's complaint. This decision was served on the applicant's counsel on 13 October 2006.

B. Relevant domestic law

Section 25 of the Styrian Regional Planning Act (*Raumordnungsgesetz*) reads as follows:

"Undeveloped Land

(1) All land not designated as building land or road surfaces shall be classified as undeveloped land.

(2) Areas of undeveloped land may be designated for special use, unless this requires clarification on the basis of a supra-local zoning regulation (§6).

'Special use' shall be defined as follows:

1. Areas used for commercial gardening, for spa, recreation, play and sports purposes, public parks, small garden complexes, dumping sites (for garbage, recycling and processing materials), landfills, soil removal sites, shooting ranges, deposits for ammunition and explosives and the areas exposed to their risks, energy generation and distribution facilities, flood retention systems, water supply and waste-water disposal and treatment plants.

2. Rounding-off areas, which are small areas in coherently built-up areas outside of building land with a maximum, non-built-up surface of 3,000m². It is only admissible to designate an area as a rounding-off area if;

- the area is suitable for building, and waste-water treatment is ensured in line with the state of the art,

- the area is exclusively earmarked for residential buildings and surrounded by a minimum of four residential buildings that must form a visual entity with the future constructions, and

- the additional construction improves the visual appearance of the location and the landscape.

Rounding-off areas may only be granted once for one specific municipal area and may only be designated in the course of a review.

(3) On undeveloped land

1. new buildings and annexes to buildings may be built on undeveloped land if;

a) they serve one of the purposes defined in item 2 of paragraph (2), or

b) they are required for an agricultural or forestry operation, or

c) a rounding-off area has been designated."

COMPLAINTS

1. The applicant complained under Article 6 of the Convention that his case was decided by administrative authorities which were not independent or judicial, and that the Administrative Court could not be seen as a "tribunal" within the meaning of the Convention.

2. Under the same provision the applicant complained that he did not have an oral and public hearing in the proceedings at issue.

3. Lastly, he complained under Article 1 Protocol No. 1 of the Convention that his inability to build on his land in the circumstances of the case infringed his right to the peaceful enjoyment of his possessions as guaranteed by that provision.

THE LAW

1. The applicant complained that he did not have an oral and public hearing in the proceedings at issue. He relied on Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal..."

The Government asserted that the Administrative Court, the only tribunal which examined the applicant's case, had to deal exclusively with questions of law, namely, whether the arguments raised by the applicant in relation to the building permit granted in 1995 were *res judicata* and, as regards his request for a building permit of 7 January 2005, whether this request was in conformity with section 25 of the Regional Land Planning Act. These were not complex questions of law and the Administrative Court had therefore had the discretion to forego an oral hearing.

The applicant did not comment on this point.

The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This requirement protects litigants against the administration of justice in secret, with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, the public nature of a hearing contributes to the achievement of the aim of Article 6 § 1, namely, a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, for example, *Diennet v. France*, 26 September 1995, Series A no. 325-A, § 33, and *Malhous v. the Czech Republic* [GC], no. 33071/96, § 55, 12 July 2001).

The Court reiterates that, according to its case-law, in proceedings such as those in the present case, before a court of the first and only instance the right to a "public hearing" under Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, *Fredin v. Sweden (no. 2)*, 23 February 1994, Series A no. 283-A, §§ 21–22; *Fischer v. Austria,* 26 April 1995, Series A no. 312, pp. 20–21, § 44; *Stallinger and Kuso v. Austria*, 23 April 1997, § 51, *Reports of Judgments and Decisions* 1997-II; and *Allan Jacobsson v. Sweden (no. 2)*, 19 February 1998, § 46, *Reports* 1998-I.

The Court has already considered that in the course of proceedings where 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. Admittedly, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public (*Schuler-Zgraggen v. Switzerland*, 24 June 1993, Series A no. 263, § 58, and *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002).

In the present case the applicant was in principle entitled to a public hearing as none of the exceptions laid down in the second sentence of Article 6 § 1 applied (see *Håkansson and Sturesson v. Sweden*, 21 February 1990, Series A no. 171-A, § 64).

The Court observes that the Administrative Court dismissed the applicant's complaint on two grounds. It found first that that the question of

the time span during which the building permit of 23 January 1995 had been valid was of no relevance to the subsequent proceedings and could only have been examined appropriately in proceedings against the Regional Government's decision of 3 February 2005 which the applicant, however, had failed to institute. The Administrative Court found further that, on the basis of the relevant provisions, in particular section 25 of the Regional Land Planning Act, the applicant clearly had no right to obtain a permit for building on his land.

The Court observes further that the applicant did not challenge the facts as found by the administrative authorities. The Court notes that where the facts are not disputed and a tribunal is only called upon to decide on questions of law of no particular complexity, an oral hearing may not be required under Article 6 § 1 (see *Varela Assalino,* cited above, with further references). The Court considers that that was the situation in the present case, as the Administrative Court only had to decide on questions of law which did not raise complex issues. Taking into account the national authorities' need for efficiency and economy (see *Schuler-Zgraggen*, cited above, § 58), the Court concludes that the Administrative Court was indeed within its rights to abstain from holding an oral hearing.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant also complained under Article 6 of the Convention that his case was decided by administrative authorities which were not independent and judicial and that the Administrative Court could not be seen as a "tribunal" within the meaning of the Convention. He also complained under Article 1 Protocol No. 1 of the Convention that his inability to build on his land in the circumstances of the case infringed his right to the peaceful enjoyment of his possessions as guaranteed by this provision.

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.

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

Declares the application inadmissible.

André Wampach
Deputy Registrar

Peer Lorenzen
President